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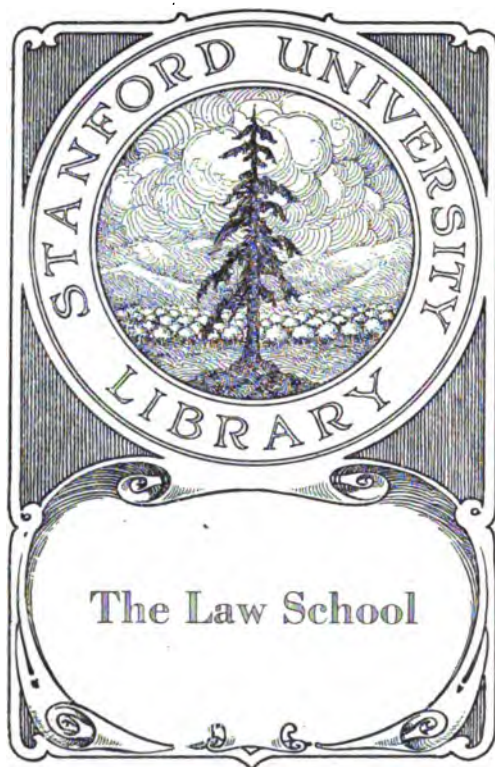
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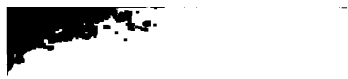
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A
TREATISE
ON
P L E A D I N G ,
WITH
A COLLECTION
OF
P r e c e d e n t s ,
AND
AN APPENDIX OF FORMS
ADAPTED TO
THE RECENT PLEADING AND OTHER RULES,
AND WITH
P r a c t i c a l N o t e s .

Nihil simul inventum est et perfectum.—Co. Lit. 230 a.

IN THREE VOLUMES.
VOL. II.

By JOSEPH CHITTY, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

Eleventh American Edition,
FROM THE SIXTH LONDON EDITION, CORRECTED AND ENLARGED.

With the new matter incorporated of the Text of the Treatise in the
SEVENTH LONDON EDITION,

By H. GREENING, Esq.

WITH NOTES AND ADDITIONS, BY JOHN A. DUNLAP & E. D. INGRAHAM, ESQRS.
AND ADDITIONAL NOTES, AND REFERENCES TO LATER DECISIONS,
By J. C. PERKINS, Esq.

SPRINGFIELD, MASS.
PUBLISHED BY G. & C. MERRIAM,
1851.

MASSACHUSETTS

Entered according to the Act of Congress, in the year 1847, by
G. & C. MERRIAM,
In the Clerk's Office of the District Court of Massachusetts.

326580

SPRINGFIELD:
H. S. TAYLOR, PRINTER.

P R E F A C E
TO
THE SECOND VOLUME
OF THIS
SIXTH [LONDON] EDITION.

[The American student will perceive that a part of the following Preface has reference to the New Rules of Pleading, recently adopted in England, but not yet in use in this country. For a full explanation, he is referred to the American Editor's Preface, at the beginning of the first volume.]

THE previous volume is a digest of the *Principles and Rules* upon which *Pleadings* should be framed, with *Practical Directions*. The present and the third volumes contain a collection of *Instances, Examples, or Precedents*, in which those principles and rules have been repeatedly applied to the principal cases that have arisen in practice. The most eminent and experienced lawyers confess that without the assistance of *Precedents* they would constantly find themselves in difficulty, and not unfrequently in error, since approved precedents not only point out the necessary averments, but also the language to be observed. Lord Coke advised every practitioner constantly to consult precedents, "*nam nihil simul inventum est et perfectum*," i. e. nothing is at the same instant invented or discovered, and perfect, but becomes so only by frequent use and occasional correction (a). For the same reason Lord Eldon said that long adopted precedents ought to have great weight (b); and still more recently Lord Tenterden observed, that it is very unwise to depart from the common course of precedents (c): and in a very recent case an affidavit to hold to bail was sustained even against a prior decision unfavorable to its

(a) Co. Lit. 230 a.

(b) Per Lord Eldon, in the *Attorney-General v. Freer*, 11 Price, 193.

(c) Per Abbott, C. J., in *Henniker v. Turner*, 4 Bar. & Cres. 159; 6 Bowl. & Ryl. 94. S. C.

validity, merely because it had been promulgated for upwards of twenty years in Mr. Tidd's *Precedents of Practical Forms*.

But the term *Precedents*, in all these cases, denotes a document that has been long in use, and not a mere novel invention, which, for the above reason, cannot safely be relied upon, as has been unfortunately frequently exemplified by the numerous successful demurrers to new forms of pleas recently invented in consequence of the necessity to plead almost every matter of defense specially. For this reason the following collection, with a few exceptions and subject to the introduction of alterations required by the new rules, was nearly forty years ago made by the author, not of his own pleadings, or those of any living practitioner, but from higher sources; and for the same reason he begs that every practitioner, when he adopts one of the *new* forms introduced into this edition, will consider the same merely as intended to *assist*, and not to be entirely confided in, unless prescribed by statute or rule of Court, or sanctioned by express decision.

It may here be proper to state the history of the greater part of the precedents collected in this and the next volume. The author had the good fortune to commence his legal studies under the directions of his relatives, the late Mr. Serjeant George Bond and Mr. Luders, who obtained for him the privilege of access to the best pleadings adopted, prepared, settled, or otherwise sanctioned and constantly used by those eminent pleaders, most of them afterwards judges, viz. Wallace, Warren, Buller, Chambre, Gibbs, Bond, Wood, Holroyd, Law, Abbott, &c. &c. These forms (I might say from time to time immemorially) had been improved with great care, after having been translated from the old entries. The author also selected some excellent original forms from the original demurrer books of Mr. Justice Ashhurst, with his valuable notes and observations (*d*). This entire collection was deficient only in the precedents in *assumpsit*. The author was enabled to supply that chasm during his pupilage under Mr. Tidd, who evinced peculiar skill and perspicuity in his pleadings in that form of action, which, of necessity, in its special counts discloses so much of the plaintiff's cause of action.

(*d*) To that valuable collection in the possession of the author, practitioners and students are welcome to refer.

For the description of *Titles to Real Property*, and the various *modes of acquiring them*, the author is greatly indebted to Sir Edward Sugden, who, although at the time surrounded by pressing engagements, very kindly bestowed great attention to the forms and the notes in *Covenant* relative to those important subjects; and for that part of his Second volume in particular the author has frequently received the thanks of his professional friends, on account of those pleadings of titles having relieved them from great trouble and anxiety in describing titles to real property, with which pleaders in general are not so conversant as conveyancers.

The *arrangement* of the subject, it is hoped, will be found natural, easy, and perspicuous. As regards the greater part of the precedents, it was not probable, when their origin is remembered, that they would be frequently found defective. During the five preceding editions, and near forty years' circulation, they have been constantly and extensively acted upon, and in most instances supported by decisions of the Courts. In the few instances when supposed to be incorrect, they have of course been corrected in this edition. In many cases, though at first doubted, their sufficiency has been established as well on special demurrer as upon writs of error. If the precedents had originated with the author himself, he would not have said thus much; but as he claims only the merit of selection and arrangement and the notes, it is due to the profession to inform them how far they may confide in the precedents themselves.

Soon after the new rules had been promulgated, I ventured to anticipate that they would not be found to *alter* any *established principle* or *rule* of pleading, or introduce any *new principle*, and it is clear that such is the result; and it is to be understood by all practitioners that as regards *Declarations*, the principal recent alterations noticed in this edition are mere *consequences* of the excellent enactment in the Uniformity of Process Act, 2 W. 4, c. 39, which abolished all the previous distressing varieties in mesne process, and reduced them principally to *four*; viz. the writ of *summons*, being mere *serviceable* process, to bring the defendant into Court; the writ of *Distringas*, having

The principal alterations only in matters of form.

the same object; the writ of *Capias*, to arrest the defendant when at large; and the writ of *Detainer*, to detain him when he is already in custody on prior process. Two subsequent rules of Court prescribed new forms of *Commencements* and *Conclusions of Declarations* to be equally observed in the three superior Courts, and which will be found properly descriptive of the mode in which the defendant has been brought into Court by one of the new process, and also prescribing that *all* declarations shall be *intituled* at the *head in the proper Court*, and of the *day, month and year when actually* delivered or filed, and that the *venue* shall only be stated in the *margin* and not repeated in the body; whereby the absurd repetition of *place*, although wholly immaterial, is now abolished, except in *trespass quare clausum fregit*, (when local description is frequently material, and in order to avoid the delay and expense of a new assignment, the name of the close or its precise abutments must be stated, or the omission may be corrected by special demurrer.) In no other respect is there any alteration in the *body or substance* of a declaration peremptorily enjoined, except indeed as to declarations on *Bills of Exchange, and Promissory Notes*, and for *common debts* recoverable in *indebitatus assumpsit*, and in *debt* with respect to some very concise forms were prescribed by Reg. Gen. Trin. T. 1. W. 4, and which must be strictly observed, and if the declaration be more lengthy than those prescribed, the expense of the extra length cannot be recovered by the plaintiff or his attorney.

And in enjoining conciseness.

In practice the forms prescribed by that rule have however been considered by the best pleaders as intended to sanction and encourage a more *succinct mode* of declaring in *all other cases*, and it has become the practice to *omit all words* that are unnecessary; thus a contract or promise is now described, by a mere statement "that the defendant *promised* to pay" or "to deliver," &c. instead of "that the defendant undertook and then and there faithfully promised the plaintiff to pay, &c." So the word "*said*," before plaintiff or defendant, is now usually omitted, and instead of "special instance and request" the word "request" only is used, and instead of the former prolix statement of the breach by the words "Yet the defendant craftily and subtly contriving and intending

to deceive and defraud the plaintiff in this behalf, hath not, although he was afterwards, to wit, on, &c. at, &c. requested, by the plaintiff so to do, as yet paid, &c." the declaration now concludes "Yet the defendant hath not paid, &c." Although the omission of a word or two might, on first consideration, appear to be of too trifling importance to merit attention, yet it will be found, that in a long record frequent repetitions of useless words occasion a considerable increase of expense. And the principle and spirit of conciseness, having been once so laudably introduced, it will, in numerous other even more important respects, be encouraged and extended by those who wish to acquire character and credit for neatness and discrimination in their pleadings, and to avoid useless expense.

But it is principally by the Reg. Gen. Hil. T. 4 W. 4. reg. 5, founded on 3 & 4 W. 4, c. 42, s. 1, 23, that the *greatest ameliorations* in pleading have been introduced and enforced. It had become a condemnable practice to encumber almost every declaration, although only for *one cause of action*, with *numerous counts*, under pretense of avoiding the risk of *variance* on the trial, and consequent expediency of inserting several counts describing the contract or the right or the injury in *various ways*, so as to meet the evidence whatever it might turn out to be. The above statute, by enabling a judge to *amend* in case of *variance* even *pending* a trial, took from the plaintiff the principal pretense for introducing several varying counts; and that excellent object having been effected, the judges then promulgated the above rule, prohibiting the use of more than *one* count upon each cause of action, or more than one plea on the same ground of defense, and enabling a defendant to apply to a judge to strike out every superfluous count; and made it *imperative* on the judge so to order, and to make the plaintiff pay the costs of the application, and even with certain more serious consequences as regards the costs of the action, if the plaintiff should persist in retaining the superfluous count and not succeed upon the same. Another rule, (viz. Hil. T. 2 W. 4,) deprived the party of the costs of any pleadings which he has adopted and on which he does not succeed, and entitles the opponents to the costs of all issues found for him. These rules co-operate powerfully to repress any redundancy in pleading, heretofore so disgracefully

And in allowing only one count or plea in respect of the same cause of action or ground of defense.

prevalent for the sole purpose of increasing the profits to the practitioners concerned.

The increased necessity for more care and extended knowledge of pleading.

It will be obvious, however, that as the plaintiff is now confined to *one* statement of his cause of action, it has become much more essential than heretofore that such statements should be *very carefully framed* after a most accurate examination, not only into the *facts* but of the *evidence* that can be *certainly* adduced in support of them; and the judges have declared, that it is the duty of every attorney practising in the Common Law Courts *not to rely merely on his special pleader, but himself to examine and consider the sufficiency and applicability of the declaration (e)*; and it is certainly desirable, as well for his own as his client's interest, that *every attorney* should inform himself upon the principles and practice of pleading, as one of the most important and useful branches of legal knowledge. It would be found salutary, if the plaintiff's attorney would in every case obtain an accurate statement of the facts and evidence, and prepare from a Volume of precedents a declaration in such form as he may consider most applicable to his client's case, and then have the draft settled by his pleader or counsel. Even as an exercise for the *articled clerks* under the principal attorney's tuition, this practice would inevitably be found of considerable utility, as habituating them to a systematic investigation of a subject highly useful if not indispensable to them in their subsequent practice, and it would save some time and labor to the gentleman who will ultimately settle the draft.

The alterations and improvements relating to *Pleas, Replications* and *subsequent Pleadings* will be pointed out in the Preface to the *third* Volume. They have been considerably altered and enlarged, and a great number of new precedents are introduced; and, to secure accuracy, the author has availed himself of the assistance of his son, Mr. Thomas Chitty, but at the same time the author has himself carefully revised every part.

J. C.

Chambers, 6, Chancery Lane,
12th January, 1836.

(e) *Osborne v. Procter*, 3 Dowl. 21; *Tennant v. Nanney*, 3 Dowl. 17; 2 Chitty's Gen. Prac. 429 to 433.

ADVERTISEMENT
TO THE
SIXTH AMERICAN EDITION.

It has been deemed proper, in preparing the present Edition of Mr. Chitty's Treatise for the press, to omit some of the precedents contained in the second and third volumes, as of no use to the American Practitioner, and an unnecessary addition to the bulk and cost of the work. Among the precedents omitted, are the commencements and conclusions of declarations in the Exchequer; in the Great Sessions in Wales; in the Common Pleas of Lancaster, &c.; and by and against particular persons, such as the Queen; Peers; Members of Parliament; which contain such variations from the precedents in use in ordinary cases in the King's Bench and Common Pleas, as are proper for the cases in which they are used in England, but which cannot serve as guides in preparing precedents to be used in any court in the United States. It has also been deemed advisable, to omit declarations in *assumpsit* for "tithes bargained and sold;" for "small tithes;" for "petty customs," &c.; some of the precedents in *trespass* "against inferior tradesmen for hunting," &c.; and in actions founded on particular Acts of Parliament; on copyhold tenure, &c. obviously of no utility or application in this country.

Philadelphia, April 1st, 1833.

PUBLISHERS' NOTICE.

IN consequence of the omission, in the American editions, of some of the forms contained in the English editions, deemed unnecessary here, and from other causes, various errors have crept into the following Analytical Table, and also the Index at the end of the third volume. Occasional complaints have been made to the publishers on this account. Aware of the great importance of a correct Index, in order that any particular form or subject may be instantly referred to, we have had the Analytical Table and Index thoroughly revised, each reference compared with its appropriate page in the text, and all errors of paging, &c. corrected. Care will be taken to maintain this accuracy hereafter. .

Springfield, 1840.

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VOLUME II.

NOTICES OF ACTION.

To C. D. Esquire, one of his Majesty's Justices of the Peace (a) in
and for the county of ———.

I, A. B. of ——— in the county of ——— Esquire (c), do hereby, accord-
ing to the form of the Statute in such case made and provided (d), give
you notice, That I shall, by my attorney, Mr. E. F. of ——— in the coun-
ty of ——— at or soon after the expiration of one calendar month from the
time of your being served with this notice, cause a Writ of Latitat (e) (1),
or, "a Precept, called a Bill of Middlesex," or, *if the action is to be in*
the Common Pleas, "Capias ad Respondendum," or, *if in the Exchequer*,
"Quo minus," or, *if the party to be proceeded against be an Attorney, a*
Member of Parliament, or Peer, &c. describe the process accordingly (f)
to be sued out of his Majesty's Court of King's *Bench, (or, "Common
Pleas," or, "Exchequer,") at Westminster, against you (g) at my suit,
and proceed thereupon according to law. (Then follows the subject-matter
of the notice, and which may be as follows (h) : For that you, the said C.

Notice of
action by
the party
to a justice
for false
imprison-
ment, (b)
(2).

[*2]

(a) It is usual, at the head of the *Notice*, to state the character in which the party, about to be sued, acted; and some forms state the color or pretence under which he acted. (See Tidd's Forms, 7th edit. 1, 2, 3, &c.—2 Campb. 196;) but the latter seems unnecessary, and if mis-stated, may be fatal. See 1 Taunt. 383.—1 Moore & P. 346.

(b) The older *Cases* as to notices of action are collected in Tidd's Prac. 9th edition, 28 to 33.—Chitty's Col. Stat. 1 vol. 645 to 648. (The more recent in Chitty's Gen. Pract. 2 vol. 63 to 70.) The stat. 24 Geo. 2. c. 44. s. 1. requires a notice to a justice of the peace. See the *Precedents* in Tidd's Forms, 7th edit. p. 1 to 2. The above precedent is inserted as more useful in practice than the forms which commence "You having," &c.

(c) A notice, describing the intended plaintiff as of "Rotherhithe, in the county of Surrey, merchant," was deemed sufficient. 3 B. & P. 552. n. The statute does not require the notice to state the abode of the intended plaintiff, but only of his attorney.

(d) See the statute 24 Geo. 2. c. 44.

(e) The statute expressly requires that the intended writ or process shall be named. 24 Geo. 2. c. 44. s. 1.—7. T. R. 631.—2 Campb. 198.—Holt C. N. P. 27.

(f) 3 Taunt. 166.

(g) Need not notice all parties to be included in action, 2 Price, 126.—5 Price, 168.—Chitty's Col. Stat. 1 vol. 647.

(h) The statute 24 Geo. 2. c. 44. s. 1. enacts "in which notice shall be clearly

(1) But in *Pennsylvania*, in the notice required to be given by the Act of 21 March, 1712, prior to the commencement of a suit against a Justice of the Peace, is not necessary to specify the *kind of writ or process* intended to be sued out, or the *kind of action* intended to be brought; it is sufficient to give notice that an *action* will be brought, and to describe clearly the *cause of action*. Mitchell v. Cowgill, 4 Binn. 20. Little v. Towland, 6 Binn. 84, overruling Kennedy v. Shoemaker, 1 P. A. Browne, 61.

(2) In a suit by the administrators of a constable, against a justice of the peace, to recover back money alleged to have been received by him as a justice of the peace by fraud and mistake, the justice is entitled to previous notice under the Act of 1772. Wise, adm. v. Wills, 2 Rawle, 209.

[*3]

Second
count.

D. on the — day of — A. D. — with force and arms, caused an assault to be made on me the said A. B. to wit, at — in the county of —; and then and there caused me to be apprehended and seized and laid hold of, and to be forced and compelled to go from and out of a certain dwelling-house, situate and being at — in the county of — into the public street there, and also to be then and there forced and compelled to go in, through, and along divers public streets and places to a certain police-office, situate and being at — in the county of — and to be unlawfully imprisoned and kept and detained in prison, in a certain dark and unwholesome prison or place, called — situate at —*with-out any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of — hours then next following, contrary to the laws and customs of this realm, and against the will of me the said A. B. whereby the said A. B. was then and there not only greatly hurt, bruised and wounded, but was also thereby greatly exposed and injured in my credit and circumstances, to wit, at — aforesaid, in the county aforesaid: — And also for that you the said C. D. on the day and year aforesaid, with force and arms, &c. caused an assault to be made upon me the said A. B. to wit at — aforesaid, in the county aforesaid, and caused me to be then and there beat, ill-treated, and apprehended and imprisoned, and kept and detained in prison, without any reasonable or probable cause, for a long time to wit, for the space of — hours then next following, contrary to the laws and customs of this realm, and against the will of me the said A. B. And other wrongs to me the said A. B. did, to my great damage, and against the peace of our lord the now king. Dated this — day of — in the year of our Lord —. Yours, &c. A. B. of — in the parish of — in the county of —.

[*N. B. To be endorsed as follows:*] “E. F. of — (i) in the county of — attorney for the within named A. B.

and explicitly contained the *cause* of action which such party hath, or claimeth to have against such justice of the peace.” If the action be brought against a justice, for any thing done under a conviction which has been quashed, the notice must state that it was done maliciously and without any reasonable or probable cause, and the form of action must be *Cass*; see 43 Geo. 3 c. 141. — 12 East, 67. — 16 East, 13. — 1 Marsh. 220. But the *form* of action need not be stated, 2 Campb. 196. If, however, it be stated, the plaintiff must declare accordingly. 7 T. R. 631, n.; but see Chit. Col. Stat. 1 vol 647. — 3 B. & A. 493. — If any special damage has resulted from the injury, it must be fully stated as in a declaration, 2 Chitty's Gen. Pract. 65; but it is sufficient to show the facts without disclosing the legal objection. 1 M. & S. 411, 12. — 5 B. & A. 837.

The cause of action may be stated precisely, as in a declaration in trespass, 1 Mac. & J. 469, for which see the precedents, post, 857, &c. and Tidd's Forms, 1 to 7. — It is usual, as in the above precedent, to frame the notice, so that the subsequent declaration may precisely correspond with it. As in trespass to the *Person*, first stating the assault, battery, and false imprisonment specially, with all the circumstances and

special damage; and secondly, a common count for false imprisonment: or in trespass to *Personal* property, a count for seizing the ship, cart, &c. and detaining it, with the consequent damage, and a common count for seizing, carrying away, and converting the same property; or in trespass to *Real* property, &c. a count for breaking and entering the house, land, &c. and making a disturbance, and seizing and detaining the property, with a common count for seizing and converting the personal property.

(i) The stat 24 Geo 2. c. 44. s. 1, enacts, “on the back of which notice shall be *indorsed* the name of the attorney or agent of the intended plaintiff.” “E. F. of Birmingham, generally,” was held sufficient, (Little v. Toland, 6 Binn. 84. and if the name of the *agent* be indorsed, the indorsement must state, that he is the agent of the plaintiff, in addition to his name. — Lake v. Shaw, 5 Serg. & Rawle, 517.) But “*at Durham*,” was deemed insufficient. (Perkins v. Slocum, 3 Serg. & Rawle, 295.) 3 B. & P. 551, 553 a. — 7 T. R. 635. — 2 Campb. 199. — 3 Taunt. 127; but describing himself as of a place in London, which in fact was in Westminster, was insufficient; 6 Esp. 138; the initial of the attorney's christian name, suffices. 2 Marsh.

(Same Address as in the last Precedent.)

I do hereby, as the attorney of and for A. B. of — in the county of — duly authorized in that behalf, according *to the form of the Statute in such case made and provided, give you notice, That the said A. B. will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a Writ of Latitat to be sued out of his Majesty's Court of King's Bench at Westminster, against you, at the suit of him the said A. B. and proceed thereupon according to law : For that, &c. (State the cause of action, as in the last precedent, and conclude as follows :)

The like by an attorney for his client (k).

[*4]

And other wrongs to the said A. B. did, to his great damage, and against the peace of our lord the now king. Dated this — day of — in the year of our Lord —.

Yours, &c. E. F. residing at — in the parish of — in the county of — attorney for the said A. B.

To C. D. and E. F. Officers of his Majesty's Excise, (or "Customs.")

The like to an excise, or custom house officer, for seizing and detaining a ship and goods (l).

[The commencement and conclusion are the same as in the notices to a Justice of Peace, ante, 1 and 2 ; but as these officers themselves usually do the act complained of, there appears to be a small difference in describing the trespasses. The form is as follows :]

For that you, on the — day of — A. D. — with force and arms, &c. unlawfully seized and took possession of a certain brig or vessel called —, together with her tackle, apparel, furniture, stores, and divers, to wit, two boats, of and belonging to me, the said A. B., being of great value, to wit, of the value of £— ; and also seized and took possession of, and carried away, a large quantity, to wit, one hundred pounds weight of tea, belonging to me the said A. B., being of great value, to wit, of the value of 100*l.*, and kept and detained the said brig or vessel, and her tackle, apparel, furniture, *stores, and boats, and the said tea, from me the said A. B. for a long time, to wit, for the space of — days then next following, and until I the said A. B. in order to regain possession thereof, was forced and obliged to, and did pay to you a large sum of money, to wit, the sum of —*l.* :—And also for that you, on the day and year aforesaid, with force and arms, &c. unlawfully seized, took and carried away, a

[*5]

Second count.

377. 7 Taunt. 63. S. C. The omission of the initial of the second christian name of the attorney, is not material. 4 Bar. & Cres. 681. Though the name be written inside instead of on the back of the notice, it will nevertheless suffice. Cook v. Curry, Chit. Col. Stat. 1 vol. 648.

(k) This must be indorsed with the name and place of abode of the attorney concerned for the plaintiff, as in the above precedent. (In Pennsylvania the notice need not be served by the attorney, or agent, but by some one empowered by him, Bates v. Shaw, 13 Serg. & Rawle, 420.)

(l) See the notes to the precedent, ante, 1, 2. The stats. 7 & 8 Geo. 4. c. 53. s. 114, and 28 Geo. 3. c. 37. s. 25, regulate this notice ; and see the stats. 23 Geo. 3. c. 70. ss. 30. 32.—24 Geo. 3. sess. 2. c. 47. s. 35. See Tidd's Prac. 9th edit. 30. It does not seem to require the name of the process to be stated, though it is absolutely necessary in the case of a notice to a justice of the peace. The plaintiff's place of abode must be stated with precision. 3 Taunt. 127.—See form of a notice of action to a trustee of a turnpike road, 5 Bar. & Cres. 125.

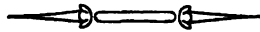
certain other ship or vessel, and divers, to wit, two boats, and a certain other large quantity, to wit, one hundred pounds weight of tea of me the said A. B. of great value, to wit, of the value of —*l.* and converted and disposed thereof to your own use; and other wrongs, &c. [*Conclude as in the preceding forms:*]

Demand
of copy of
warrant
from a
constable
(m).

To C. D.

Whereas, on or about the — day of — 1830, you apprehended, assaulted and imprisoned A. B. of —, laborer, (*or as the case may be*) under color and pretence of some warrant or warrants of some justice or justices of the peace authorizing you so to do; now I do hereby, as the attorney for the said A. B. and on his behalf, demand of you the perusal and copy of all and every warrant and warrants under and by virtue of which you apprehended and imprisoned the said A. B. (*or as the cause of action may be, stating it shortly*), as aforesaid. Dated the — day of — 1830.

E. F. of, &c., attorney for the said A. B.



AFFIDAVITS TO HOLD TO BAIL.



In the King's Bench (a),
(or, "*Common Pleas*,"
or, "*Exchequer*.")

Affidavit
to hold to
bail in
common
cases (b).

A. B. of Cheapside, in the city of London, merchant (c) maketh oath, and saith, That C. D. is justly and truly indebted to this deponent —

(m) (As to a demand and perusal of a justice's warrant to be made under 24 G. 2. c. 44. see 2 Chitty's Gen. Pract. 61 to 64.)

(a.) As to the affidavit in general, see Tidd 9th edit. 178. (And as to arrest, and this affidavit fully, Chitty's Gen. Pract. vol. iii. 323 to 341; 515 to 517.) It may be intitled in the court in which it is intended to be used, 7 T. R. 451; but it must not be intitled in a cause; *Rule*, Mich. 38 Geo. 3 K. B.—7 T. R. 454.—1 B. & P. 96. 227.

(b) See a modern form, Chitty's Gen. Pract. vol. 3. 339, in note.) An affidavit to hold to bail is required by the stat. 12 G. 1. c. 29. (amended by the 5 Geo. 2. c. 27. and made perpetual by 21 G. 2. c. 3, and extended to inferior courts by the 19 G. 3. c. 70.) by which it is enacted, "that in all cases where the plaintiff's cause of action shall amount to the sum of *ten pounds* or upwards an affidavit shall be made and

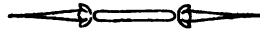
filed, of such cause of action." And by the 7 & 8 G. 4. c. 71. no person can be held to bail when the cause of action does not originally amount to 20*l.* The law relating to affidavits to hold to bail, is collected in Tidd's Prac. 9th edit. 178 to 140.—Sellon's Prac. 104 to 115.—Imp. K. B. 8th edit. 121 to 144. The precedents of affidavits will be found in Tidd's Forms, 7th ed. 74 to 87; and in Imp. 8th ed. 133 to 144.—Only one precedent is here given, which will suffice in the usual course of business: referring to the several *indebitatus* counts for the descriptions of the various debts.

(c) The true place of abode and addition of the deponent must be inserted.—*Rule*, Mich. T. 15 Car. 2.—1 East, 18. 330.—3 East, 154.—3 B. & P. 550.—4 Taunt. 154; but see 6 Taunt. 73; what is a sufficient description, see Tidd's Prac. 9th edit. 179.—3 M. & S. 165.—3 B. & P. 550.

in the sum of £100 (*d*), of lawful money of Great Britain, for "*goods sold and delivered *by this deponent to the said C. D. (e), and at his request (f).*"

A. B.

Sworn (*g*) at the Bill of Middlesex Office, (or, *King's Bench Office*, or — *as the case may be*) this — day of — A. D. 1830, before — (*the officer's name.*) Or, if in the country, say, "Sworn at — the — day of — A. D. 1830," before E. F. a Commissioner of the Court of *King's Bench*, (or, *Common Pleas*, according to the fact.)



*PROCEEDINGS BY SPECIAL ORIGINAL.

[*7]

(*N. B. No title of the Court or Term is to be stated at the head of the Præcipe.*)

Præcipe for a special original writ in *assumpsit* or *case* (*h*)

London (*i*), (to wit.) If A. B. make you secure, &c. then put by gages and safe pledges, C. D. late of (*London, merchant, (k), according to the fact,*) that he be before us (*l*) on (*the Morrow of all Souls (m)*),

(*d*) The sum for which the defendant is to be arrested. It is better not to add "and upwards." The plaintiff may recover more than he swears to, though he will not have the security of bail to a greater extent.

(*e*) This must depend on the nature of the debt in each particular case. In Tidd's Forms, 7th edition, 74 to 87, a great variety of debts is described. The debt may be described, as in the following *indebitatus counts*, which are indexed at the head of this volume, in the Analytical Table. See also the pleas and notices of Set-off, post, vol. iii. 932 to 939. If founded on an agreement, it should state in what respect it has been broken.—10 East, 358.—4 M. & S. 330. Care should be taken to swear to the description of debt which the plaintiff is certain of establishing on the trial; for, otherwise the plaintiff may lose the security of bail, even after verdict, 2 Taunt. 107. As to the certainty necessary in stating the debt, see Tidd's Prac. 9th ed. 180 to 187. (3 Chitty's Gen. Prac. 334 to 337.) The court will supply nothing by intendment. 1 B. & C. 109.

(*f*) When the defendant's request is necessary to constitute a debt, it must be stated.—9 Barn. and Cress. 543.—By the 59 Geo. 3. c. 49. s. 1, the restrictions on payments in cash, under the several Bank Acts, finally ceased and determined on the 1st May, 1823,

so that it is no longer necessary to negative a tender of the debt in bank notes, in an affidavit to hold to bail.

(*g*) This is termed the Jurat. The affidavit may be sworn before a judge, or commissioner of the court, authorized to take affidavits, or before the officer who issues the process, or his deputy. Tidd, 9th edit. 179.—3 M. & S. 157, 8.—If made by several persons, their names must be written in the Jurat. 7 T. R. 82. It is sufficient in the Jurat, if it appear to have been sworn before E. F. a commissioner, &c. without adding "*of the court of King's Bench.*" 7 T. R. 451.

(*h*) Read the points as to the præcipe, ante, vol. i. 220.—Tidd, 9th edit. 104. See Præcipes in different forms of action, 1 Rich. C. P. 81. 216.—Lil. Ent. 90.

(*i*) This should be the venue in the action, or the plaintiff will lose his bail, 3 Lev. 135. It must not be a county palatine, or where an original writ does not run; see ante, vol. i. 221.

(*k*) Or, yeoman, &c. according to the fact. See statute 1 Hen. 5. c. 5.—2. Stra. 923.

(*l*) Or if in the Common Pleas, say, "before our justices of the bench at Westminster," omitting, "wheresoever," &c.

(*m*) Must be a general return day.

Conclusion.

wheresoever we shall then be in England, (n), to show, For that whereas, &c. [*Here state the cause of action at length, precisely as in a Declaration, 2 Saund. Rep. 209 a. n. 1. and after stating all the counts and the breach, conclude as follows:*] To the damage of the said plaintiff of £— (o) as it is said, &c.

It is usual for the Pleader to frame the præcipe as above directed—such præcipe, when it is intended to proceed by original writ and capias, is the instructions left with the Filacer, for the original writ itself, which in ordinary cases is not issued, unless it become necessary in consequence of a writ of error upon a judgment by default. When the original writ is issued, it is so by the Cursitor. The Filacer, upon the præcipe being left with him, issues the capias ad respondendum. The following is a form of the original writ itself, when complete:—

The original writ thereon. (p).

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, to the Sheriffs of London [*the venue*] greeting: If A. B. shall make you secure of prosecuting his claim, then put by gages and safe pledges, C. D. late of [London, merchant], that he be before us on the Morrow of All Souls [*the return*] wheresoever we shall then be in England, (or in C. P. before our justices at Westminster, on, &c.) to show, For that whereas, &c. (*as in the præcipe to the words "as it is said"*) and have there the names of the pledges and this writ. Witness ourself at Westminster, the — day of — in the — year of our reign.

Sometimes the Pleader is requested to draw the capias ad respondendum, which may be as follows:—

The capias thereon.

William the Fourth, &c. (*as supra*). To the sheriffs of [London] greeting: We command you, that you take C. D. late of [London, merchant], if he be found in your bailiwick, and him safely keep, so that you may have his body before us on [the Morrow of All Souls], wheresoever we shall then be in England, (or in C. P. before our justices at Westminster, on the Morrow of All Souls), to answer A. B. in a plea, For that whereas, &c. (*as in the original, to the words "as it is said"*) and have there this writ. Witness Charles Lord Tenderden (or in C. P. Sir Nicholas Conyngham Tindal, Knight,) at Westminster, the — day of — in the — year of our reign.

If non est inventus be returned to the above capias, then an alias capias is issued, and if that be returned non est inventus, then a pluries capias is issued, as follows:

Alias or pluries capias.

William the Fourth, &c., to the sheriffs of [London] greeting: We command you as before (or if a pluries, as oftentimes) we have commanded you, that you take, &c. (*as in the above*.)

(n) As to these words, see 9 East, 55. If the writ be returnable in the Common Pleas, then say, "that he be before our justices of the bench at Westminster," on, &c. to show, For that, whereas, &c.

(o) In the body of the declaration the sum may be laid larger than the real debt, but as a fine is paid to the king in propor-

tion to the damages at the end of the præcipe, (see the Scale of Fines, Impey's Prac. 7th edit. 591.—Tidd's Forms, 6th edit. 24.) the damages in this place should only be enough to cover the real debt and interest, to the time of final judgment.

(p) As to this writ in general, See Tidd's Prac. 9th edit. 102 to 115.

If the defendant be not in the county stated as the venue in the præcipe, then a testatum capias may be issued in the following form, into the county where the defendant is:—

William the Fourth, &c. (as before). To the Sheriff of [Kent] greeting: We command you that you take C. D. late of, &c. (as in the capias, altering the return to the words "as it is said") and whereupon our sheriffs of [London] returned to us (or in C. P. to our Justices at Westminster,) at a certain day now past, that the said C. D. was not found in his bailiwick, whereas it is testified in our court, before us (or, in our same court, in C. P., omitting "before us,") that the said C. D. lurks and wanders up and down in your county, and have there this writ. Witness, &c. (as before). Testatum capias.

If the defendant be, or be supposed to be, in a liberty, then in the above writs insert the following clause of non omittas:—

William the Fourth, &c. (as before). To the Sheriff of [Kent] greeting: We command you that you do not omit by reason of any liberty of the bailiff of the hundred of — in your county, but that you take C. D. late of — if he be found in your bailiwick, and him safely keep, so that you have his body before us on — wheresoever we shall then be in England (or in C. P. before our justices at Westminster, on —) to answer A. B. in a plea, For that whereas, &c. (as in the previous process), and have there this writ. Witness, &c. Non omittas capias.

The following is the form of the declaration in assumpsit, or case when the proceedings are by original writ:—

In the King's Bench (or, Common pleas.)

Michaelmas Term, 1 William 4. Declaration thereon.

London, (q), (to wit.) C. D. (r) was attached to answer A. B. of a plea of trespass on the case upon promises, and thereupon the said A. B. by — his attorney, complains, For that whereas, &c. [State the cause of action precisely, as in the *præcipe; if that be defective, the declaration should nevertheless correspond with it, and afterwards a summons may be taken out to amend the declaration. Conclude as follows:] Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £—(s) and therefore he brings his suit, &c. [*8] Conclusion.

(No pledges to be added.)

In the King's Bench (or, Common Pleas).

—next after— in Michaelmas Term,
1 William 4 (t).

London (venue), (to wit.) C. D. was attached to answer A. B. in a plea of trespass on the case upon promises; and thereupon the said A. B. Declaration where

(q) This must be the venue in the writ, or in bailable actions the plaintiff would lose his bail; ante, vol. i. Ejectment.

(r) The addition of the defendant need not, nor should be stated in the declaration. 3 B. & P. 395; ante, vol. i. Ejectment.

(s) The same damages as in the præcipe.

(t) The declaration should be intitled after the outlawry was completed, 1 Wils. 73. 1 East, 133; but a mistake may be amended.—2 J. B. Moore, 87.

one of the defendants has been outlawed (u) (1). by — his attorney, complains, For that whereas the said C. D. and one E. F. (which said E. F. by due course of law, has been outlawed, (or, if a woman, say "waived") at the suit of the said A. B. in this plea and suit (w), and still remain so outlawed (x), on, &c. at &c. were indebted, &c. [State the promises and breach, and conclude, stating that the said C. D. and E. F. wholly refused, and the said C. D. still doth refuse, to the damage, &c. as before.]

[*9] Præcipe for original writ in debt (y). * — (to wit.) Command C. D. late of — [merchant] that justly and without delay he render unto A. B. the sum of £— of good and lawful money of Great Britain, which he owes to and (y) unjustly detains from him, as it is said, and unless, &c. Returnable before the lord the king, on — wheresoever, &c. [or in C. P. before his Majesty's justices at Westminster, on —].

The capias thereon.

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, To the sheriffs of [London] greeting: We command you, that you take C. D. late of — in your county, merchant, if he be found in your bailiwick, and him safely keep, so that you may have his body before us on — wheresoever we shall then be, in England, (or if in C. P. "before our justices of the bench at Westminster,") to answer A. B. of a plea that he render to the said A. B. the sum of £— of good and lawful money of Great Britain, which he owes to and (y) unjustly detains from him, as it is said, and have there this writ. Witness ourselves at Westminster, the — day of — in the — year of our reign.

In the King's bench (or, Common Pleas).

Michaelmas Term, 1 William 4.

Declaration thereon (z). London, (venue) [to wit.] C. D. was summoned to answer A. B. of a plea that he render unto the said A. B. the sum of £— of good and lawful money of Great Britain, which he owes to and [y] unjustly detains

(u) This precedent is taken from Impey's Pract. K. B. 7th ed. 599; 8th ed. 588; and see Brownl. Rep. 197.—Lil. Ent. 20. 1 Brown. 20. The form usually has been as follows, but the above seems more correct; "—, to wit, C. D. and E. F. were attached to answer A. B. of a plea of trespass on the case, &c. and thereupon the said A. B. by G. H. his attorney, comes and gives the court here to understand and be informed, that since the suing out of the original writ in this cause, and before this day, to wit, on, &c. the said E. F. was duly outlawed in the same Court here in this suit, as by the record of the said outlawry remaining in the said court in full force more fully appears; and hereupon the said A. B. by his attorney aforesaid, complains against the said C. D. in the plea aforesaid, that whereas, &c."

(w) The declaration must show an outlawry in the present suit, 3 East, 144; but

need not refer to the record of outlawry, 7 East, 50. As to the plea denying the outlawry, see 1 East, 133, 634.

(z) In an action against acceptors of a bill, one of whom has been outlawed, introduce this averment of outlawry, after statement of the direction of the bill to the defendants. See a declaration against one executor after outlawry of the others, Lil. Ent. 20.

(y) As to the præcipe and capias in debt in general, see the notes to the above precedents in assumpsit, ante, 9, and ante, vol. i. 220. The præcipe and capias in debt do not disclose the particulars of the cause of action, which is not set forth till the plaintiff declares, 2 Saund. Rep. 209, n. 1.—Bac. Abr. Actions, C. If the proceeding be by or against an executor, the words "owes to and" are to be erased.

(z) See the notes to the declaration in assumpsit, ante, p. 7.

(1) There is no outlawry in civil cases in Pennsylvania. The return of *non est inventus* has in pleading the same effect. Dillman v. Shultz, 5 Serg. & Rawle, 35.

from him, and thereupon the said A. B. by — his attorney, complains, For that whereas, &c. [*State the bond, or other debt, or cause of action fully, and conclude as follows :*] Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of — and therefore he brings his suit, &c.

(*Omit pledges.*)

*— (to wit.) Command C. D. late of — [merchant] that justly and without delay he keep with A. B. the covenant made by him the said C. D. with the said A. B. according to the form and effect of a certain indenture, (*or, "of a certain deed-poll," or, "of certain articles of agreement," or, "of a certain charter-party of affreightment,"*) made between them, as it is said, and unless, &c. Returnable before the lord the king, on — wheresoever, &c. (*or in C. P. before his majesty's justices at Westminster, on —*). [*10] *Præcipe for an original writ in covenant (a).*

William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, to the sheriff of — greeting: We command you, that you take C. D. late of — in your county [merchant] if he be found in your bailiwick, and him safely keep, so that you may have his body before us on — wheresoever we shall then be, in England, (*or in C. P. before his majesty's justices at Westminster, on, &c.*) to answer A. B. of a plea that he keep with the said A. B. the covenant made by him the said C. D. with the said A. B. according to the form and effect of a certain indenture, (*or, "of a certain deed-poll," or, "of certain articles of agreement," or, "of a certain charter-party of affreightment,"*) made between them, as it is said, and have there this writ. Witness ourselves at Westminster, the — day of — in the — year of our reign. The capias as thereon

In the King's Bench.

Michaelmas Term, 1 William 4.

London, (*venue*) (to wit.) C. D. was summoned to answer A. B. of a plea that he keep with him the covenant made by the said C. D. with the said A. B. according to the force, form, and effect of a certain indenture, (*or, "of a certain deed-poll," or, "of certain articles of agreement," or, "of a certain charter-party of affreightment,"*) made between them, &c. and thereupon the said A. B. by — his attorney, complains, For that whereas, &c. [*State the deed, covenants, and breaches complained of, fully, and conclude thus :*] "Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £ — and therefore he brings his suit," &c. Declaration thereon (b).
[*11]

(*Omit pledges.*)

(a) As to the præcipe and capias in covenant in general, see the notes to the above precedent in *assumpsit*, ante, vol. i. *Ejectment*. The præcipe and capias in covenant do not disclose the particulars of the cause

of action which is afterwards stated in the declaration. 2 Saund. Rep. 209, n. 1.—*Bac. Abr. Actions, C.*

(b) See the notes to the precedent of the declaration in *assumpsit*, ante, 7.

BEGINNINGS AND CONCLUSIONS OF DECLARATIONS.

IN THE KING'S BENCH, BY BILL.

IN KING'S
BENCH. *Ellenborough.*

*Saturday next after the Morrow of All Souls, in Michaelmas
Term, 1 William 4. (a)*

In assump-
sit. MIDDLESEX, (the venue) (to wit (b)). A. B. (c) complains of C. D. being in custody (d) of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case on promises (e), For that whereas, &c. [*Here set forth the cause of action in assumpsit, and conclude as post, 16. It is best to describe the plaintiff and defendant throughout by the terms, "the said plaintiff," "the said defendant," without repeating their names, see 1 vol. 230. 2 Marsh. Rep. 101. 1 New R. 289.*]

In ac-
count.
[*13] — (to wit.) A. B. complains of C. D. being &c. (as above) of a plea, that he render to the said A. B. a reasonable *account for the time he was bailiff to the said A. B. in — in the county of — (or, "receiver of the monies of the said A. B.") For that whereas, &c.—(See Willes, 208. 1 Wentw. 81 to 90. See the full form, post, vol. iii. Declaration.)

In annui-
ty. — (to wit.) A. B. complains of C. D. being, &c. (as ante, 12) of a plea that he render unto the said A. B. the sum of — of lawful money of Great Britain, which he is in arrear to the said A. B. of a certain annuity or yearly rent of — and which the said C. D. owes to the said A. B. For that whereas, &c. (2 Wils. 221. Co. Ent. 48.)

(a) As to the title of the declaration in general, see ante, vol. i. Joinder, and 2 Saund. 1, note 1. The declaration should in general be intitled of the Term in which the writ is returnable, 3 T. R. 624; but when it is by the bye, may be intitled of the term when it is delivered, Id. 627: and if there be several defendants, who put in bail of different terms, it should be intitled of the Term of which the last bail was put in. Id. 1 Wils. 242. When the cause of action arose after the first day of the Term in which the writ is returnable, the declaration should be intitled specially of a subsequent day in that Term, and it is in general advisable in an action of assumpsit, case, or trespass, to intitle the declaration specially of the day it is delivered or filed, in order to admit of evidence of a promise or acknowledgment, or cause of action

accruing after the first day of the Term, 1 T. R. 116. 7 T. R. 4. 4 East, 75. But a declaration in *sci. fa.* may be intitled generally, 3 Wils. 154.

(b) As to the venue, see ante, vol. i. Elections.

(c) If the defendant has been misnamed in the process, then in order to avoid a plea in abatement from the mistake being carried into the declaration, describe the defendant as in the Form, post, 15.

(d) This form is to be adopted whether the defendant be in the actual or in the supposed custody of the marshal. As to the omission of the words, see ante, vol. i. Pleading.

(e) It seems unnecessary here to state the nature of the cause of action. Plead. Assist. 292. 11 East, 62, 65. Ante, i. vol. Pleading.

— (to wit.) A. B. complains of C. D. being, &c. (*as ante*, 12) of a plea that he render to the said A. B. the sum of — (f) of lawful money of Great Britain, which he *owes to and* (g) unjustly detains from him. For that whereas, &c. In debt.
In debt.

— (to wit.) A. B. who sues as well for our sovereign lord the king, (*or*, “for the poor of the parish of — in the county of —”) as for himself in this behalf, complains of C. D. being in the custody, &c.) (*as ante*, 12) of a plea that he render to our said lord the king, (*or*, “to the poor of the aforesaid parish,” and to the said A. B. who sues as aforesaid, the sum of — of lawful money of Great Britain, which he owes to and unjustly detains from them. For that whereas, &c. In debt,
qui tenet
(h).

— (to wit.) A. B. complains of C. D. being, &c. (*as ante*, 12) of a plea of breach of covenant. For that whereas, &c. (see forms, Plead. Assist. 313.) In cov-
enant.

*— (to wit.) A. B. complains of C. D. being, &c. (*as ante*, 12) of a plea that he render to the said A. B. certain goods and chattels, (*or*, “deeds and writings,” *as the claim is*) of the value of — of lawful money of Great Britain, which he unjustly detains from him. For that whereas, &c. (See forms, post, 593.) [*14]
In detinue

— (to wit.) A. B. complains of C. D. being, &c. (*as ante*, 12) of a plea that he render to the said A. B. certain goods and chattels, (*or*, “deeds and writings,” *according to the claim*) of the value of £— of lawful money of Great Britain, which he unjustly detains from him, and also the sum of £— (*the aggregate of the sums in each of the counts in debt*) of like lawful money, which he owes to and unjustly detains from him. For that whereas, &c. (See forms, post, 593, 595.) In debt
and deti-
nue.

— (Same as in *assumpsit*, except in the description of the form of action, which is as follows;) “of a plea of trespass on the case.” For that whereas, &c. In case, or
trover.

— (to wit.) A. B. complains of C. D. being, &c. (*as ante*, 12) of a plea of trespass, For that (i) the said C. D., &c. In tres-
pass.

(f) The demanding more or less than appears from the body of the declaration to be due, is no ground of demurrer, see 11 East, 62. 1 Hen. Bl. 249. Com. Dig. tit. Pleader, C. 84, and Vin. Abr. tit. Misest-ing. 2 Chit. Rep. 234.

(g) See forms, 2 Rich. C. P. 276.—Plead. Assist. 360, “of a plea of debt” would suffice. 11 East. 62. In actions by and against executors and administrators, in general omit the words in italics. Com. Dig. Pleader, 2 D. 1, 2. 2 W. 8. 1 Saund. 1. 112, n. 1. 216. and 3 East, 2. The plaintiff may always declare in the detinet only. 4 M. & S. 120; but see 1 Lev. 130, 224. 1 Sid.

342, *contra*. It is said that the words “of a plea that he render,” &c. are superfluous, and may be rejected, 11 East, 65; but see 6 Mod. 306.

(h) As to the necessity for declaring *qui tenet*, see Com. Dig. Action on the Case upon Statutes, ante, vol. i. Declaration.

(i) A declaration by *bill* in *trespass*, stating, that *whereas* or *wherefore* the defendant did the act complained of, is bad on special demurrer, see ante, vol. i. Declaration. 1 Stra. 621.—2 Stra. 1151. 1162; but not so by *original*, or in C. P. when the writ is recited, 1 Wils. 99. 2 Wils. 203.

IN KING'S *Ellenborough.*
BENCH.

Michaelmas Term, 1 Will. 4.

To detain a prisoner in custody of the marshal in vacation, where the cause of action accrues in vacation. — (to wit.) Be it remembered, That on the — day of — A. D. — (*the day the bill is filed.*) A. B. brought into the office of the clerk of the declarations of the court of our lord the now king before the king himself, according to the course and practice of the same court, his certain bill against C. D. being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of &c. (*as the plea is*) and filed the same bill, as of [Michaelmas] Term, in the 1st year of the reign of our said lord the king; which said bill follows in these words; that is to say, to wit, A. B. complains of C. D. being in the custody, &c. (*as ante*, 12, *first precedent*, see 8 T. R. 643.)

Against a prisoner in custody of the sheriff (k). — (to wit.) A. B. complains of C. D. being in the custody of the sheriff of — by virtue of a certain Precept, called a bill of Middlesex, (*or*, "Writ of our said lord the king, called a Latitat," *as the writ is*) issued at the suit of the said A. B. out of the court of our said lord the king, before the king himself, against the said C. D. in this suit, and *returnable in the same court on — next after — in this same Term, of a plea of trespass on the case *upon promises (or as the plea is.)* For that whereas, &c.

[*15]

Against two, one in custody of the sheriff, and the other of the marshal. — (to wit.) A. B. complains of C. D. and E. F. the said C. D. being in the custody of the sheriff of Middlesex, by virtue, &c. (*as ante*, 15) and the said E. F. being in the custody of the marshal, &c. (*as ante*, 12.) For that whereas, &c. (See 10 Wentw. 385.)

Against a defendant sued by a wrong name (l). — (to wit.) A. B. complains of C. D. who was *arrested*, (*or, if the process was not bailable, "served with process,"*) by the name of E. D. being, &c. For that whereas, &c. (*describe the defendant by the terms "the said defendant," throughout.* 1 B. & P. 105. 647, 8. 3 East, 167.)

[*16]

Where one of the plaintiff's died after the issuing of writ and before declaration. * — (to wit.) A. B. by — his attorney, comes and gives the court of our lord the king, before the king himself, at Westminster, in the county of Middlesex, to understand and be informed, that C. D. now in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, was arrested by virtue of a certain Precept called a Bill of Middlesex, (*or "Writ called a Latitat,"*) issued out of the court of our said lord the king, before the king himself, against him the said C. D. *at the suit of him the said A. B. and one E. F. in this suit; and that since the issuing the said precept (*or "writ,"*) and before this day, to wit, on, &c. (*day of death, or about it*) the said E. F. died, to wit, at, &c. (*the venue*) and the said A. B.

(k) As to this form, see vol. i. Pleading. See the form, Lil. Ent. 436. Since the 4 & 5 W. & M. c. 21. s. 3, if the declaration do not show at whose suit the defendant is in custody, it will be bad on general demurrer. 2 Lord Raym. 1362.—1 Wils. 119, 20; but this form is not necessary when the plaintiff has proceeded by special original, or in the Common Pleas or Exchequer. Impey's K. B. 618. Tidd, 9th ed. 342.—Ante, vol. i. Pleading.—And in a declaration in debt it is unnecessary to state at whose suit the de-

fendant is in custody; the words "of a plea that he render," &c. being a sufficient allegation that he is in custody at the plaintiff's suit. Id. Ibid. 1 Ken. 114.

(l) This form should be adopted where the defendant is misnamed in the process, otherwise if the misnomer be carried into the declaration, the defendant may plead in abatement. If the plaintiff's name be mistaken in the process, he may be described in the same way, *mutatis mutandis*, in order to avoid a plea in abatement.

then and there survived him, which the said C. D. doth not deny, but admits the same to be true ; and hereupon the said A. B. complains, by — his attorney, against the said C. D. of a plea of trespass on the case upon promises, (or, as the plea is.) For that whereas, &c. (*proceed in the usual way, laying the promises or causes of action to the plaintiff and his deceased partner, and concluding to the damage of the surviving plaintiff.*)

IF KING'S
BENCH.

— (to wit.) A. B. comes, &c. (*as in the above precedent to the asterisk, and then proceed as follows*)—" and one E. F. at the suit of the said A. B. and that since the issuing the said precept, (or, ' writ,') and before this day, to wit, on, &c. the said E. F. died, to wit, at, &c. and the said C. D. then and there survived him, which the said C. D. doth not deny," &c. (*as in the above to the end, laying the promises by C. D. and the deceased party.*)

Where one of the defendants died after the issuing of writ, and before declaration.

To the damage of the said plaintiff of £— and therefore he brings his suit, &c. (n).

Pledges to prosecute (o) } John Doe,
and
Richard Roe. CONCLUSION of a declaration in King's Bench (m)

*And therefore as well for our said lord the king, (or, " for the poor of the said parish of —") as for himself in this behalf, he brings his suit, &c. Pledges, &c. (*as above.*)

[*17]
Declaration in debt, qui tam (p). Do. in trespass.

And other wrongs to the said plaintiff then and there did, against the peace of our said lord the king, and to the damage of the said plaintiff of — and therefore he brings his suit, &c.

Pledges, &c. (*as above.*)

IN THE COMMON PLEAS.

IN COMMON
PLEAS.

In the Common Pleas.

— next after — in Michaelmas Term, 1 Will. 4 (q).

Middlesex, (to wit.) C. D. (s) was attached (t) to answer A. B. of a plea

In assumpsit, case, or trover (r).

(m) This form is proper in every action by bill, except debt, qui tam, and trespass.

(n) As to the necessity for the word "suit," &c. see ante, vol. i. Declaration.

(o) The omission of pledges is not material. 3 T. R. 157. See as to pledges, ante, vol. i. Declaration.

(p) The declaration should not conclude "ad damnum" in a penal action, for a common informer is not entitled to damages. 4 Burr. 2021. 2490.—1 Marsh. Rep. 180.

(q) As perhaps a common capias may be issued before the cause of action arose, the same as in K. B. (see 1 B. & P. 342. 2 B. &

P. 234 :) it may be advisable to intitule the declaration specially ; as in K. B. (see ante, p. 12, n. (a).)

(r) This form is proper, whether or not the defendant be actually a prisoner in the custody of the warden.

(s) The addition need not be stated in the declaration. 3 B. & P. 395. If the defendant be misnamed in the process, describe as in form, post, 19.

(t) As to the distinction between the words *attached* and *summoned*, and as to this short recital of the nature of the action, see 1 Saund. 318, n. 3 ; ante, vol. i. Declara.

IN COM-
MON
PLEAS.

of trespass on the case *upon promises* (u); and thereupon the said A. B. (w) by E. F. his attorney, complains (x). For that whereas, &c. (*Here state the cause of action, and describe the parties to the suit throughout thus: "the said plaintiff," "the said defendant," without repeating the names, and conclude as follows:*;) Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £—and therefore he brings his suit, &c.

Conclu-
sion.

[*18]
In debt
(y).

*—— (to wit.) C. D. was summoned to answer A. B. of a plea that he render to him the sum of £— of lawful money of Great Britain, which he *owes to and* unjustly detains from him; and thereupon the said A. B. by —— his attorney, complains. For that whereas, &c.

In debt,
qui tam.

—— (to wit.) C. D. was summoned to answer A. B. who sues as well for our sovereign lord the king, (*or, "for the poor of the parish of —— in the county of ——"*) as for himself in this behalf, of a plea that he render to our said lord the king, (*or, "to the poor of the said parish,"*) and to the said A. B. who sues as aforesaid, the sum of £— of lawful money of Great Britain, which he owes to and unjustly detains from them; and thereupon the said A. B. by —— his attorney, complains. For that whereas, &c.

In ac-
count &c.

—— (to wit.) In account, annuity, and detinue, the defendant is stated to have been *summoned* to answer, and the plea is described as in K. B. by bill.

In cove-
nant.

—— (to wit.) C. D. was summoned to answer A. B. of a plea that he keep with him a covenant made by the said C. D. with the said A. B. according to the force, form, and effect of a certain indenture, (*or, "deed-poll," or, "articles of agreement," or, "charter-party of affreightment," as the case may be*) made between them, &c. (*or, if by the assignee of the reversion, "made by the said C. D. with E. F. and his assigns," or, if by an heir, "with E. F. and his heir," or, if against the assignee of the reversion," made by G. H. for himself and his assigns with the said A. B."*) and thereupon the said A. B. by —— his attorney, complains. For that whereas, &c.

In detinue See the form in K. B. ante, 14, which may be readily adapted to an action in the C. P.

In replev-
in.

—— (to wit.) C. D. was summoned to answer A. B. of a plea wherefore he took the cattle, (*or, "goods and chattels," according to the fact*) of the said A. B. and unjustly detained the same against sureties and pledges until, &c. and thereupon the said A. B. by —— his attorney complains. For that &c. (*see post, 843.*)

Stating defendant was summoned, when he ought to have been attached, would be bad on demurrer. 2 Chit. R. 638. *Sed qu;* see Clark v. Crosby, ante, vol. i. Trespass, post, 27.

(u) In case of trover, omit the words in italics.

(w) Or, "the said plaintiff." See 2 Marsh. R. 101.—6 Taunt. 121.—1 New Rep. 230.

(z) The omission of these words, though untechnical, is not demurrable, 1 B. & P. 366.

(y) See the note to the form in debt in K. B. ante, 13. In action by or against an executor or administrator, the words in italics must be omitted. See ante, 13, n.

(f).

* — (to wit.) C. D. was attached to answer A. B. of a plea (z), <sup>in com-
mon pleas
in tres-
pass.</sup> wherefore the said C. D. with force and arms, &c. broke and entered, &c. or "made an assault, &c." reciting the trespasses at length, but without particularizing the time, number, quantity, or value, and other wrongs to the said A. B. there did, to the great damage of the said A. B. and against the peace of our said lord the king, &c.; and thereupon the said A. B. by E. F. his attorney, complains that the said C. D. on, &c. at, &c. (repeating the trespasses, with the circumstances of time, number, quantity, and value.)

According to 1 Saund. 818 a. note 3. The declaration need not recite the supposed writ as above, but may be as in the case in C. P. inserting "plea of trespass" instead of "trespass on the case," and omitting the word whereas; and it is now most usual and advisable to adopt such form as follows:—

— (to wit.) C. D. was attached to answer A. B. of a plea of trespass, and thereupon the said A. B. by — his attorney, complains, For that, &c. (Here state the cause of action, which may be in the forms post, 850 to 876.)

* In the Common Pleas.

As yet of Michaelmas Term, in the 1st year of, &c. to wit, on the 6th day of December, A. D. 1830.

London, (to wit.) C. D. was attached to answer A. B. of a plea of trespass on the case, upon promises, and thereupon the said A. B. by — his attorney complains. For that whereas the said defendant heretofore, and before the commencement of this suit, to wit, on, &c. at, &c. (Conclude as in other cases, stating throughout that "before the commencement of this suit, to wit, on, &c. defendant was indebted," &c.)

— (to wit.) C. D. was attached to answer A. and B. of a plea of trespass on the case (as the plea is); and thereupon the said A. by E. F. his attorney, comes and gives the court here to understand and be informed, that since the suing out of the original writ in this cause, and before this day, to wit, on, &c. (day of his death, or about it) at (venue) the said B. died, which the said C. D. doth not deny, but admits the same to be true; and thereupon, the said A. by his attorney aforesaid complains, that whereas, &c.

The same as the last, *mutatis mutandis*.

[*20]
To detain a prisoner in custody of the warden of the Fleet in vacation where the cause of action arises in such vacation. Where one of the plaintiffs died after the issuing of the writ.

Where one of the defendants died.

Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £— and therefore he brings his suit, &c.

Wherefore, as well for our lord the king (or, "for the poor of the parish of —") as for himself in this behalf he brings his suit, &c.

(z) As to the insertion here of the words "and thereupon the said A. B. complains," see 2 Marsh. Rep. 101. the plaintiff sues in a particular character as executor, &c.

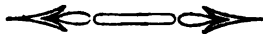
(a) This form will suffice in all cases except in debt qui tam, and trespass, or where

(b) See the form and note in K. B. ante, 13, 18.

Conclusion of a declaration in C. P. (a). Ditto in debt, qui tam (b).

IN COM-
MON PLEAS
Do. in
trespass.

And other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff and against the peace of our lord the king; wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £— and therefore he brings his suit, &c.



IN INFERI-
OR
COURTS.

IN INFERIOR COURTS.

Before the Mayor and Aldermen in the Chamber of the Guildhall of the City of London.

In the
Mayor's
Court,
London,
by baron
and feme,
feme be-
ing feme
sole trader
within the
city (c).

[*23]

A. B. and E. F. his wife (which said E. F. (1) doth sole merchandize without her husband, in the art or trade of — within the city of London), by — their attorney, complains against C. D. in a plea of trespass on the case. For that whereas the said C. D. on, &c. at the parish of — in the city of London, and within the jurisdiction of this court, was indebted to the said E. F. then and now being the wife of the said A. B. and then and now trading and merchandizing within the said city, in the art or *trade aforesaid, alone and without her said husband, according to the custom of the said city, in the sum of £— of lawful, &c. or, &c. (*Here state the cause of action, laying the promises to E. F. and describing her "as such sole trader as aforesaid."*)

Declara-
tion
against
baron and
feme, feme
being sole
trader
within the
city.

(*Title of the Court as above.*)

A. B. by — his attorney, complains against C. D. and E. F. his wife, which said E. F. doth sole merchandize without her husband, in the art or trade of a — within the city of London, in a plea of trespass on the case upon promises. For that whereas the said E. F. so being such sole trader as aforesaid, on, &c. in London, &c. then and still being the wife of the said C. D. and then and still trading and merchandizing within the said city, in the art or trade aforesaid, alone and without her said husband, according to the custom of the said city, as such sole trader as aforesaid, was then and there indebted, &c.

Com'ce-
ment and
conclu-
sion of
declara-
tion in the
Borough
Court of
South-
wark, (d).

[*24]

Borough of Southwark, (to wit.) A. B. by — his attorney, complains against C. D. in a plea of trespass on the case upon promises. For that whereas the said defendant, on, &c. to wit, at Southwark, in the county of Surrey, and *within the jurisdiction of this court, was indebted, &c. &c. (*Stating every material fact to have happened "at Southwark aforesaid, within the county and jurisdiction aforesaid," and conclude as in the King's Bench, by bill, ante, page 16.*)

(c) As to this custom, see 2 B. & P. 93.

(d) See Plead. Assist. 385. Morg. 174.

(1) In *Pennsylvania* she may sue and be sued, plead and be impleaded at law, in any court, without naming her husband. Act of 22d Feb. 1718. 1 Sm. Laws, 99. See *Burke v. Winkle*, 2 Serg. & Rawle, 189.

*BY AND AGAINST PARTICULAR PERSONS.

ATTORNIES, &c.

*Ellenborough.**Michaelmas Term, 1 Will. 4.*

— (to wit.) (b). A. B. gentleman, one of the attornies of the court of our lord the now king, before the king himself, being present here in court, in his own person, according to the liberties and privileges of the said court for such attornies, and other officers of the court aforesaid, from time immemorial used and approved of in the same court, complains of C. D. being in the custody, &c.—2 Saund. 1, n. 1. (*Same conclusion as in other cases.*)

Declaration by an attorney in K. B. (a).
Pledges, &c.

— (to wit.) A. B. complains of C. D. gentleman, one of the attornies of the court of our lord the now king, before the king himself, being present here in court in his own person, of a plea of trespass on the case (*or as the plea is*). For that whereas, &c. (*Instead of the words at the end, "and therefore he brings his suit, &c." say "he prays relief," &c.*)

Bill against do. (c).
Pledges, &c.

Ellenborough.Michaelmas Term, 1 Will. 4.*

[*30]

— (to wit.) Be it remembered, that on the — day of — (f), in the 1st year of the reign of our lord the now king, A. B. brought into the office of the clerk of the declarations of the court of our said lord the king, before the king himself, according to the course and practice of the same court, his certain bill against C. D. gentleman, one of the attornies of the same court, and filed the same bill as of Michaelmas Term, in the first year of the reign of our said lord the king, which said bill follows in these words, that is to say, — (to wit.) A. B. complains (*as ante*, 29. —See 5 T. R. 325. 2 Saund. 1, n. 1.)

Declaration when the cause of action accrues, and the bill is filed in vacation (e).

*Ellenborough.**Michaelmas Term. 1 Will. 4.*

— (to wit.) A. B. complains of C. D. Esquire, marshal of the Marshalsea of our lord the now king before the king himself, present here in court, in his own proper person, of a plea of trespass on the case (*or as the plea is*). For that whereas, &c. (*Here state the cause of action, and conclude as follows :*) To the damage of the said A. B. of £— and therefore he prays relief, &c.

Do. against the marshal (g).
Pledges, &c.

(a) See form, Plead. A. 197.

(b) As to venue in action against attornies, see Tidd's Prac 9th edit. 80.

(c) See forms, 2 Rich. C. P. 90 — Plead. A. 157.

(d) The omission of these words is not a cause of demurrer. — Andr. Rep. 247.

(e) See ante, vol. i. Joinder of Actions. The essoign day is a day of the Term so as to file this bill without a memorandum;

and how plaintiff is to act in such case as to notice to plead, see 5 J. B. Moore, 425.

(f) The day of filing the bill, but though a wrong day be stated, evidence will be allowed to correct the mistake. — 5 B. & A. 847.

(g) The like in debt, see post, 419. If the bill be filed in vacation, the form will be as that against an attorney, *supra*, *mutatis mutandis*.

ATTOR-
NIES, &c. *In the Common Pleas.*

Declar-
ation by an
attorney
of C. P.
(k). — (to wit.) C. D. was attached by his majesty's writ of privilege is-
suing out of his said Majesty's Court of the Bench here, to answer unto
A. B. gentleman, one of the attornies of the same court, according to the
liberties and privileges of the same court, for such attornies, and other
officers of the same court, from time immemorial used and approved of
therein, of a plea of trespass on the case (*or as the plea is*); and there-
upon the said A. B. in his own person, complains, whereas, &c.
(conclude as usual.) Pledges, &c.

[*31] **In the Common Pleas.*

Michaelmas Term, 1 Will. 4.
To the Justices of our Lord the King
of the Bench.

Bill
against an
attorney
of C. P.
(i). — (to wit.) A. B. by E. F. his attorney, complains of C. D. gentle-
man, one of the attornies of his Majesty's Court of the Bench here, pre-
sent here in court in his own person, of a plea of trespass on the case, &c.
(*or as the plea is*). For that whereas, &c. (*Conclude as in K. B. 1*
Rich. C. P. 262. Andr. Rep. 247.)

In the Common Pleas.

Declar-
ation there-
on after
appear-
ance. — (to wit.) Be it remembered, That on ——— next after ——— in
this same Term, A. B. came into his Majesty's Court of the Bench here,
by E. F. his attorney, and brought into the same court here his certain
bill against C. D. gentleman, one of the attornies of the said Majesty's
Court of the Bench here, present here in court, in his own person, of a
plea of trespass on the case (*as the plea is*); and there are pledges for
the prosecution thereof, to wit, John Doe and Richard Roe; which
said bill follows in these words, that is to say, To the justices of our lord
the king of the Bench, ——— to wit, A. B. by ——— his attorney, com-
plains of C. D. (*to the end of the bill.*)

[*32]
INFANTS. *Ellenborough.*

* INFANTS.

Declar-
ation by an
infant in
K. B. (j). — (to wit.) A. B. by E. F. who is admitted by the court of our
lord the now king before the king himself, here to prosecute for the said
A. B. who is an infant within the age of twenty-one years, as the next
friend of the said A. B. complains of C. D. being, &c. — [2 Saund.
117 f. Tidd's Pract. 9th edit. 99.]

In the Common Pleas.

Declar-
ation by an
infant in
C. P. — (to wit.) C. D. was attached to answer A. B. of a plea of tres-
pass on the case (*as the plea is*), and *thereupon the said A. B. by E. F.

[*33] (k) See other forms, 1 Rich. C. P. 455, 264.—Plead. Assist. 305. It seems a Ser-
259.—Morg. Prec. 480.—Lil. Ent. 27. 65, jeant must be sued by original.—Tidd's
88. Prac. 9th edit. 80.—Plead. Assist. 305.
(i) See other forms, 1 Rich. C. P. 262. (j) See form, Plead. A. 160.

who is admitted by the court of our lord the king of the bench here, to prosecute for the said A. B. who is an infant within the age of twenty-one years, as the next friend of the said A. B. complains that, Whereas, &c.

ASSIGNEES OF BANKRUPTS, &c.

ASSIGN-
EES.*Ellenborough.**Michaelmas Term, 1 Will. 4.*

— (to wit.) A. B. and C. D. assignees of the estate and effects of E. F. a bankrupt, according to the Statute (k) in force concerning bankrupts, complain of G. H. being, &c. (*as ante*, 12.) For that whereas, &c. (*See forms, post*, 97.)

Com-
mence-
ment of
declara-
tion by as-
signees of
bankrupt
in K. B.

— (to wit) E. F. was attached to answer A. and B. assignees of the estate and effects of C. D. a bankrupt, according to the Statute in force concerning bankrupts, of a plea of trespass on the case (*as the plea is*); and thereupon the said A. and B. assignees as aforesaid, by G. H. their attorney, complain that, Whereas, &c. (*See form, post*, 97.)

(l)
The like
in C. P.

— (to wit.) A. B. and C. (the said B. and C. being assignees of the estate and effects of E. F. a bankrupt, according, &c. *as above*) complain, &c. (*See form, post*, 101.)

By one
partner
and the as-
signees of
another.

— (to wit.) A. B. and C. D. assignees of the estate and effects of I. K. a bankrupt, under and by virtue of a commission of bankruptcy duly issued and awarded against the said I. K. and E. F. and G. H. assignees of the estate and effects of L. M. a bankrupt, under and by virtue of a commission of bankruptcy duly issued and awarded against the said L. M. according to the Statute in force concerning bankrupts, complain of O. P. being in the custody, &c. For that whereas, &c.

By assign-
ees of two
or more
bankrupts
under sev-
eral com-
missions,
to recover
a debt due
to the joint
estate (l).

— (to wit.) A. B. assignee of the debts, estate, and effect of C. D., heretofore an insolvent debtor, and duly discharged from imprisonment according to the force, form, and effect of act of parliament made at Westminster, in the 7th year of the reign of his late Majesty King George the Fourth, intituled, "An Act to amend and consolidate the laws for the relief of insolvent debtors in England," according to the force, form, and effect of the said act, complains of E. F. being, &c. (*if in C. P. or Exchequer, alter the commencement accordingly.*) For that whereas, heretofore and before

By the as-
signees of
an insol-
vent debt-
or (m).

(k) The Statute now in force is the 6 Geo. 4. c. 16. See forms, Morg. Prec. 453. Plead. Assist. 311.—2 Rich. C. P. 80, 93.—Lil. Ent. 41. As to how assignees sue when there are different commissions, &c. see ante, vol. i. 16.

The trustee or assignee of a bankrupt under the Scotch Sequestration Acts, has no power to sue in this country on a *chose in action*.—4 D. & R. 669.—6 M. & S. 126.

The precedent therefore on this head, inserted in prior editions of this work is omitted.

(l) See ante, vol. i. 16.—2 J. B. Moore, 3.

(m) The statute now in force concerning insolvent debtors, is the 7 Geo. 4. c. 57. See the precedent, 1 Wentw. 368. See also, as to actions by assignees of an insolvent, and when they should sue, ante, vol. i. 17. 61.

(1) See, as to what is a sufficient averment of the plaintiffs' title to sue as assignees, *Fletcher et al. v. Pagson et al.*, 5 Dow. & Ry. 1.

ASSIGN-
EEB.

the said C. D. subscribed his petition for his discharge from imprisonment, according to the provisions of the said statute, to wit, on, &c. at, &c. (See the forms in *assumpsit*, post, 101; and in *trover*, post 838.)

By the as-
signee of
an insol-
vent, after
the remov-
al of the
first assign-
ee by the
Insolvent
Court.

— (to wit.) R. B. assignee of the remaining debts, estate, and effects of T. A. an insolvent debtor, and duly discharged from imprisonment in pursuance of an act of parliament made at Westminster, in the 7th year of the reign of his late Majesty King George the Fourth, intituled “An Act to amend and consolidate the laws for the relief of insolvent debtors in England,” the said R. B. having heretofore been appointed an assignee of the debts, estate, and effects of the said T. A. remaining unsettled, undisposed of, and not applied by one A. N. before then assignee of the debts, estate, and effects of the said T. A. the said A. N. having before then been, under and by virtue of the said act of parliament, removed from such trust and office as assignee as aforesaid, complains of R. S. &c. (*Proceed as usual as in other actions at the suit of assignees, as post, 101.*)

Conclu-
sion in K.
B. by as-
signee of a
bankrupt
or insol-
vent.
The like
in C. P.

To the damage of the said plaintiff, as assignee as aforesaid, of £— and therefore he brings his suit &c.

Pledges, &c.

Whereof the said plaintiff saith, that as assignee as aforesaid he is injured, and has as such assignee sustained damage to the amount of £— and therefore he brings his suit, &c.

[*84]

EXECU-
TORS AND
ADMINIS-
TRATORS.

*BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

Ellenborough.

Michaelmas Term, 1 Will. 4.

Beginning
of a decla-
ration by
an execu-
tor against
an execu-
tor in K.
B. (n).

— (to wit.) A. B. executor of the last will and testament of E. F. deceased, complains of C. D. executor of the last will and testament of G. H. deceased, being in the custody, &c. (Ante, 12. See 1 Saund. 112, n. 1, 2. The form is the same against an executor *de son tort*, 1 Saund. 265. In debt, whether by or against an executor or administrator, omit the word “owes to and.” See ante, 13.)

The like
in C. P.

— (to wit.) C. D. executor of the last will and testament of G. H. deceased, was attached (*or*, “summoned”) to answer A. B. executor of the last will and testament of E. F. deceased, of a plea of trespass on the case (*or as the plea is*;) and thereupon the said A. B. executor as aforesaid, by G. H. his attorney, complains that, Whereas, &c.

By the ex-
ecutor of
an execu-
tor.

— (to wit.) A. B. executor of the last will and testament of E. F. deceased, which said E. F. in his life-time and at the time of his death was executor of the last will and testament of G. H. deceased, complains, &c.

See a form, post, 104.

See a form, post, 105.

See a form, post, 106.

— (to wit.) A. B. administrator of all and singular the goods, chattels, and credits which were of E. F. deceased, at the time of his death, who died intestate, complains *of C. D. administrator of all and singular the goods, chattels, and credits which were of G. H. deceased, at the time of his death, who died intestate, being in the custody, &c. (Ante, 12. See forms, post, 109, &c.)

— (to wit.) C. D. administrator, &c. (*as ante*, 34,) was attached (*or in debt or covenant "summoned"*) to answer unto A. B. administrator, &c. of a plea, &c.

— (to wit.) A. B. administrator (with the last will and testament of G. C. deceased, annexed) of all and singular, the goods and chattels, rights and credits, which were of the said G. C. deceased, at the time of his death left unadministered by W. B. and E. S. in their life-time, now respectively deceased, and which said W. B. and E. S. in their life-time, and at their deaths, were the executors of the said last will and testament of the said G. C. deceased, complains of G. H. being in the custody, &c. (*See form post*, 111.)

See a form, post, 110.

See a form, post, 111.

— (to wit.) A. B. administrator of all and singular the goods and chattels and credits of E. F. deceased, limited until the original will and testament of the said deceased, or an attested copy thereof, should be brought into and left in the Registry of the Court of the Registry of the Archbishop of Canterbury, Primate of all England, and Metropolitan, and letters of administration to the same annexed, of all and singular the goods and chattels and credits of the deceased, should be applied for and granted by the same court, but no further or otherwise, or in any other manner, complains, &c. For that whereas, &c. (*as usual in other actions at the suit of an administrator, see forms, post*, 109.) Yet, &c. (*as post*, 35 a) nor to the said plaintiff after the death of the said E. F. (to which said plaintiff, after the death of the said E. F. to wit, on, &c. at, &c. administration of all and singular the goods, chattels, and credits, which were of the said C. D. at the time of his death, limited until the original, &c. (*as above*) by — was granted. To the damage of the said plaintiff as administrator as aforesaid, and therefore he brings his suit, &c. with this that the original last will and testament of the said deceased, or any authentic or other copy thereof, hath not yet been brought into or left in the Registry of the Court of the Archbishop of Canterbury, and letters of adminis-

By a surviving executor.

By husband and wife, executrix.

Against an executor.

By an administrator against an administrator in K. B. (o).

[*35] By an administrator against an administrator in C. P.

By an administrator against an administrator de bonis non with will annexed.

By an administrator during the minority of the estate.

By a surviving administrator.

By an administrator limited until the original will or a copy thereof, be brought into the Archbishop's Court

Profert.

(o) See a precedent, Plead. A. 369, &c.

EXECU-
TORS AND
ADMINIS-
TRATORS.

tration, with the same annexed, of all and singular the goods, chattels, and credits of the said deceased, been applied for or granted by the same court, and the said letters of administration are now in full force and effect.

Against
an admin-
istrator de
bonis non
with will
annexed.
Profert
by an ex-
ecutor in
K. B. (p).

See a form, post, 113.

And the said A. B. brings into court here the letters testamentary of the said E. F. deceased, whereby it fully appears to the said court here, that the said A. B. is executor of the last will and testament of the said E. F. deceased, and hath the execution thereof, &c.

Profert by
the execu-
tor of an
executor
(q).

And the said A. B. brings into court here as well the letters testamentary of the said E. F. deceased as the letters testamentary of the said G. H. deceased, whereby it fully appears to the said court here that the said E. F. in his life-time was executor of the last will and testament of the said G. H. deceased, and that the said A. B. is executor of the last will and testament of the said E. F. deceased, and hath the execution of the last wills and testaments of the said E. F. and G. H. respectively, &c.

Profert by
a surviv-
ing execu-
tor.

See a form, post, 105.

Conclu-
sion of a
declara-
tion by an
adminis-
trator in
K. B. (r).

[36*]

(*To the end of all the counts in the declaration.*)— Yet the said defendant not regarding his said promises and undertakings, but contriving and intending to deceive and defraud the said E. F. in his life-time, and the said plaintiff as administrator as aforesaid, after the death of the said E. F. to which said plaintiff after the death of the said E. F. to wit, on &c. (*date of grant*) at &c. (*venue*) aforesaid, administration of all and singular the goods, chattels, and credits, which were of the said E. F. deceased, at the time of his death, who died intestate, by (*— christian name of the Archbishop, &c.*) by *Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan* (s), in due *form of law was granted, in this behalf, hath not as yet paid the said sums of money, or any part thereof, to the said E. F. in his life-time, or to the said plaintiff, since the death of the said E. F. (although often requested so to do;) but he so to do hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiff, to the damage of the said plaintiff, as administrator as aforesaid of—; and therefore he brings his suit, &c. (*Add a profert to the letters of administration, as next form.*)

Profert by
an admin-
istrator in
K. B.

(*To the end of the declaration to the word "suit" &c. ut supra.*) And the said plaintiff brings into court here the letters of administration of the said archbishop, (or "bishop,") which give sufficient evidence to the said

(p) This profert is not necessary until declaration.

(q) See forms Co. Ent. 1. b.—Lil. Ent. 165, 6.

(r) See forms, Lil. Ent. 165, 166, 399; and as to administration by a diocese Com. Rep. 17.

(s) This is to be taken from the grant of the administration. If the administration was granted by the vicar-general and official principal of a bishop, instead of the words in italics, say "by A. B. vicar-general and official principal of the Lord Bishop of Chester."

court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain day and year therein named, to wit the day and year in that behalf above mentioned, &c.

EXECUTORS AND ADMINISTRATORS.

Pledges, &c.

And the said plaintiff brings into court here the letters of administration of the said archbishop, which give sufficient evidence to the said court here, of the grant of administration to the said E. F. as aforesaid, as also the letters of administration of the said archbishop, after the death of the said E. F. to the said plaintiff as aforesaid, which give sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, the respective dates whereof are the days and years aforesaid in that behalf.

Proferit by an administrator de bonis non of an administrator (t.)

Pledges, &c.

And the said plaintiff brings here into court the letters testamentary of the said G. C. deceased, whereby it appears that the said W. B. and E. S. were executors of the last will and testament of the said G. C. and in their life-time had the execution thereof. And the said plaintiff brings here into court the letters of administration of the said archbishop, which gave, &c. (*Conclude as in the above form.*)

Proferit by an administrator, with the will annexed.

BY CLERKS OR TREASURERS APPOINTED TO SUE BY STATUTE.

— (*venue*) (to wit.) A. B. clerk (or treasurer) to the trustees for putting into execution, and acting under and by virtue of a certain act of parliament, made and passed in the — year of the reign of his present Majesty [or late Majesty, King — the —], intituled “An Act,” &c. (*here set out the title of the act.* If the authority to sue be under more than one statute, then, after stating the title of the first act, say “and of a certain other act of parliament made and passed in the — year of the reign of, &c.” according to the force, form, and effect of the said statute (or statutes), complains of C. D. being in the custody, &c. (u). For that,” &c.) state the promises or causes of action to have been made with, or to have accrued to “the said trustees,” and conclude thus. To the damage of the said trustees of £— and therefore the said A. B. as clerk (or treasurer) as aforesaid, according to the force, form, and effect of the said statute (or statutes), brings his suit, &c.

CLERKS, &c. UNDER STATUTES. Declaration by a clerk or treasurer to trustees &c. empowered to sue under a statute.

Pledges, &c.

— (*venue*) (to wit.) A. B. complains of C. D. clerk (or treasurer) to the trustees for putting, &c. (*describe him as directed in the preceding form*) according to the force, form, and effect of the said statute (or statutes), being in the custody of the marshal, &c. of a plea of, &c. For that, &c.

Declaration against such clerk or treasurer.

(t) The production of this proferit is sufficient evidence without production of the original grant to the deceased administrator.

1 B. & C. 150.

(u) The above form may be readily adapted to an action in the Common Pleas.

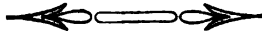
CLERKS,
&c. UN-
DER STAT-
UTES.

(state the promises or causes of action to have been made by, or accrued against "the said trustees," and conclude as usual.)

Declara-
tion by a
clerk or
treasurer
to a com-
pany, em-
powered
to sue un-
der a stat-
ute.

— (venue) (to wit.) A. B. clerk (or treasurer) to a certain company called the — company, according to the force, form, and effect of a certain act of parliament, made and passed in the — year of the reign of his present Majesty (or his late Majesty King —), complains of C. D. being in the custody, &c. of a plea of, &c. For that whereas, &c. (state the debt or cause of action to have accrued to "the said company," and conclude thus). To the damage of the said company of £— and therefore the said A. B. as clerk (or treasurer) as aforesaid, according to the said statute, brings his suit, &c.

Pledges, &c.



[*37]

*DECLARATIONS IN ASSUMPSIT.



I. COMMON COUNTS.

The usual
form of an
indebitatus
assumpsit
count.

And whereas also (w) the said defendant afterwards, to wit, on the day and year last (x) aforesaid, at [London, the venue (y)] aforesaid, was indebted to the said plaintiff in the [further] sum of £— of like (z) lawful money, for, &c.

Venue
how to be
stated.

(Here the subject-matter of the debt must be stated, as that the plaintiff had sold lands or goods to the defendant, or done work for him, or had lent money, &c. as in the following counts, 2 Saund. 350, n. 2. and, except in the counts for money had and received, it must be alleged that the debt was incurred at the defendant's request. 1 Saund. 264, n. 1. the count then proceeds as follows:)

and at his special instance and request, and being so indebted, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at [London, the venue] aforesaid, undertook, and then and

(w) If there be no special count preceding the first indebitatus count, the form immediately after the commencement of the declaration runs thus: For that whereas the said defendant heretofore, to wit, on the — day of — in the year of our Lord — at — in the county of — was indebted," &c.

(x) If there be a special count preceding the indebitatus count, it is usual, especially in declarations on bills or notes, to insert in the common counts a day as recent as possible, with reference to the title of the declaration, so that the common breach may appear to be after the money payable by the bill, note, &c. become due. Care must be taken that the day be not one after the title of the declaration; see ante, vol. i. 235, 6.

(y) As to the mode of stating the venue,

see ante, vol. i. 248 to 252. When the venue is laid in London, there is no occasion to state the parish and ward, and therefore it is better to omit it. Where the venue is laid in a county generally, state the common venue, town and the county, thus: "at Westminster, in the county of Middlesex." Where the venue is in a city and county of itself, state the venue thus: "at the city of Bristol, and county of the same city;" and afterwards throughout state it, "at the city and county aforesaid."

(z) If the words "lawful money of Great Britain" have not been before mentioned, here insert them, instead of the words, "like lawful money." But such words are altogether immaterial, and need not be inserted, though usual to insert them.

there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money, when he the said defendant should be thereunto afterwards requested. COMMON COUNTS.

And whereas also afterwards, to wit, on the day and year *last* aforesaid, at [London, *the venue*] aforesaid, in consideration *that the said plaintiff, at the like special instance and request of the said defendant, *had before that time, &c.* The usual form of a quantum meruit count (a). [*38]

(Here insert the subject-matter of the debt as in the following counts, and then proceed as follows :)

he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him so much money *as he therefore reasonably deserved to have of the said defendant, when he the said defendant should be thereunto afterwards requested. And the said plaintiff avers, that he therefore reasonably deserved to have of the said defendant the further sum of £— of like lawful money, to wit, at [London, *the venue*] aforesaid, whereof the said defendant afterwards, to wit, on the day and year *last* aforesaid, there had notice. [State the breach as post, 90.]

(Same as the above quantum meruit to the asterisk, and then proceed as follows :)

as the said last-mentioned goods, wares, and merchandize, at the time of the said sale and delivery thereof, were reasonably worth, when the said defendant should be thereunto afterwards requested. And the said plaintiff avers, that the said last-mentioned goods, wares, and merchandize, at the time of the said sale and delivery thereof, were reasonably worth the further sum of £— of like lawful money, to wit, at [London, *the venue*] aforesaid, whereof the said defendant afterwards, to wit, on the day and year *last* aforesaid, there had notice. The usual form of the quantum valebant count (b).

For that whereas the said defendant heretofore, to wit, on, &c. at, &c. (*venue*) was indebted to the plaintiff in divers goods and chattels, to wit, [100 fish, of the value of £10, for divers tolls or dues, due and of right payable from the defendant to the plaintiff, on and in respect of the defendant having before then used and enjoyed, and having had the liberty and privilege of using and enjoying divers capstans, machines, windlasses, and ropes of the plaintiff, to haul, and to assist in the hauling, of divers boats, of the defendant, and of divers other boats which the defendant had used, on to the beach, to wit, at, &c.] and being so indebted, he the said defendant in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c., aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said goods and chattels when he the said defendant should be thereunto afterwards requested. Yet, &c. (*stating a breach in the non-payment of the goods and chattels.*) Indebitatus assumpsit on a promise to pay by chattels (c).

(a) As the plaintiff may recover on the indebitatus count, though no contract for a specific price be proved, the quantum meruit, or valebant count, seems necessary, and where the declaration is otherwise long, should be omitted. 2 Saund. 122, n. 2. As to this count in general, see Cro. Jac. 618, 619.—Ante, vol. i. 301.

except when the demand is for goods sold and delivered, or, bargained and sold, and the quantum meruit count appears to be in all cases sufficient.

(c) The subject-matter of the above form is from 6 B. & C. 385, where it was held, that indebitatus assumpsit would lie for goods and chattels. The form may be readily adapted to other claims for goods. See 6

1. RESPECTING REAL PROPERTY.

*1. RESPECTING REAL PROPERTY.

For a freehold estate sold and conveyed (d).

The indebitatus count is as ante, 37, inserting these words, "for certain messuage, tenement, and premises, with the appurtenances, of plaintiff (e), before that time bargained, sold and released (f) by plaintiff to the said defendant, and at his special instance and request being so indebted," &c. (Conclude as ante, 37.)—The quantum thereon is as ante, 37, inserting as follows, "had before that time been sold, and released to the said defendant a certain other messuage, tenement, and premises, with the appurtenances, of the said plaintiff, he the said defendant undertook," &c. (Conclude as ante, 38.)

For a copyhold estate surrendered (g).

The indebitatus count is as ante, 37, inserting these words, "for certain messuages, tenements, and premises, with the appurtenances, before that time bargained, sold, and surrendered by the said plaintiff to the said defendant, and at his special instance, &c. And being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time bargained, sold, and surrendered to and for the said defendant, certain other messuages, tenements, and premises, with the appurtenances, he the said defendant undertook," &c. (Conclude as ante, 38.)

For a leasehold estate sold and assigned (i).
[*40]

*The indebitatus count is as ante, 37, inserting these words, "for certain messuages, tenements, and premises, with the appurtenances (j) that time bargained, sold, and assigned *by the said plaintiff to the said defendant, and at his special instance and request, for the remainder of a certain term of years then to come and unexpired therein. And being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time bargained, sold, and assigned to the said defendant certain other messuages, tenements, and premises, with the appurtenances, for the remainder of a certain term of years then to come and unexpired therein, he the said defendant undertook," &c. (Conclude as ante, 38) (2).*

For the good-will of a business (l).

The indebitatus count is as ante, 37, inserting these words, "for the

B. & C. 385, as to the use of this count. (Roberts v. Beatty, Church v. Peterow, 3 Penns. Rep. 63. 301.)

(d) It is usual to insert these two counts; but, in point of law, it should seem, from the case before Lord Ellenborough, of James v. Shore, Sittings at Westminster after Michaelmas Term, 1816, Stirling, attorney for plaintiff, that these counts are not sustainable, and that the plaintiff must declare specially (1). (But see the observation of Parke, B. in Slattern v. Runder, 3 Tyr. 963.)

(e) It is usual, but unnecessary and unadvisable, to state the situation, 6 East, 348.

If mis-stated, the variance may, in some cases, be a ground of non-suit, 1 Esp. Rep. 273. 3 Camp. 235; but see 1 Taunt. 570, 1. 13 East, 9. 3 Taunt. 128.

(f) This allegation will depend on the nature of the conveyance, as whether it were by lease and release, feoffment, &c. If not conveyed, only state the sale.

(g) See n. (d), ante.

(h) See n. (e), ante.

(i) Id. lb. See form, 3 D. & R. 99. 1 B. & C. 704. S. C.

(k) Id. ib.

(l) A contract for the transfer of the good-will of a business is good in law. See

(1) Lewis, Ex. v. Culberston, 11 Serg. & Rawle, 49. And see Weighley's Adm. v. Weir, 2 Serg. & Rawle, 311.

(2) See Nelson v. Snow, 18 Johns. 483.

will of a certain trade and business of the said plaintiff, before then relinquished and given up by the said plaintiff to and in favor of the said defendant, and at his special instance and request, and being so indebted,"

(Conclude as ante, 37.)—*The quantum meruit thereon is as ante, inserting as follows*, "had before that time relinquished and given up in favor of the said defendant a certain other trade and business of the said plaintiff, he the said defendant undertook," &c. (Conclude as ante, 33.)

The indebitatus count is as ante, 37, inserting these words, "for the good-will of a certain public-house, commonly called or known by the name of — (n), and the trade and business of him the said plaintiff of a public-house, and victualler therein, before that time relinquished and given up by the said plaintiff to and in favor of the said defendant, and at his special instance and request. And being so indebted," &c. (*A quantum meruit may be easily framed*) (1).

L. RESPECTING REAL PROPERTY.

For the good-will of a public-house, and the plaintiff's business therein. (m).

The indebitatus count is as ante, 37, "for so much money before that time due and payable from the said defendant to the said plaintiff, upon, for, and in respect of the relinquishing and giving up of certain buildings, erections, and improvements, before then made and erected by the said plaintiff, in and upon certain other lands and premises, with appurtenances, by the said plaintiff before that time quitted, relinquished and given up to and in favor of the said defendant, at his special instance and request; and being so indebted," &c. (Conclude as ante, 37.)

By outgoing against incoming tenant, for fixtures left by plaintiff on premises. (e).

The indebitatus count is as ante, 37, inserting these words, "for the use

For the use and occupation of a house and land. (p).

4 East, 190. 4 Esp. 179. Agreement for the sale of, will sometimes be enforced in Equity. 1 Sim. & Stu. Rep. 174.

(m) See post, 44.

(n) Ante, 39, note (g).

(e) See special counts, and notes, post, 301, &c.

(p) The stat. 11 Geo. 2. c. 19. s. 14. gives this remedy, in order to avoid difficulties in suing on a demise. See the forms, Morgan's Free. 17. 2 Rich. C. P. 90. Lil. Ent. 38. Pl. Ass. 5, 215, 268, 275. The statute is not usually referred to in the declaration.

It is unnecessary in debt or assumpsit for use and occupation, to state where the premises lie, or any of the particulars of the demise. 6 East, 248.

The venue is not local. 5 Taunt. 25, except when the demise was not to the defendant, when perhaps it may be local, the same as in an action against the assignee of the lessee in covenant. 1 Saund. 241, n. 5.

This count is sufficient, though the defendant may not himself have occupied the premises. 8 T. R. 327. 16 East, 33. 2 Stark. 527. But if the plaintiff has recognized another person as his tenant, he cannot afterwards charge the defendant, 2 B. & A. 119. 2 Stark. 235. And though the premises demised, have been destroyed by fire, 4 Taunt. 45, or where the occupation has been otherwise merely constructive, 6 Bingh. 206, the above common count will suffice.

It may be brought by the assignee of the reversion before attornment. 16 East, 99, by a grantee of a rent-charge. 1 T. R. 378, by a succeeding incumbent. 5 T. R. 4.—Peake's Ev. 242.—Selw. N. P. 1312. So the assignee of a tenancy created by a parol may, it should seem, be sued for rent due in his own right. 2 Hen. Bla. 319. A corporation may be sued in assumpsit for use and occupation. 4 Bingh. 75.

The defendant cannot plead nil habuit. 1 Wils. 314.—2 Wils. 208; and therefore it

(1.) See a declaration in *assumpsit*, that defendant in consideration that plaintiff would give up a bargain to him, and permit him to become the purchaser of certain houses bargained for by the plaintiff, promised to pay 40l.: which was held a sufficient consideration to support the action: *Price v. Seaman*, 7 Dow. & Ry. 14. S. C. in C. P. 2 Bing. 437.

1. RESPECTING REAL PROPERTY.

[*42]

and occupation of a certain messuage, tenements, *and premises (g), (or, of a certain messuage, buildings, farm and land, *as the case is*) with the appurtenances, of the said plaintiff (r), by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff, for a long time before then elapsed (s), *had, held, used, occupied, possessed, and enjoyed. And being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon, is as ante*, 37, *inserting as follows*, "had before that time suffered and permitted the said defendant to have, hold, use, occupy, possess, and enjoy a certain other messuage, tenements, and premises, (or, a certain other messuage, buildings, farms, and land, *as the case is*) with the appurtenances, of the said plaintiff, and that he the said defendant had, according to the said last-mentioned sufferance and permission of the said plaintiff, had, holden, used, occupied, possessed, and enjoyed the same for a long space of time then elapsed, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For the use and occupation of a fishery (t).

The indebitatus count is as ante, 37, *inserting these words*, "for the use and occupation of a certain fishery, and the right of fishing in a certain river called the — in the county of — of the said plaintiff, by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff for a long time before then elapsed, had held, used, occupied, possessed and enjoyed. And being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit count thereon is as ante*, 37, *inserting as follows*, "had before that time suffered and permitted the said defendant to have, hold, use, occupy, possess, and enjoy a certain other fishery and right of fishing in a certain other river called the — in the said county of — of the said plaintiff, and that he the said defendant had, according to the last-mentioned sufferance and

does not seem material to allege that the estate was the plaintiff's.

Where there is an agreement under seal, for a lease not containing any covenant for the payment of rent, this action may be supported. 4 Esp. 28.

If it be doubtful whether there be a demise under seal, it is advisable to declare in debt on demise, as in 1 Saund. 276, n. 1. 202, 3.—1 New Rep. 104.—Lord Raym. 1508, with a count in debt for use and occupation.

This action for use and occupation seems the only remedy where there is no specific rent agreed upon.—5 B. & A. 322.

When this action lies against administrators, &c. 2 J. B. Moore, 100.—When against assignees of a bankrupt, see ante, vol. i. 43.

How to declare against executors for rent due since testator's death, 1 Saund. 112, 5th edit. 3 B. & A. 101.

(g) In *Bird v. Wilton*, Chelmsford Assizes, 9th March, 1830, cor. Bayley, J. declaration for use and occupation of a *messuage* with the appurtenances. The evidence was of a demise, not under seal of a *messuage with a garden and paddock*, and a point was reserved as to whether this was not a variance. Bayley, J. said, that stating the use and occupation to be, "of *premises*, with the appurtenances," would in general be

safe. On a motion for a new trial, the court held this was no variance. *Easter Term*, 1830. K. B.; and see 2 Saund. 400.—6 B. & C. 251. As the rent issues out of the realty, if the demise be of a house and *furniture*, the latter need not be noticed. 6 B. & C. 251.

(r) It is not necessary or advisable to state the local situation; it would be fatal if misstated, see ante, 39, note a.—3 Campb. 235.—3 Taunt. 128.—3 M. & S. 380. But if described by a name generally known, a mistake may be immaterial. 1 Taunt. 570.—13 East, 9.

(s) In 1 Rich. C. P. 1. and Morg. 17, the time is stated under a *videlicet*, but this is not necessary.

(t) See form for the use and occupation of a water course, 4 B. & C. 8. (As to the law and form of an *indebitatus count* for the use of tolls or other *incorporeal hereditaments*, see the Mayor of Carmarthen v. Lewis, 6 Car. & P. 608; *Bird v. Higginson*, 1 Harr. & Woll. 61. 1 Nev. & Man. 505, S. C. Although by agreement not under seal no interest will pass in any *incorporeal hereditament*, yet if a lessee, or other party has had the enjoyment thereof, *indebitatus assumpsit* for the rent or other agreed sum may be supported. *Ibid.*)

permission of the said plaintiff had, held, used, occupied, possessed, and enjoyed the same for a long time before then elapsed, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

1. RESPECTING REAL PROPERTY.

The indebitatus count is as ante, 37, *inserting these words*, "for the use of a certain way and passage for divers cattle, waggons, and other carriages, loaded with timber, wood and bark (*as the right of way may be*), in, through, over, and along certain closes of the said plaintiff, before that time had, *used and enjoyed by the said defendant, and at his request, and by the sufferance and permission of the said plaintiff for a long time then elapsed, and being so indebted," &c. (*Conclude as ante*, 37.)—(*The quantum meruit thereon is as ante*, 37, *inserting as follows*.) "had before that time suffered and permitted the said defendant, by himself and his servants and other persons, and with cattle, waggons, and other carriages, to fetch, draw, take, and carry away divers large quantities of timber, wood and bark (*as the case is*), through, over, and along certain other closes and parcels of land of the said plaintiff, and that the said defendant had accordingly by the said permission of the said plaintiff, by himself the said defendant and his servants, and divers other persons, and with cattle, waggons and other carriages, fetched, drawn, carried, took and carried away the said timber, wood and bark, through, over, and along the said last-mentioned closes and parcels of land of the said plaintiff, he the said defendant undertook," &c. (*Conclude as ante*, 33.)

For the use of a way.

[*43]

The indebitatus count is as ante, 37, *inserting these words*, "for the use and occupation of a certain pew and seats in the parish church of — in the county of — by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff, had, used, occupied, possessed, and enjoyed by him, the said defendant and divers other persons, on divers Sundays and holydays, and other days and times, for and during a long time before elapsed, for the attending and hearing divine and church service performed in the said church, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time suffered and permitted the said defendant and divers other persons to use, have, occupy, possess, and enjoy a certain other pew and seats in the said parish church of — in the county of — and that he the said defendant and the last-mentioned other persons had, according to the last mentioned sufferance and permission, used, occupied, possessed, and enjoyed the same on divers other Sundays and holydays, and other days and times, for and during a long time before then elapsed, for the attending and hearing divine and church service performed in the said church, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For the use and occupation of a pew in a church.

The indebitatus count is as ante, 37, *inserting these words*, "for the use and occupation of divers seats and places in and parcel of a certain messuage and premises of the said plaintiff by the said defendant, and divers other persons, before that time used, occupied, possessed, and enjoyed, for the viewing of a certain procession, on a certain day then past, and at the special instance and request of the said *defendant, and being so

For the use and occupation of a seat in a house to view a public procession.

[*44]

1. RE-
SPECTING
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PERTY.

indebted," &c.—*Conclude as ante, 37.*—*The quantum meruit is as ante, 37, inserting as follows,* "had before that time suffered and permitted the said defendant and divers other persons to have, use, occupy, possess, and enjoy, divers other seats and places in and parcels of a certain other messuage and premises of the said plaintiff, and that the defendant and the said last-mentioned other persons had, according to the said last-mentioned sufferance and permission of the said plaintiff, had, used, occupied, possessed, and enjoyed the same, in and for the viewing of certain other procession, on a certain day then past, he the said defendant undertook, &c. (*Conclude as ante, 38.*)

For the
use of a
tennis
court,
balls and
rackets.

The indebitatus count is as ante, 37, inserting these words, "for the use of a certain tennis court of the said plaintiff by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff, before that time used in and for the playing of divers lawful sets and games at tennis therein, and for the use and hire of divers dresses, balls, and rackets of the said plaintiff, before that time let to hire, to the said defendant, at the special instance and request, and by the said defendant, according to that letting to hire, had and used, in and for the playing the said sets and games, and being so indebted," &c. (*Conclude as ante, 37.*)—*The quantum meruit thereon is as ante, 37, inserting as follows,* "had before that time suffered and permitted the said defendant to use a certain other tennis court of the said plaintiff, and that the said defendant had, according to the said last-mentioned sufferance and permission, before that time used the said last-mentioned tennis court in and for the playing of divers other sets and games of tennis therein. And also in consideration that the said plaintiff, at the like special instance and request of the said defendant, had before that time let to hire to him the said defendant divers other dresses, balls, and rackets of the said plaintiff to be had and used, and that he the said defendant had accordingly had and used the same in and for the playing of the said last-mentioned sets and games, he the said defendant undertook," &c. (*Conclude as ante, 38.*)

For the
use, occu-
pation,
and profits
of an inn
(u).

[*45]

The indebitatus count is as ante, 37, inserting these words, "for the use, occupation, and profits of a certain inn commonly called and known by the name and sign of the — Inn, of the said plaintiff by the said defendant, and at his *special instance and request, and by the sufferance and permission of the said plaintiff for a long time before then elapsed, had, held, used, occupied, received and taken, and being so indebted," &c. (*Conclude as ante, 37.*)—*The quantum meruit thereon, is as ante, 37, inserting as follows,* "had before that time suffered and permitted the said defendant to have, hold, use, and occupy a certain other inn, commonly called — of the said plaintiff, and receive and take the profits thereof, and that he the said defendant had, according to the said last-mentioned sufferance and permission of the said plaintiff, had, held, and occupied the said last mentioned inn, and received and taken the profits thereof for a long time before then elapsed, he the said defendant undertook, &c. (*Conclude as ante, 38.*)

(u) Ante, 40.

"For that whereas the said defendant, after the 24th of June, 1738, mentioned in a certain act of parliament made in the 11th year of the reign of his late Majesty King George the Second, to wit, on the— (x) day of November, A. D.— at, &c. (*venue*) by force of the said statute, became and was indebted to the said plaintiff in a large sum of money, to wit, the sum of [£10] of lawful money of Great Britain, for the use and occupation of a certain messuage and premises, with the appurtenances, on the 29th day of September, A. D. 1830, *held by the said defendant*, as tenant thereof to the said plaintiff, at and under the yearly rent of [£20], payable quarterly [to wit, on, &c. on, &c. on, &c. and on &c.] (*according to the fact*) by the said defendant, and at his special instance and request for a long space of time, to wit, from the 29thth September, A. D. 1830, till the said 25th December, A. D. 1830, (*according to the fact*) had, used, occupied, possessed and enjoyed, notwithstanding a certain notice theretofore given by the said defendant to the said plaintiff of his intention to quit, and that he the said defendant would quit and deliver up unto the said plaintiff the said messuage and premises, with the appurtenances, upon the said 25th December, A. D. 1830, and being so indebted," &c. (*Conclude as ante*, 37.)

I. RESPECTING REAL PROPERTY. On 11 G. 2. c. 19. s. 18. for double rent, tenant having neglected to quit in pursuance of his own notice (w).

The indebitatus count is as ante, 37, *inserting these words*, "for the use of certain pasture land of the said plaintiff, and the eatage of the grass thereon growing, by him the said plaintiff before that time let to the said defendant, and *at his special instance and request, and by the said defendant according to such letting, had and used in and for the depasturing of cattle, for a long time before then elapsed, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time suffered and permitted the said defendant to have and enjoy, and that the said defendant had accordingly had and enjoyed certain other pasture land of him the said plaintiff, and the eatage of certain grass thereon growing, in and for the depasturing of certain other cattle, for a long time before then elapsed, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For the use of pasture land, and eatage of the grass (y). [*46]

The indebitatus count is as ante, 37, *inserting these words*, "for the use, occupation, and enjoyment of a certain barn and barn yard (*according to the fact*) and premises, with the appurtenances, and of certain prædial tithes of the said plaintiff by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff for a long time before then elapsed, had, held, used, occupied, received, taken and enjoyed, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had suffered and permitted the said defendant to have, hold, use, occupy, receive, take

For the use, occupation, and enjoyment of premises and prædial tithes.

(w) See a good precedent with notes, and a suggestion that the venue is local, 2 Went. 64, 65; see also a precedent and law, 2 B. & A. 559; see also the notes, Chit. Col. Stat. 1 vol. 647. The remedy, when the landlord gives notice to quit, is debt for double value, 4 Geo. 2. c. 28. s. 1. and see a form of declaration for it, post, 493.

(z) Any day before the title of declaration.

(y) This count is proper where the defendant has the use of the land, and turns on his cattle himself. When the plaintiff retains the land in his own possession, and depastures the defendant's cattle himself, the counts are for agistment, as post, 59; and when cattle are taken care of under cover, or in a straw yard, then the precedent is as post, 59.

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and enjoy, a certain other barn and barn yard (*according to the fact*) and premises, with the appurtenances, and certain other prædial tithes of the said plaintiff, and that he the said defendant had, according to the said last-mentioned sufferance and permission, had, used, occupied, received, taken, and enjoyed the same for a long space of time before then elapsed, he the said defendant undertook," &c. (*Conclude as ante, 38.*)

For the
use and
occupa-
tion of
lands,
with the
right to
take the
tithes.

[*47]

The indebitatus count is as ante, 37, inserting these words, "for the use and occupation of a certain [messuage and buildings, lands, and] premises, with the appurtenances, and certain tithes of the said plaintiff by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff, for a long time before then elapsed, held and enjoyed, and for certain tithes whereof the said plaintiff was the proprietor, issuing and arising from and out of certain lands and premises in the occupation of the said defendant, and by the said defendant before that time, and at his special instance and request, and by the sufferance and permission of the said plaintiff, had taken and retained to his the said defendant's own use, and being so indebted," &c. (Conclude as ante, 37. —A quantum meruit may be readily framed.)

For the
use and
occupa-
tion of un-
furnished
lodgings.

The indebitatus count is as ante, 37, inserting these words, "for the use and occupation of certain rooms and apartments of the said plaintiff, in and parcel of a certain dwelling-house (z) by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff, for a long space of time before then elapsed, had, held, used, occupied, possessed, and enjoyed (a), and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time permitted the said defendant to have, hold, use, occupy, possess, and enjoy, certain rooms and apartments of the said plaintiff, in and parcel of a certain other dwelling-house, and that he the said defendant had, according to the said last-mentioned sufferance and permission, had, holden, used, occupied, possessed, and enjoyed the same for a long space of time then elapsed, he the said defendant undertook, &c. (Conclude as ante, 38.)

For the
use and
occupa-
tion of
furnished
lodgings
(b).

[*48]

*The indebitatus count is as ante, 37, inserting these words, "for the use and occupation of certain rooms and apartments of the said plaintiff, in and parcel of a certain dwelling-house (c), by the said defendant, and at his special instance and request, and by the sufferance and permission of the said plaintiff, for a long space of time before then elapsed, had, held, used, occupied, possessed, and enjoyed, together with certain household furniture, linen, and other necessities, goods, and chattels of the said plaintiff therein *being, and being so indebted," &c. (Conclude as ante, 37.) The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time suffered and permitted the said defendant to have, hold, use, oc-*

(z) It is not necessary nor advisable to state the local situation, ante, 39, n. (a).

(a) The count is sustainable, though the defendant may have refused to occupy, though in such case it is advisable to declare on the agreement, ante, 41, n.

(b) See form, Plead. Ass. 283.

(c) It is not necessary nor advisable to state the local situation, ante, p. 39, n. (b).

cupy, possess, and enjoy, certain other rooms and apartments of the said plaintiff, in and parcel of a certain other dwelling-house, and that the said defendant had, according to the said last-mentioned sufferance and permission of the said plaintiff, had, holden, used, occupied, possessed, and enjoyed the same, together with certain other household furniture, linen, and other necessities, goods, and chattels of the said plaintiff, therein being, for a long time before then elapsed, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

I. RESPECTING REAL PROPERTY.

The indebitatus count is as ante, 37, *inserting these words*, "for the use and occupation of certain rooms, apartments, and furniture of the said plaintiff before that time used and enjoyed by the said defendant, at his special instance and request, and by the permission of the said plaintiff, and for meat, drink, fire, candles, attendance, goods, chattels, and other necessities by the said plaintiff before that time found and provided for the said defendant, and at his like special instance and request, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time permitted the said defendant to use and enjoy, and that he the said defendant had accordingly used and enjoyed certain other rooms, apartments, and furniture of the said plaintiff; and also in consideration that the said plaintiff, at the like special instance and request of the said defendant, had before that time found and provided other meat, drink, fire, candles, attendance, goods, chattels, and necessities for the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For board and lodging (d).

The indebitatus count is as ante, 37, *inserting these words*, "for warehouse-room by the said plaintiff before that time found and provided for, in and about the stowing and keeping of certain goods and chattels, before then stowed and kept in certain warehouses and other erections and buildings and premises of the said plaintiff, for the said defendant, and at his special instance and request, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before *that time found and provided other warehouse-room for, in, and about the stowing and keeping of certain other goods and chattels before then stowed and kept in certain other warehouses, erections, buildings, and premises of the said plaintiff for the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For warehouse-room of goods (e).

[*49]

The indebitatus count is as ante, 37, *inserting these words*, "for the standing of certain carriages and chattels by the said plaintiff before that time kept and taken care of in certain buildings and premises for the said defendant, and at his special instance and request, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time kept and taken care of, in a certain building and premises, certain other carriages and chattels for the said defendant, he the said defendant undertook, &c. (*Conclude as ante*, 38.)

For the standing of a carriage.

(d) See the counts, post; when let for illegal or immoral purposes, this action does not lie. Selw. N. P. 67; See 1 Campb. 348.

(e) See form, Morg. Prec. 19.

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For the
moorage
of ships (f)

The indebitatus count is as ante, 37, inserting these words, "for the mooring and fastening of a certain ship or vessel called, &c. to a certain chain of the said plaintiff, laying and being in the river Thames, in the said county of Middlesex, for a long space of time then elapsed, moored and fastened by the said defendant to the said chain of the said plaintiff, and by his permission and sufferance, and at the special instance and request of the said defendant, and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time, at the like special, &c. of the said defendant, permitted and suffered him to moor and fasten a certain other ship or vessel called — to a certain other chain of him the said plaintiff, in the river Thames aforesaid, in the county aforesaid, and that the said defendant, by virtue of such permission and sufferance, had before then moored and fastened the said last-mentioned vessel to the said chain there, for a long space of time then elapsed, he the said defendant undertook," &c. (Conclude as ante.)

For fines
on admis-
sion to co-
pyhold
(g).

*The indebitatus count is as follows, "for that whereas the said defendant, on, &c. at, &c. [venue] being tenant of certain customary tenements with the appurtenances, parcel of the manor of — was indebted to the said plaintiff, then and still being lord of the said manor, in the sum of £— of lawful money of Great Britain, for certain reasonable fines duly assessed, due and payable from the said defendant to the said plaintiff, for and on the admission of him the said defendant, according to the usage and custom of the said manor into the said customary tenements, with the appurtenances, to hold to him, his heirs and assigns, of the lord of the said manor, at the will of the lord, according to the *custom of the said manor, and being so indebted," &c. (Conclude as ante, 37.)—No quantum meruit count is to be added.*

[*50]

For tolls
on loaded
carriages
passing
over a
bridge (h).

The indebitatus count is as ante, 37, inserting these words, "for divers tolls and duties due and of right payable by the said defendant to the said bailiffs, &c. for the passage of divers loaded waggons, and loaded carts of the said defendant, before that time drawn over a certain bridge, which said bridge the said bailiffs, &c. and their predecessors, by their said several names of incorporation from time whereof, &c. have from time to time repaired and supported, and have been used and accustomed to repair and support, and being so indebted," &c. (Conclude as ante, 37.)—No quantum meruit count is to be added.

For tolls
on goods
brought to
market
and
weighed
in plain-
tiff's beam
(i)

The indebitatus count is as ante, 37, inserting these words, "for toll due and of right payable by the said defendant to the said mayor and burgesses, &c. for weighing at a certain beam of them the said mayor and burgesses,

(f) See a similar form, Morg. Prec. 24. For boomage, pilotage, buoys, and sea-marks, see Plead. A. 52, 3. For moorage, see 3 Wentw. 69. For quarterage on goods loaded on board ships in a port, 1 Wentw. 132. For buoyage and anchorage, 1 Wentw. 183. For the use of a dock, Lil. Ent. 38.
(g) This general count is sufficient, 1 T. R. 618, 19 — 3 B. & P. 846 — 1 B. & P. 102. — 2 Dougl. 727. — 6 East, 56. — The particu-

lars of the land holden, need not be set out, 1 Bridg. Eq. Dig. 3d ed. 381.

(h) This general count is sufficient. 1 T. R. 616. 1 B. & P. 102. For tolls for passing over a manor with cattle, 1 Wentw. 180.

(i) As to this count, 4 T. R. 104, and when the plaintiff must declare specially, see 6 East, 438. See form, and necessary evidence, 3 Bingham.

divers goods, wares, and merchandize of the said defendant, before that time brought by the said defendant to the said market of and in the said borough, to be there sold, and by the said mayor and burgesses, at the special instance and request of *the said defendant, weighed at the said beam, and being so indebted," &c. (Conclude as ante, 37.)—No quantum meruit count is to be added. [451]

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The *indebitatus count* is as ante, 37, inserting these words, "for divers reasonable tolls before that time and then due and of right payable by and from the said defendant to the said plaintiff, as the farmer and proprietor of a certain market called the cattle market, situate, &c. and of the dues, duties, tolls and privileges thereto belonging, and accruing and arising thereby and therefrom, from a certain time now elapsed, for and in respect of his the said defendant having, whilst he the said plaintiff was such farmer and proprietor as aforesaid, brought into the said market and sold therein divers live cattle, to wit, — bullocks, — bulls, — oxen, — cows, — heifers and — calves, and being so indebted, he the said defendant, in consideration," &c. (Conclude as ante, 37.)—No quantum meruit count is to be added.

For tolls due for having brought into a market, and sold therein, live cattle, at the suit of the farmer (k).

The *indebitatus count* is as ante, 37, inserting these words, "for divers other tolls and duties before that time and then due, and of right payable by and from the said defendant to the said plaintiff, for and in respect of his the said defendant having brought into the said market, and sold therein, divers other live cattle, to wit, &c. (as before) and being so indebted," &c. (Conclude as ante, 37.)

Second *indebitatus* count for same tolls.

The *indebitatus count* is as ante, 37, inserting these words, "for divers tolls before that time due and payable by the said defendant to the said plaintiff, as farmer and renter, duly made and appointed, according to the form of the Statute in such case made and provided, of the tolls due and payable according to the form of the Statute in such case made and provided, at a certain turnpike-gate, duly erected and placed upon a certain turnpike-road, and at certain cranes, engines, and weighing-machines also erected upon and near to the said turnpike-road, according to the form of the Statute in that case made and provided (or, instead of the preceding statement, say, "constituted and appointed according to the form of the Statute in such case made and provided, of the tolls due and payable for carriages and cattle traveling upon a certain turnpike-road in the county of — and through a certain gate erected upon the said road, according to the form of the said Statute;") for divers cattle and carriages of the said defendant, which before that time had traveled upon the said turnpike-road, and through the gate aforesaid, and for divers other carriages of the said defendant, which had before that time traveled upon the said turnpike-road, and been weighed at the said cranes, engines, and weighing-machines, and

By the farmer, for tolls due for passing through turnpike-gate (l).

(k) See a precedent for tolls for goods pitched and exposed to sale in Newgate Market, 1 Wentw. 153; in Covent Garden Market, 3 B. & A. 366. For toll on wool bought in a market, see 1 Wentw. 156; and other precedents referred to in Petersdorf's Index, tit. Tolls. 1 T. R. 616. 1 B. & P. 192. 4 B. & A. 268. In general,

the buyer is the party liable, 3 B. & A. 370; and see the law as to markets and tolls, 2 Chit. Com. Law, 142, &c. Com. Dig. tit. Market.

(l) This, though on a local act, will serve as a general precedent. See 2 Wentw. 180. See also a precedent in 10 East, 104. See the law as to turnpike roads, Burn, J.

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being so *indebted," &c. (*Conclude as ante*, 37.) — *No quantum meruit count is to be added.*

Second
indebita-
tus count
thereon.

The indebitatus count is as ante, 37, *inserting these words*, "for divers other tolls and duties before that time due and of right payable by the said defendant to the said plaintiff, for divers other cattle and carriages of the said defendant, which before that time had traveled upon a certain other turnpike-road, of which said last-mentioned tolls and duties the said plaintiff was then and there renter and collector in that behalf duly constituted and appointed, and being so indebted," &c. (*Conclude as ante*, 37.)— *No quantum meruit count is to be added.*

Petty cus-
toms (m).

The indebitatus count is as ante, 37, *inserting these words*, "for so much money due and payable to the said mayor, &c. for petty customs, for divers goods, wares, and merchandize, by the said defendant, before that time imported into the port of — and being so indebted," &c. (*Conclude as ante*, 37.)

For calls
on shares
in a
bridge (n).

The indebitatus count, after declaring specially, is as ante, 37, *inserting these words*, "for monies payable and due, owing from the said defendant to the said company, for and in respect of divers, to wit, — shares of which the said defendant was proprietor, and which he held in the said — bridge, by virtue of divers calls before then duly made by the said committee for the time being of the said — bridge, for the said monies. And being so indebted," &c. (*Conclude as ante*, 37.)

[*53]
The like
in another
way.

**The indebitatus count, after declaring specially, is as follows*, "and whereas also the said defendant afterwards, to wit, on, &c. at, &c. was indebted to the said plaintiff, who then, and at the several times in this count mentioned, was and still is such treasurer as aforesaid, in the further sum of £— of like lawful money, for money due and payable from the said defendant to the said plaintiff as such treasurer, for a certain call or sum, to wit, the sum of £— duly called for and required by five or more of the commissioners for putting in execution the powers and authorities by the said act given and granted, to be paid by the said defendant to the said plaintiff, so being treasurer to the said commissioners, at a certain time before then elapsed, upon and in respect of a certain sum, to wit, the sum of £— which the said defendant had, before the passing of the said act, subscribed and agreed to advance, for the purposes in such act mentioned. And being so indebted," &c. (*Conclude as ante*, 37.)

The like
in another
form at
the suit of
the treas-
urer to
Vauxhall
bridge
company.

And whereas also, the said defendant afterwards, &c. was indebted to the said company in the sum of, &c. of lawful, &c. for monies due and payable from the said defendant to the said company, for and in respect of divers, to wit, ten shares, of which the said defendant was proprietor, and which he held in the said Vauxhall bridge, by virtue of divers calls before then duly made by the said committee for the time being of the said Vauxhall, &c. for the said monies. And being so indebted, he the said defendant, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, and then

(m) See a form for tolls and buoys, 4 M. & S. 288.

(n) See special counts and notes, post, 390, 1, 3.

and there faithfully promised the said company," &c. (*Conclude as ante*, 37.)

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The indebitatus count is as ante, 37, *inserting these words*, "for and in respect of his the said defendant having before then subscribed a certain sum of money, to wit, the sum of £— for and towards the making of the said road in the said act mentioned, and which said sum of £— he the said defendant hath been duly required to pay in pursuance of the said act, at certain times now past, but hath neglected to pay the same. And being so indebted," &c. (*Conclude as ante*, 37.)

For calls
under a
road act
(e).

And whereas also, the said defendant afterwards, to wit, on, &c. at, &c. was indebted to the said plaintiff, who then, and at the several times in this count mentioned, was, and still is, such treasurer as aforesaid, in the further sum of, &c. for money due and payable from the said defendant to the said plaintiff, as such treasurer as aforesaid, for a certain call or sum, to wit, &c. duly called for and required by five or more of the commissioners for putting in execution the powers and authorities by the said first-mentioned act given and granted to be paid by the said defendant to the said *plaintiff, so being treasurer to the said commissioners at a certain time before then elapsed, upon and in respect of a certain sum, to wit, the sum of £— which the said defendant had, before the passing of that act, subscribed and agreed to advance, for the purposes in such act mentioned; and being so indebted, he the said defendant, in consideration thereof, afterwards, to wit, on, &c. at, &c. undertook and then and there faithfully promised the said treasurer," &c. (*Conclude as ante*, 37. *Add a count on an account, stated.*)

At the suit
of the
treasurer
of a canal
company,
for calls.
(p).

[*54]

After the special counts as post, 248, *insert an indebitatus count, as ante*, 37, *inserting as follows*, "for part of the expense of building a certain party-wall, before then built at the expense of the said plaintiff, agreeably to the directions of the said act of parliament, between a certain other messuage or building of him the said plaintiff, situate and being in the parish aforesaid, in the county aforesaid, and a certain other messuage or building adjoining thereto; and which said last-mentioned party-wall had before then been made use of by the said defendant, who before and at the time of building and finishing the same, was the owner of and person entitled to the improved rent of such messuage or building, and also for part of certain other expenses which were necessary for the pulling down

For con-
tribution
to a party-
wall (q).

(e) See 2 Chit. on Commercial Law, 133.

(p) See special counts and precedents, post, 390. For law, &c. see 2 Chit. on Commercial Law, 134, &c.

(q) The 14 Geo. 3. c. 78, after pointing out how the expenses of erecting party-walls are to be defrayed, enacts, that "in case the same be not paid within twenty-one days next after demand, thereof, then the same shall and may be recovered, together with full costs of suit, of and from such owner or owners by action of debt, or on the case, in any of his Majesty's courts of record at Westminster," Sect. 41. As to the construction on this statute, see a full note, Chit.

Col. Stat. 127; see also 3 T. R. 458.—5 T. R. 130.—8 T. R. 602.—1 B. & P. 303.—9 East, 322.—10 East, 227.—2 Taunt. 63.—5 Taunt. 90.—Comyn on Contracts, vol. ii. 191, &c. As to who is the owner of the improved rent, see 2 B. & A. 467.

See the special count, post, 248. It should seem that plaintiff might recover on common count for money paid, 5 T. R. 130.—8 T. R. 692.—2 Comyn on Contracts, 194.

The parties may by agreement between themselves waive the formalities prescribed by the 14 Geo. 3 c. 78. *Stuart v. Smith*, 2 Marsh. Rep. 435.—1 Holt. 321. 7 Taunt. 158. S. C.

1. RE-
SPROTING
REAL PRO-
PERTY.

of a certain old party-wall between the said several buildings, before then pulled down by and at the expense of the said plaintiff, agreeably to the direction of the said act of parliament. And being so indebted," &c. (*Conclude as ante*, 37.) (1).

[*55]

*II. RESPECTING PERSONAL PROPERTY.

For goods
or cattle
sold and
delivered
to the de-
fendant
(r).

The indebitatus count is as ante, 37, *inserting these words*, "for divers goods, wares, merchandize, and chattels (s), (or, when for live animals, say, 'horses, mares, geldings, bulls, cows, oxen, sheep, cattle, goods, and chattels,' as the case may be,) by the said plaintiff, before that time sold and delivered to the said defendant, and at his special instance and request (t), and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum valebant thereon is as ante*, 38, *inserting as follows*, "had before that time sold and delivered divers other goods, wares, merchandize (2), and chattels, (or, 'horses, mares, geldings, bulls, cows, oxen, sheep, cattle, and chattels,') to the said defendant, he the said defendant undertook, and then and there faithfully promised the plaintiff to pay him so much money as the said last-mentioned goods, wares, and merchandize, (or, horses, &c. as *supra*,) at the time of the said sale and delivery thereof, were reasonably worth (u), when he the said defendant should be thereunto afterwards requested. And the said plaintiff avers, that the said last-mentioned goods, wares, merchandize, and chattels, (or, horses, mares, &c. as before) at the time of the said sale and delivery thereof, were reasonably worth the *further sum of £— of like lawful money, to wit, at, &c. (venue) aforesaid, whereof the said defendant, afterwards, to wit, on the day and year aforesaid, there had notice.

[*56]

For goods
bargained
and sold to
defendant
and deliv-
ered to a
third per-
son (w).

The indebitatus count is as ante, 37, *inserting these words*, "for divers goods, wares, and merchandize, (or, horses mares, &c. as *ante*,) by the

(r) As to this count, when it lies, and its general application, see *ante*, vol. i. 302, 3. 2 Stark. 39. 19 Ves. 609. To support this count, there must have been an actual delivery, or something equivalent to it, 2 B. & A. 755. See, as to contracts relating to the sale of goods, 3 Chit. Com. Law, 273, 129. Index tit. "Sale." This form is not sustainable for fixtures, 2 Marsh. Rep. 495. See 4 J. B. Moore, 73. The word "chattels" is more comprehensive than "goods," as it includes animate property, &c. and in all cases it is as well to insert it, see forms, Lil. Ent. 31, 88. The word "effects," will include fixtures, and it should seem that *indebitatus assumpsit* for divers "fixtures, effects, and goods and chattels," would entitle the plaintiff to recover fixtures, and is a proper and comprehensive form. Hallen v. Runder, 1 Crompt. M. & Ros. 266. 1

Chit. Gen. Prac. 94, 95; 4 B. & A. 206.

(s) It is not necessary to say, "of the plaintiff," Bul. N. P. 139; and those words should, according to the decision, 5 Esp. 31, 2, be omitted, if the action be at the suit of a broker, factor, &c. But see 6 Taunt. 65, 67, that this is not material.

(t) As the word "sold," (like the word "hired," 6 Taunt. 289) implies a contract, perhaps the omission of the words "at the special instance and request of the defendant," would not be material, 2 T. R. 30.

(u) This count is not available where there has been a contract for a sum certain, Stra. 648. But see 6 Taunt. 108; see *ante*, 38.

(w) This count, though usual, is not necessary; the delivery may be stated to have been to the defendant, 8 T. R. 326. Stra. 127. See *vid* Bul. N. P. 136. 1 Selw.

(1) Act of 24 Feb. 1721. 15 April, 1782. Purd. Dig. 884, (Edit. 1831.) Ingles v. Brighurst, 1 Dall. 341. Hart v. Kucher, 5 Serg. & Rawle, 1.

(2) That it is unnecessary to allege that the plaintiff promised to sell and deliver, see 10 Mass. 237, 238.

said plaintiff, before that time bargained and sold to the said defendant, and under and by virtue of that bargain and sale delivered to one E. F. at the special instance and request of the said defendant; and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum valebant thereon is as ante*, 37, *inserting as follows*, "had before that time bargained and sold divers other goods, &c. to the said defendant, and had, under and by virtue of the said last-mentioned bargain and sale, delivered the same to the said E. F. he the said defendant undertook," &c. (*Conclude as ante*, 38.)

2. RESPECTING PERSONAL PROPERTY.

The indebitatus count is as ante, 37, *inserting these words*, "for divers goods, wares, and merchandize, by the said plaintiff, before that time bargained and sold to the said defendant, and at his special instance and request, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum valebant thereon is as ante*, 37, *inserting as follows*, "had *before that time bargained and sold to the said defendant divers other goods, wares, and merchandize, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For goods bargained and sold to defendant generally (x).
[*57]

The indebitatus count is as ante, 37, *inserting these words*, "for a certain crop of grass, (or, 'turnips' as the case is,) of the said plaintiff, before that time bargained and sold by the said plaintiff to the said defendant, and at his special instance and request, and by the said defendant, under and by virtue of that bargain and sale before that time accepted, mowed, cut down, (or, if for a crop of turnips, &c. 'accepted, gathered,') had, taken, and carried away; and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time bargained and sold to the said defendant a certain other crop of grass (or, 'turnips') of the said plaintiff, and that the said defendant had, under and by virtue of the said bargain and sale, accepted, mowed and cut down, the said last-mentioned crop of grass, (or, if for a crop of turnips, 'accepted and gathered the said last-mentioned crop of turnips,') and had taken and carried away the same, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For a crop of grass or turnips, &c. bargained and sold (y).

N. P. 6th edit. 300. If the defendant be sued on a collateral liability to pay for goods sold to another, the count must be special, 1 Saund. 211 b. See form, post, 314. Plead. Assist. 11, &c.

(x) See form, Plead. Ass. 10. Distinction between this count and the one for goods sold and delivered, 19 Ves. 609. This count is proper when there has not been an actual delivery of the goods, ante, vol. i. 303. — When it will not suffice, id. See form of declaration for not accepting goods, post, 264. The defendant cannot be held to bail for goods bargained and sold, see 12 East, 399. (And see *Atkinson v. Bell*, 8 B. & Cresw. 277, cited in *Lathrop v. Bryant*, 1 Bing. N. C. 430, as to when a special count is necessary.)

(y) See, as to this count, 1 B. & P. 397. As to what crops agreed to be taken by incoming against outgoing tenant, are re-

coverable under this count, 3 B. & C. 357, 364; and see another form there, suggested by Abbott, C. J. a sale of a growing crop of grass is within the Statute of Frauds, 29 Car. 2. c. 3. s. 4. See Chit. jun. on Contracts, 207. Chitty's Col. Stat. vol. 1. 371, and the cases in 5 B. & C. 829. (But when at the time of sale, the crop of any description is ripe, and the future growth forms no part of the substance of the contract, it is otherwise, and the crop is to be considered as goods and chattels, that may be affected by 29 Car. 2. c. 3. s. 17, but not by s. 4; *Smith v. Surman*, 9 B. & C. 561, 577; *Watts v. Friend*, 10 B. & C. 109. 5 B. & A. 105. 1 Chit. Gen. Pract. 93. See 2 Johns. 452. 9 Johns. 108. 1 Penns. Rep. 57. 471. 3 Penns. Rep. 471. 1 Rawle, 256. That the declaration must be special, see *Lewis Ex. v. Culbertson*, 11 Serg. & Rawle, 48.)

2 RE-
SPECTING
PERSONAL
PROPERTY.
For neces-
saries
found and
provided
for defend-
ant (z).

The indebitatus count is as ante, 37, inserting these words, "for meat, drink, washing, lodging, and other necessities, and goods and chattels, by the said plaintiff before that time found and provided for the said defendant, and at his special instance and request; and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time found and provided other meat, drink, washing, lodging, and necessities, goods and chattels, for the said defendant, he the said defendant undertook," &c. (Conclude as ante, 38.)

For neces-
saries
found and
provided
for third
persons
(a).

The indebitatus count is as ante, 37, inserting these words, "for meat, drink, washing, and lodging, goods and chattels, and other necessities, by the said plaintiff before that time found and provided, at the special instance and request of the said defendant, for one E. F. and divers persons; and being so indebted," &c. (Conclude as ante, 37.) The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time found and provided other meat, drink, washing, lodging, goods and chattels, and necessities, for the said E. F. and divers other persons, he the said defendant undertook," &c. (Conclude as ante, 38.)

For horse-
meat and
stabling
(b).

The indebitatus count is as ante, 37, inserting these words, "for horse-meat, stabling, care, and attendance, by the said plaintiff before that time found, provided, and bestowed for, in, and about the feeding and keeping of divers horses, mares, geldings, and cattle, of and for the said defendant, and at his special instance and request; and being so indebted," &c. (Conclude as ante, 37.) — The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time found, provided, and bestowed other horse-meat, stabling, care, and attendance, for, in, and about the feeding and keeping divers other horses, mares, geldings, and cattle, of and for the said defendant, he the said defendant undertook," &c. (Conclude as ante, 38.)

For the
agisting
of cattle
(c).

[*60]

*The indebitatus count is as ante, 37, inserting these words, "for the agisting, depasturing, and feeding of divers cattle, *by the said plaintiff before that time agisted, depastured, and fed in certain pastures and premises of the said plaintiff for the said defendant, and at his special instance, &c.; and being so indebted," &c. (Conclude as ante, 37.) — The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time agisted, depastured, and fed divers other cattle in certain other pastures and premises of the said plaintiff, for the said defendant, he the said defendant undertook," &c. (Conclude as ante, 38.)*

For the
hire of
goods,
horses,
&c. ships,
furniture,
&c. (d).

The indebitatus count is as ante, 37, inserting these words, "for the use and hire of divers [horses, mares, and geldings, cattle, bridles, saddles, and

(z) See the form, ante, 48, and forms, Plead. Assist. 224. Morgan, 29.

(a) See forms, 2 Rich. C. P. 89.—Lil. Ent. 31. 39.—As to the necessity for this count see ante, 56.—Stra. 127.—8 T. R. 323. Bul. N. P. 136.

(b) See note, ante, page 45.—Plead. Assist. 41.—Morg. 30.—Where vendor lia-

ble for, when contract of sale rescinded, 2 Chit. Rep. 416.—2 Camp. 82.—2 Moore, 106, 582.—8 Taunt. 535; and see post, 279, n.

(c) See note, ante, page 45.—Morg. 27.

(d) As to this count, see 1 Com. Rep. 116.—6 Taunt. 389.—Plead. Assist. 5.—1 Rich. C. P. 210.—Lil. Ent. 28.

harness, and of divers chaises and other carriages, or, 'of certain lighters and other vessels, or, 'of certain plate, linen, china, furniture,' as the case may be,] goods and chattels, by the said plaintiff before that time let to hire and delivered to the said defendant, and at his special instance and request, and by the said defendant, under and by virtue of that letting to hire, before then had and used; and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, inserting as follows, "had before that time let to hire and delivered to him the said defendant divers other [horses, mares, and geldings, cattle, bridles, saddles, and harness, and divers other chaises and other carriages, or, 'certain other lighters and other vessels,' or, 'certain plate, linen, china, furniture,' as the case may be,] goods and chattels, and that the said defendant had, under and by virtue of the said last-mentioned letting to hire, before then had and used the same, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

2. RESPECTING PERSONAL PROPERTY

The indebitatus count is as ante, 37, inserting these words, "for the use of divers stallions of the said plaintiff, before that time had and used, by and with the permission of the said plaintiff, in and for covering of divers mares of and for the said defendant, and at his special instance and request; and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, inserting as follows, "had before that time suffered and permitted certain other stallions of the said plaintiff to cover certain other mares of and for the said defendant, and that the said last-mentioned *stallions had accordingly covered the said last-mentioned mares, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For covering mares.

[*61]

The indebitatus count is as ante, 37, inserting these words, "for the use of divers bulls of the said plaintiff, before that time used for the bulling of divers cows of the said defendant, by the permission of the said plaintiff, and at the special instance and request of the said defendant; and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, inserting as follows, "had before that time permitted divers other bulls of the said plaintiff to bull divers other cows of the said defendant, and that the said last-mentioned bulls had accordingly bulled the said last-mentioned cows, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For bulling cows.

The indebitatus count is as ante, 37, inserting these words, "for certain freight [primage, and average] before that time, and then due, and

For freight, primage, average (e).

(e) As to who may sue for freight, see ante, vol. i 5.—3 Chit. Com. Law, 416, 421. Lil. Ent. 33, 54. Plead. Ass. 70.—Morg. 23, and the law, 3 M. & S. 482.—4 Id. 141. 6 Taunt. 618.—2 Marsh. 319. 4 Campb. 337. 1 Marsh. 122. 4 Taunt. 125.—3 Chit. Com. Law, 407; and see Abbott on Shipping, index "freight."

The usual form is more particular, but it seems less subject to variance to say, "in and on board of divers ships and vessels, for the said defendant, and at his request,"

as in the above precedent, without stating the name of the ship, voyage, &c.

This common count will suffice, even in an action against the indorsee of a bill of lading. 3 Bing. 383. Burrough, J. diss. See, as to this count, and when the declaration should be special, 2 B. & P. 323. If there be a charter-party or contract under seal, in general the declaration must be on the deed. 1 New Rep. 104: when not, see id. and Abbott, 5th edit. 163, 170, 188. 12 East, 578. 1 J. B. Moore, 358. 7 Taunt.

2. EX-
PECTING
PERSONAL
PROPERTY
[*62]

payable from the said defendant to the said plaintiff, upon, for, and in respect of the carriage and conveyance of divers goods, merchandize, and chattels, by the said plaintiff before that time carried and conveyed, in *and on board of divers ships and vessels, (f), from divers ports and places to divers other ports and places, and there, to wit, at the said last-mentioned ports and places delivered by the said plaintiff for the said defendant, and at his special instance and request; [and for the care and attendance of the said plaintiff and his servants, in and about the loading and unloading of the said goods, merchandize, and chattels, and the delivery thereof as aforesaid"] (g). *Conclude as ante, 37.*—*The quantum meruit thereon is as ante, 37, inserting as follows,* "had before that time carried and conveyed certain other goods, merchandize, and chattels in and on board divers other ships and vessels, from divers other ports and places to divers other ports and places, and there, to wit, at the said last-mentioned ports and places, had delivered the same for the said defendant [and had bestowed other his care and attendance in and about the loading and unloading of the said last-mentioned goods, merchandize and chattels, and the delivery thereof as aforesaid], he the said defendant undertook," &c. (*Conclude as ante, 38.*)—*Add a count for the use and hire of ships, &c. as ante, 60.*

For gene-
ral aver-
age (h).

The indebitatus count is as ante, 37, inserting these words, "for certain general average before that time, and then and there due and payable from the said defendant, upon, for, and in respect of divers goods, merchandizes, and chattels, of the said defendant, having been, before that time, carried and conveyed by the said plaintiff in and on board divers other ships or vessels, in and during divers voyages for the said defendant, and at his special instance and request, and in respect of certain losses, damages, and expenses by the said plaintiff incurred, in and about the preservation of the said ship and cargo, and the said last-mentioned goods, merchandizes, and chattels, from damage and loss during the said last-mentioned voyage. And being so indebted," &c. (*Conclude as ante, 37.*)—*The quantum meruit thereon is as ante, 37, inserting these words,* "had before that time carried and conveyed divers other goods, merchandizes, and chattels of the said defendant, in and on board divers other ships or vessels, and during certain other voyages, and the said defendant undertook, and then and there faithfully had incurred certain other losses, damages, and expenses in and about the preservation of the said last-mentioned ship and cargo, goods, merchandizes, and chattels, during the said last-mentioned voyages, he the said defendant undertook," &c.—(*Conclude as ante, 38.*)—*Add account for money paid, and account stated.*)

656, S. C. 4 B. & C. 962. Extra freight may be recovered under the count for work and labor, especially if there be a promise to pay it. Holt, C. N. P. 392. If the demand be for freight only, erase the words "prime and average;" if for average only, erase the words "freight and prime." See a count for average, 1 East, 220. For average no *quantum meruit* is added. (When freight cannot be apportioned, the voyage being incomplete, Chitty jun. on Contr. 2d edit. 569, 570, 575.)

(f) They may be laid to be the vessels of the plaintiff, though he be only captain, 6 Taunt. 65.

(g) If only for freight, leave out these words between brackets.

(h) See special counts, post, 216, 219; for law, see Abbott on Ship. 5th edit. 342, &c. —3 Chit. Com. Law, 433. Hughes on Insurance, 284 to 300.

And whereas, also, heretofore, to, wit, on, &c. at, &c. aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had, before *that time, carried and conveyed certain other goods, merchandizes, and chattels, in and on board of certain other ships or vessels of the said plaintiff, in and during a certain other voyage, and had incurred and sustained certain losses, damages, and expenses, as to the said last-mentioned ship or vessel, in and about the preservation of the said last-mentioned goods, merchandizes, and chattels, whilst on board thereof as aforesaid, he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him so much money as he therefore reasonably deserved to have of and from the said defendant, when he the said defendant should be thereunto afterwards requested; and the said plaintiff avers, that he therefore reasonably deserved to have of and from the said defendant, the further sum of £— of like lawful money, whereof the said defendant, afterwards, to wit, on the day and year last aforesaid, at (venue) aforesaid, had notice.—[Add counts for money paid, account stated, and usual breach.]

2. RESPECTING PERSONAL PROPERTY. [*63] The like in another form.

The indebitatus is as ante, 37, inserting these words, "for the tonnage of divers goods, merchandize, and chattels, of the said defendant by the said plaintiff, before that time carried and conveyed upon divers parts of a certain cut or canal, navigable and passable from divers places to divers other places, in certain boats, barges, and other vessels, for the said defendant, and at his special instance and request, and being so indebted," &c.—(Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time carried and conveyed divers other goods, merchandize, and chattels, of the said defendant, upon divers other parts of the said cut or canal, in certain other boats, barges, and vessels, for the said defendant, he promised the said plaintiff to pay him so much money as he therefore reasonably deserved of the said defendant to have for the tonnage thereof."—(Conclude as ante, 38.)

For the tonnage of goods (i).

*The indebitatus count is as ante, 37, inserting these words, "for the passage of the said defendant (or, 'of divers, to wit, — seamen before then carried and conveyed by the said plaintiff') in and on board of a certain ship or vessel, whereof the said plaintiff was master and commander, from divers ports and places to divers other ports and places, and at the special instance and request of the said defendant, * and being so indebted," &c. — (Conclude as ante, 37.) — The quantum meruit thereon is as ante, 37, inserting as follows," had before that time carried and conveyed the said defendant (or, 'divers, to wit, — other seamen')—in and on board of the said ship or vessel whereof the said plaintiff was master and commander, from divers ports and places to divers other ports and places, he the said defendant undertook," &c.—(Conclude as ante, 38.)*

For a passage on board a ship (k).

[*64]

(i) 3 Wentw. 70.
(k) Governed by rules as to freight. 5 East, 330, 331.—2 Campb. 15, 16.—3 Chit. Com. Law, 424.—Abbot on Ship. 5th edit.

206. (As to the law relating to a captain's or master's duty to passengers, and contract under seal as to passage, Corby v. Leader, 6 Car. & P. 32.)

2. RE-
SPECTING
PERSONAL
PROPERTY.
For de-
murrage
(l).

The indebitatus count is as ante, 37, inserting these words, "for the use of a certain ship or vessel whereof the said plaintiff was owner (m,) by the said defendant before that time retained and kept on demurrage, with certain goods, merchandize, and chattels on board thereof, for a long time before then elapsed, and at his special instance and request, and being so indebted," &c.—(Conclude as ante, 37.)—The quantum meruit thereon is ante, 37, inserting as follows, "had before that time suffered and permitted the said defendant to retain and keep, and that he the said defendant had accordingly retained or kept, a certain other ship or vessel whereof the said plaintiff was owner, with certain other goods, merchandize, and chattels on board thereof, on demurrage, for a long time before then elapsed, he the said defendant undertook," &c. (Conclude as ante, 38.)

For light-
erage.

The indebitatus count is as ante, 37, inserting these words," for the lightorage of divers goods, merchandize, and chattels, by the said plaintiff before that time carried and conveyed in certain lighters and other vessels of the said plaintiff, and by the said plaintiff shipped and landed from and out of the same for the said defendant, and at his special instance and request, and being," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting these words, "had before that time carried and conveyed divers others goods, merchandize, and chattels, in certain other lighters and other vessels of the said plaintiff, and had unshipped and landed the same from and out of the same ships and other vessels for the said defendant, and at his like special instance and request, he the said defendant undertook," &c. (Conclude as ante, 38.)

[*65]
For light-
erage,
wharfage,
and ware-
house
room (m).

**The indebitatus count is as ante, 37, inserting these words, " for the lightorage, wharfage, and warehouse-room of divers goods, merchandize, and chattels, by the said plaintiff before that time shipped and landed in and by certain lighters and other vessels of the said plaintiff, and deposited and kept in and upon a certain wharf, and certain warehouses and premises of the said plaintiff, for the said defendant, and at his special instance and request, and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is ante, 37, inserting as follows, "had before that time shipped and landed divers other goods, merchandize, and chattels in and by certain others lighters and vessels of him the said plaintiff, and had deposited and kept the same in and upon a certain other wharf, and certain other warehouses and premises of the said plaintiff, for*

(l) As to demurrage, see Abbot on Ship. 5th edit. 169, 180, &c. 3 Chit. Com. Law, 427, 430. When this general count suffices, see 3 Taunt. 387, and when not, 2 Esp. Rep. 708. If the contract for demurrage be under seal, the declaration must be in debt on the deed, 1 New Rep. 104. Ante vol. i. 5. and see a precedent in Debt, post, 426; in Covenant, post, 523. If there be no contract for demurrage, the declaration should be special on the implied contract, to ship or unship the goods in a reasonable time. 2 New Rep. 258.—4 Campb. 131.—12 East, 179.—6 J. B. Moore, 415, 425.—3

C. & P 186—Abbot, 181; and see a form, post, 221.

(m) The owners, and not the master, must sue for demurrage, or on an implied contract to pay a compensation for the detention of the vessel where there has been no express contract. Abbot, 4th edit. 169, 170. 4 Taunt 1. *Aliter* on an express contract. 4 Taunt. 52.—*Evans v. Foster*, K. B. 30th June, 1830, S. P. (And see further, Chit. jun. 2d Edit. 185, note (g).)

(n) This form may be easily applied to a demand for wharfage, or for warehouse-room only. And see the precedent for warehouse-room, ante, 48; Morg. 26.

the said defendant, he the said defendant undertook," &c.—(Conclude as FOR WAGES. ante, 38.) (o).

III. RESPECTING PERSONAL SERVICES (p).

First,—Wages.

The indebitatus count is as ante, 37, inserting these words, "for the wages or salary of the said plaintiff, before that time and then due and payable from the said defendant to the said plaintiff for the service of the said plaintiff, by him before then done and performed as the hired servant of and for the said defendant and on his retainer, and being so indebted," &c. (Conclude as ante, 37.) If the service has been performed on board a ship add these words, "in and on board a certain ship or vessel." For wages as a hired servant (q).

**The indebitatus count is as ante, 37, inserting these words, "for the wages of the said plaintiff before that time and then due and payable from the said defendant to the said plaintiff, for the service of the said plaintiff before then done and performed as a mariner, of and belonging to a certain ship or vessel, whereof the said defendant, during the time of such service,"* [*66] For wages, as a sailor, against the captain or owner (r).

(o) For boomage, buoys, and sea-marks, See Pl. Ass. 52, 3. For Moorage, See 3 Wentw. 69, and ante, 49. For pilotage, crimpage, and salvage, see post, 67, 68.

(p) When the demand is for wages, fees, or work and labor in particular professions, &c. it is usual to insert a count stating concisely the nature of the service as in the above precedents, but the usual common count for work and labor, post, 74, will perhaps in all cases, suffice. 3 Campb. 37. 2 Wils. 20. 1 New Rep. 289. 2 Saund. 350, n. 2. 373. (And in the recent case of *Fisher v. Snow*, 3 Dowl. Rep. 29, it was considered, that under a count for *work done and materials found*, an attorney might recover his fees for conducting an action or defense, and for preparing deeds or securities. Since the Gen. Pleading Rules, Hil. Term, 4 W. 4. sec. 5, prohibiting *several counts* for the *same debt*, or subject matter, the pleader must make his election, and adopt a form precisely applicable, or *one most comprehensive and general*, so as to avoid all risk of variance in the description of the service performed. As to the *apportionment of seamen's wages*, see *Tesse v. Roy*, 1 Cr. M. & R. 316.)

(q) As to the wages of servants in general, see Chit. jun. Contr. 172—Burn, J. tit. "Servants;" also note, post, 74. (1 Chit. Gen. Pract. 72 to 84.) The demand for wages being specific, no *quantum meruit* is added, but it is usual to add two counts for work and labor generally, as post, 74. If the defendant has refused to employ the plaintiff, a special count should be inserted

for not employing. 2 East, 145, as post, 324. So if the plaintiff was turned away without the usual month's notice, a special count should be inserted, as in form, post, 326. See 2 East, 145. 3 C. & P. 349. It seems, however, that where wages are payable quarterly, or at other intervals, and the servant is discharged in the middle of the quarter, &c. he may recover for the remainder of the quarter, &c. on a general count for work and labor.—1 Stark. 198. 4 Campb. 375. S. C. 5 Bingh. 132.

(r) If it be against the owner of the ship, say, "a certain ship or vessel of the said defendant;" and omit the words in italics. The observation in the note to the last precedent is applicable to this. If the contract be under seal, and delivered as a deed, an action of debt or covenant must be brought; if it be not under seal, or not so delivered, then an action of assumpsit or debt. Abbott on Ship. 5th ed. 485. Where the defendant has refused to employ the plaintiff as seaman, or improperly dismissed him, the declaration should be special. See form, post, 325. The plaintiff is not bound to show that the ship earned freight, the defendant must prove the negative, if such proof will furnish a defense. 7 Taunt. 319. 1 Hagg. Ad. Rep. 227. Abbott, Ship. 5th ed. 485. For the law in general, see Abbott on Shipping.—Holt on Shipping. (1 Chitt. Gen. Pract. 73 to 74; and 2 Id. 520 to 526. *Seem* that a common count for work done would frequently be preferable to that for wages.)

FOR WAGES. *was master and commander, and for the said defendant, and on his retainer and being so indebted," &c. (Conclude as ante, 37.)*

For short allowance money by a seaman. *The indebitatus count is as ante, 37, inserting these words, "for and in respect of his the said plaintiff having, at the special instance and request of the said defendant, for a long space of time, to wit, for the space of ——— months (s) then elapsed, and whilst he the said plaintiff served as mariner on board the ship or vessel of the said defendant, and for the said defendant relinquished his right to and not received from the said defendant a great part of his daily allowance of meat, drink, chattels, and other necessities which he the said plaintiff was, during that time, entitled to receive and have as such mariner as aforesaid, of and from the said defendant, under and by virtue of a certain agreement before then made between the said plaintiff and the said defendant; and being so indebted, &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time relinquished his right, and had not received for a long space of time, to wit, for the space of ——— then elapsed, and whilst the said plaintiff served as a mariner on board the said ship or vessel of the said defendant, and for the said defendant another great part of his daily allowance of meat, drink, chattels, and necessities, which he the said plaintiff was, during that time, entitled to receive and have as such mariner as aforesaid of and from the said defendant, under and by virtue of a certain agreement before then made between the said plaintiff and the said defendant, he the said defendant undertook," &c. (Conclude as ante, 38.)*

Quantum meruit thereon.

For wages as a ship-steward or mate, against the captain (t). *The indebitatus count is as ante, 37, inserting these words, "for the wages or salary of the said plaintiff before that time and then due and payable from the said defendant to *the said plaintiff, for the service of the said plaintiff, by him before that time done and performed, as the steward of the said defendant, for a long time before then elapsed, in and on board of a certain ship or vessel whereof the said defendant was, for and during all that time, master and commander, and for the said defendant, and on his retainer; and being so indebted," &c. (Conclude as ante, 37.)—If at the suit of the mate, instead of the words in italics, insert "mate of." (See ante, 65,)*

[*67]

For wages as captain, against the owner (u). *The indebitatus count is as ante, 37, inserting these words, "for the wages of the said plaintiff due and owing for his service, before then done and performed by him the said plaintiff, as master and commander of a certain ship or vessel for the said defendant, and on his retainer; and being so indebted," &c. (w). (Conclude as ante, 37.)*

For prize-money, wages, &c. by a quarter-master, against the owner. *The indebitatus count is as ante, 37, inserting these words, "for certain prize-money, wages, and reward, before that time, and then due and payable from the said defendant to the said plaintiff, for the service of the said*

(s) Any time sufficient to cover the real prize-money without express contract to pay. 2 Stark. 361.

(t) A purser's steward on board one of his Majesty's ships cannot recover wages him to wages, see 1 J. B. Moore, 65.

(u) See observation, ante, 65.

plaintiff, before that time done and performed by the said plaintiff as quarter-master on board a certain ship or vessel of the said defendant, on the retainer, and at the special instance and request of the said defendant; and being so indebted," &c. (x). (*Conclude as ante*, 37.)

FOR
WAGES.

The indebitatus count is as ante, 37, *inserting these words*, "for the pay or salary of the said plaintiff before that time, and then due and payable from the said defendant to the said plaintiff, for the services of the said plaintiff, before then done and performed by the said plaintiff as quarter-master of a certain corps, called, &c. for the said defendant, and at his special instance and request and being so indebted," &c. (y). (*Conclude as ante*, 37.)

For salary
as quarter-
master of
a corps of
troops.

The indebitatus count is as ante, 37, *inserting these words*, "for certain pilotage and reward before that time, and then *due and payable from the said defendant to the said plaintiff, for the pilotage, mooring and unmooring of a certain ship or vessel of the said defendant, by the said plaintiff before then piloted, moored, and unmoored for the said defendant, and on his retainer; and being so indebted," &c. (a). (*Conclude as ante*, 37.)

For pilot-
age (z).
[*68]

The indebitatus count is as ante, 37, *inserting these words*, "for certain crimpage and reward before that time, and then due and payable from the said defendant to the said plaintiff, upon and for the procuring, raising, and shipping of certain seamen by the said plaintiff before that time procured, raised, and shipped in and on board of a certain ship or vessel for the said defendant, and on his retainer; and being so indebted," &c. (b). (*Conclude as ante*, 37.)

For crim-
page.

The indebitatus count is as ante, 37, *inserting these words*, "for salvage of a certain anchor and cable by the said plaintiff, before that time saved for and delivered to the said defendant; and being so indebted," &c. (*Conclude as ante*, 37.)

For sal-
vage (c).

Secondly,—Fees.

FEES.

The indebitatus count is as ante, 37, *inserting these words*, "for the work and labor, care, diligence, and attendance *of the said plaintiff by the said plaintiff before that time done, performed, and bestowed, as the attorney and solicitor of and for the said defendant, and upon his retainer, in and about the prosecuting, defending, and soliciting of divers causes,

As an at-
torney, in
prosecut-
ing and
defending
suits, &c.
and pre-
paring
deeds, &c.
(d).

(z) Ibid.

(y) Ibid. Plead. A. 52, 58.

(z) As to pilotage, see 6 Geo. 4. c. 125. and 1 Taunt. 300. Peake, C. N. P. 107. 2 Chit. Com. Law, 46. Abbott on Ship, 5th ed. 148 to 161.

(a) See observation, ante, 65.

(b) Ante, 65.

(c) See note, ante, 65. In the case of salvage, from perils of the sea, the statutes have not taken away the common law remedy, Abbott on Ship, 5th ed. 307. 3 B. &

P. 612, and the precedent there; but in the case of recapture, as the admiralty has peculiar jurisdiction over prize-causes, (see 2 Dougl. 594, &c.), the 33 Geo. 3. c. 66. s. 42, renders it necessary for the re-captor to resort to that court. As to the mode of recovering salvage, see the acts 48 Geo. 3. c. 130. 49 Geo. 3. c. 123. 53 Geo. 3. c. 87. 1 & 2 Geo. 4. c. 75. See 2 Holt on Ship. 230. (2 Chit. Gen. 528)

(d) This form will suffice in all cases by an attorney or solicitor against his client,

[*69]

FOR FEES. suits, and business for the said defendant, and for fees due and of right payable to the said plaintiff in respect thereof.—And also for other the work and labor, care, diligence, and attendance of the said plaintiff before that time done, performed, and bestowed, in and about the drawing, copying, and engrossing of divers conveyances, deeds, and writings, for the said defendant, and in and about other the business of the said defendant, and for the said defendant and at his special instance and request, &c.—And also for divers journeys and other attendances by the said plaintiff before then made, performed, and given, in and about the said business, and other the business of the said defendant, and for the said defendant, and at his like special instance and request, and being so indebted,” &c.

[*70]
As an attorney.
Quantum meruit thereon.

*(Conclude as ante, 37.)—*The quantum meruit thereon is as ante, 37, inserting as follows*, “had before that time done, performed, bestowed and given, other his work and labor, care, diligence, and attendance, the attorney and solicitor of and for the said defendant, and upon his retainer, in and about the prosecuting, defending, and soliciting of divers other causes, suits, and business, for the said defendant; and had also at the like special instance and request of the said defendant before that time done, performed and bestowed, other his work and labor, care, diligence and attendance, in and about the drawing, copying, and engrossing of divers other conveyances, deeds, and writings, for the said defendant, and in and about other the business of the said defendant, and for the said defendant.—And had also at the like special instance and request of the said defendant before that time made, performed, and given divers other journeys and attendances in and about other the business of the said defendant, and for the said defendant, he the said defendant undertook,” &c. (*Add a count for work and labor generally, and all the common counts* (e) (1).

[*72]
The like for procuring defendant's discharge as an insolvent.

* Same as in the preceding form, ante, 68, except, instead of the words “prosecuting, defending, and soliciting of divers causes, suits; and business,” say “endeavoring to procure and obtain, and procuring and obtaining the said defendant's discharge from imprisonment, as an insolvent debtor, in pursuance of the statute then in force for the relief of insolvent debtors in England.”

As a witness (f)

The indebitatus count is as ante, 37, inserting these words, “for the for business done at law or in equity, adding one count for work and labor generally, and the money counts; where there was no suit carried on, or no deeds prepared, &c. or no journeys taken, the parts of this form not applicable to the case should be omitted. If the suit were carried on for a third person at the defendant's request, this count, with a little alteration will suffice, 2 Show. 421. But if the defendant be liable, in respect of a collateral undertaking in writing, the declaration must be special, see 1 Saund. 211, b. and see a form post, 251, 2. A common count for work and labor would in all cases suffice. (3 Dougl. 59.) Ante, 65, n. Skin. 218. See notes, post, 75, as to what is a defense to this action, &c. and see in general Chit. jun. on Contr. 2d edit. 443 to 447. 2 Chit. Gen. Prac. 26. 3 Campb. 451. M'Clel. Rep. 25.
(e) When an attorney may recover on the count for money paid, though his bill has not been delivered in, see Tidd, 9th ed. 325. 11 East, 285. 5 B. & A. 898.
(f) See Chit. jun. Contr. 175.—1 Taunt. 10.—A promise to pay for loss of time, is not binding. — 1 B. & B. 515. — 4 J. B. Moore, 300, S. C.—5 M. & S 156. Collins

(1) In *Pennsylvania* it has been decided in one case, that an action cannot be maintained by a gentleman of the Bar, for a compensation for services rendered in the trial of a case, and for advice; but if the client gives a note or bond for such compensation an action lies thereon. *Mooney v. Lloyd*, 5 Serg. & Rawle, 412. But this case has been recently overruled, and it is now settled, that an attorney at law has a legal right to recover a *quantum meruit* for his professional services, *Gray v. Brackenridge*, 2 Penn. 75. dec. *Robbins v. Harvey*, 5 Conn. 335.

work and labor, jourmies, and attendance of the said plaintiff, by him the said plaintiff before that time done, performed, bestowed, made, and given, as a witness for and on the behalf of the said defendant, and at his special instance and request, in and about the attending to give him the said plaintiff's evidence upon the trial of a certain action before then depending in the court of our said lord the king, before the king himself, and wherein the said defendant was plaintiff, and one E. F. was defendant, and being so indebted," &c. (*Conclude as ante, 37.*)—*The quantum meruit thereon is as ante, 37, inserting as follows*, "had before that time done, performed, and bestowed other his work, labor, and attendance, and made divers other jourmies,* and given other his attendance as a witness, upon the trial of a certain other cause wherein the said defendant was plaintiff, and the said E. F. defendant, he the said defendant undertook," &c. (*Conclude as ante, 38.*)

FOR FEES.

[*74]

Thirdly,—For Services in general.

The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, and diligence of the said *plaintiff, by the said plain-

FOR SERVICES IN GENERAL.

For work and labor and materials (g).

[*75]

v. Godefroy, Easter Term, K. B. 1830. (1 Barn. & Adolph. 950.) A person who is subpoenaed, and attends, but refuses to give evidence unless his expenses are paid, may sue in assumpsit for his necessary expenses of attendance against the party who subpoenaed him. 13 East, 15.

(g) See forms, Lil. Ent. 26, 38, 43, &c.; for work and labor as an actress, 2 Rich. C. P. 83; for Forms for recovery of wages, &c. ante, 65 to 69.

As to this count in general, see fully, ante, vol. i. 303. A contract to pay money for any description of work and labor done for the defendant, may be given in evidence under this count, and medicines, &c. administered may be considered as materials found by the plaintiff, and used in and about the work and labor. 4 Campb. 37.—1 N. R. 189. Skin. 218. Ante, vol. i. 304. When the work or service has been completely performed for the defendant, and accepted by him, though under a special agreement, if the agreement was not under seal, and was for payment in money, this count is sufficient. Fitzg. 302.—1 Wils. 117.—Bul. N. P. 139.—2 Chit. Rep. 320; and in some cases, though the original agreement be not performed, yet, if the defendant has actually derived benefit from the part performance, he will be liable on the *quantum meruit* or *quantum valebat*. Peake, 103.—1 Stark. 275.—6 Taunt. 322.—1 Marsh. 581. 4 Taunt. 745.—2 Taunt. 150.—3 Chit. Com. Law, 271. acc. but see 1 New Rep. 355. Where new work is not applicable to the special contract, plaintiff may recover under this count. Holt, C. N. P. 236.—1 Stark. 275. S. C. Where A. being employed by B. as a clerk, at a salary of 200*l.* per annum, payable

quarterly, was discharged in the middle of a quarter, and paid proportionably, it was held, after his having tendered his services for the rest of the quarter, he might recover for it under this count, 1 Stark. 198.—4 Campb. 375, S. C. 5 Bingham. 132. This common count will suffice to support a claim for the services of the plaintiff's apprentice whilst he was harbored by defendant, for plaintiff may waive the tort and sue in assumpsit. 3 M. & S. 191.

But this count will not suffice where the agreement remains incompleated, and the defendant has not accepted the work done under it, and in such case, if the plaintiff can recover at all, the declaration should be special; as if the defendant has prevented plaintiff from completing the agreement in consequence of defendant's non-performance of some condition precedent, or the like. 2 East, 145. Form, post, 328; or if the agreement was conditional, and the defendant has not waived or assented to the complete performance of the condition; as where the plaintiff agreed to build a mill, and if it did not answer, to build another, and the defendant had not consented that the mill answered. 2 Chit. R. 320.

Nor will this common count for work and labor and materials, suffice, to recover a claim for work bestowed on the materials of the plaintiff, in making a chattel which never became defendant's property, by being vested in him. 8 B. & Cres. 277, 283.

Nor can a person who contracts to build a house, furnishing both timber and labor, recover for the materials on account for goods sold and delivered, although by reason of a deviation from the original plan, the contract is superseded as to price. 6 Taunt. 322.

FOR THE
VICKS IN
GENERAL.

tiff before that time done, performed, and bestowed, in and about the business of the said *defendant (h) and for the said defendant, and at his

(As to *builders, carpenters, and workmen* in general, see Chit. Jun. on Contr. 2 edit. 448.)

If the plaintiff declare upon a special agreement, and also upon a *quantum meruit*, and at the trial prove a special agreement, but different from that stated in the declaration, he cannot recover on either count; not on the first, because of the variance, nor on the second, because there was a special agreement; but if he prove a special agreement, and the work done, but not pursuant to such agreement, he shall recover upon the *quantum meruit*, for otherwise he would not be able to recover at all. Bul. N. P. 2d ed. 139. 1 New. 355.

As to contracts for work and labor in general, see fully Chit. jun. on Contracts, 2 ed. 430 to 463, and the notes to the preceding forms, 65 to 74.

It is a general rule, that if there has been no beneficial service *whatever*, there shall be no pay. 3 Stark. 6. 1 Campb. 38. 3 Campb. 451. 1 Ry. & Moo. 317. 9 B. & C. 92; but if *some* benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for the plaintiff's non-performance of the agreement. 3 Stark. 6. 1 Campb. 39. 190. 7 East, 484; and though a party undertakes a work of specified dimensions and materials, and deviates from the specification, yet, if the defendant expressly or impliedly suffer the deviation, or accept the thing manufactured in its incomplete state, then the defendant will be bound by the original contract, as far as it can be traced, and a fair remuneration for the work done is recoverable. 1 Stark. 275. 6 Taunt. 322. 1 Marsh. 581. 4 Taunt. 745. 2 Taunt. 150. Bla. Rep. 103, *acc.*; but see 1 New Rep. 375; and where some additions are made to a building which the workman contracts to finish for a certain sum of money, the contract shall exist as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. But if a man contract to work by a certain plan, and that plan be so entirely abandoned that it is impossible to trace the contract and say to which part of the work it shall be applied, in such case the workman shall be permitted to charge for the whole work done, by measure and value, as if no such contract had been made. Per *Ld. Kenyon*, *Peake's Rep.* 103.

Where the plaintiff undertook, for a specified sum, to repair and make perfect an article then in a damaged state, and did repair it in part, but did not make it perfect; it was held he could not recover even for the work actually done. 9 B. & Cres. 92.

If the plaintiff has put better materials into a work than those contracted for, he cannot, in general, compel the defendant to

pay an increased sum for them. 3 Car. & P. 453.

Though a specified sum be agreed on for the performance of the work, it seems defendant may reduce that sum on showing the inferiority of the work to what it ought to have been, and giving the plaintiff notice that defendant intends setting up such a defense at the trial. 7 East, 479.—1 Camp. 38.—3 Stark. 32.—And where the claim is on a *quantum meruit*, the defendant may, without notice, reduce the damages, by showing that the work was improperly done, and may entitle himself to a verdict, by showing its total insufficiency. *Id.*—1 Campb. 191; 3d in. 401.—1 Stark. 108. If a bill of exchange has been accepted for the work, the bad quality and partial insufficiency, do not form a ground for reducing the amount claimed.—1 Camp. 40.—3 Camp. 346.—3 Campb. 38.—14 East, 486.

To entitle the plaintiff to recover, there must have been an expressed or implied contract for remuneration. Therefore an action cannot be maintained for services performed, with a view to a legacy, and not in expectation of reward in nature of a debt. Str. 728.—1 Esp. 188. Where a person performed work for a committee, under a resolution entered into by them, "that any service rendered by him should be taken into consideration; and such remuneration be made as should be deemed right;" it was held no action would lie to recover a recompense for such work. *Taylor v. Brewer*, 1 M. & S. 290. Bail cannot sue for trouble and loss of time in going to a place to become bail for another. 1 Car. & P. 434. As to the right of arbitrators to remuneration, see Chit. jun. on Contr. (2 ed. 435, several cases *pro* and *con.*)

But where the defendant requested the plaintiff to take care of and show defendant's house, and promised to make him a handsome present, it was held, the plaintiff might recover a reasonable recompense for the work and labor. 5 Taunt. 302.—*Fitzg.* 302.

If a slave comes over from the West Indies, and continues in the service of his master here, he is not entitled to wages, unless there has been some agreement or contract of service. 3 Esp. Rep. 3. And see 2 Car. & P. 231.

See further as to the right to recover for work and labor, in particular cases, for wages and fees, the various notes, ante, 65 to 75, and post, 76 to 87.

(h) If done at the request of the defendant for a third person, omit the statement of the business, &c. being "of the defendant;" and if the defendant's liability be merely collateral on a written contract, declare specially, 1 Saund. 211 b.

special instance and request, and also for divers materials (i) and other necessary things by the said plaintiff before that time found and provided, and used and applied, in and about that work and labor for the said defendant, and at his like special instance and request, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time done, performed, and bestowed other his, work and labor, care, and diligence, in and about other the buisness of and for the said defendant, and had also at the like special instance and request of the said defendant, before that time found and provided divers other materials and necessary things, and used and applied the same in and about the said last-mentioned work and labor, he the said defendant undertook," &c. (*Conclude as ante*, 38.)—[*Add one count for goods sold—money paid—and the account stated—and breach. If the demand be for work only, you may omit those parts which relate to the materials.*]

FOR SERVICES IN GENERAL.

The indebitatus count is as ante, 37, *inserting these words*, "for the work and labor, care, and diligence of the said plaintiff, before that time done, performed, and bestowed by the said plaintiff and his servants, and with his horses, carts, and carriages, [or, 'with his lighters and other vessels'] goods, and chattels, in and about the buisness of the said defendant, and for the said defendant, and at his special instance and request, and being so indebted," &c. (*Conclude as ante*, 37,) *if it be for the carriage of goods, instead of the words, between the brackets, say* [in and about the carrying and conveying of divers goods, chattels, and *merchandise, and delivering the same for the same defendant, and at his special instance and request," &c. *or the count may be as in the next indebitatus count.*] *The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time done, performed and bestowed other his work and labor, care, and diligence, by himself and his servants, and with his horses, carts, and carriages [or, 'with his lighters and other vessels'] goods, and chattels, in and about the business of the said defendant, and for the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 38.)—[*Add one indebitatus assumpsit count for work and labor generally—the account stated—and breach.*]

For work with horses and carriages, or with lighters, &c.

[*77]

The indebitatus count is as ante, 37, *inserting these words*, "for the carriage and conveyance of divers goods, merchandize, and chattels, by the said plaintiff before that time carried and conveyed in certain carts and other carriages for the said defendant, and at his special instance and request, and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time carried and conveyed divers other goods, merchandize, and chattels, in certain other carts and carriages, for the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 38.)—[*Add one count for work and labor generally—money paid—account stated—and breach.*]

For the carriage of goods by land (k).

(i) Where necessary to insert this, see 6 Taunt. 324.—1 Marsh. 581. S. C. Plaintiff may recover for work and labor, although

the count include also a demand for materials.

(k) See the observations on the last indebitatus count.

FOR SERVICES IN GENERAL. For work, journees, and attendance.

The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, and diligence of the said plaintiff by him the said plaintiff, before that time done, performed, and bestowed, in and about the business of the said defendant, and at his special instance and request, and for divers journees and attendances by the said plaintiff before that time made, performed, and given, in and about the said work and labor for the said defendant, and at his like special instance and request, and being so indebted," &c.—(Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time done, performed, and bestowed other his work and labor, care, and diligence, in and about other the business of the said defendant, and for the said defendant, and had also at his like special instance and request, before that time made, performed, and given, divers other journees and attendances in and about the said last-mentioned work and labor for the said defendant, he the said defendant undertook," &c. (Conclude as ante, 38.)—[Add one count for money paid—account stated—and breach.]

[*78]

As an agent generally, and for commission (l).

The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, diligence, journees, and attendance of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed, as the agent of and for the said defendant, and on his retainer, and for certain commission and reward due and of right payable from the said defendant to the said plaintiff in respect thereof, and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time done, performed, and bestowed other his work and labor, care, diligence, journees, and attendance, as the agent of and for the said defendant, he the said defendant undertook," &c. (Conclude as ante, 38.) [Add one count for work and labor generally—account stated—and breach.]

As a factor or agent in selling goods (m).

The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care and diligence, journees and attendances of the said plaintiff, by him the said plaintiff before that time done, performed, and bestowed, as the factor and agent of the said defendant, in and about the selling and disposing of divers goods, merchandize, and chattels, and in and about other the business of the said defendant, and for the said defendant, and at his special instance and request, and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time done, performed, and bestowed, other his work and labor, care, and diligence, journees and attendances, as the factor and agent of the said defendant, in and about the selling and disposing of divers other goods, merchandize, and chattels, and in and

(l) See 1 Wentw. 195; and see in general as to an agent's right to commission, Chit. jun. Cont. 162, 3. 3 Chit. Com. Law, 221. Pailey Prin. & Agent. Ante, 74, n. (a). Where the principal derives no benefit whatever from the acts of his agent, in consequence of some misconduct or mismanagement on the part of the latter, no remuneration can be recovered.—1 Com. Contr. 271. 8 Bro. P. C. 339.—3 Stark. C. N. P. 161.

1 Car. & P. 384.—3 Taunt. 32.—3 Camp. 451.—M'Clel. Rep. 25.—An agent cannot recover commission for effecting sales in an illegal undertaking.—3 B. & Cres. 639.—5 D. & R. 542, S. C.

(m) See a form for *del credere* commission for which *indebitatus assumpsit* will lie, 14 East, 578; at least it would be good after verdict.—3 Taunt. 371.—2 J. B. Moore, 420. S. C.—See the preceding note.

about other the business of the said defendant, and for the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 28.) — [Add one count for work and labor generally — money paid — the account stated — and breach.]

FOR SERVICES IN GENERAL.

The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, and diligence, of the said plaintiff by him before that time done, performed, and bestowed, in and about the writing, drawing, and making out of divers policies of insurance of divers ships and vessels, goods, merchandize, and chattels, before that time written, drawn, and made out by the said plaintiff as an insurance-broker, and in and about the causing and procuring divers persons to insure divers sums of money upon the said ships and vessels, goods, merchandize, and chattels, at the special instance and request of the said defendant, and for divers sums of money before that time advanced and paid by the said plaintiff for the said defendant at his like request to divers persons, as and for certain premiums and rewards, for the underwriting and subscribing the said policies of insurance, before that time underwritten and subscribed for the insurance of the said ships and vessels, goods, merchandize, and chattels, during certain voyages undertaken by the said ships and vessels, and for the trouble, care, and diligence of the said plaintiff in that behalf, at the like special instance and request of the said defendant, and being so indebted," &c. (*Conclude as ante*, 37.) — *The quantum meruit thereon is as ante*, 37, inserting as follows, "in consideration that the said plaintiff, as such insurance-broker as aforesaid, at the like special instance and request of the said defendant, had before that time done, performed, and bestowed other his work and labor, care, and diligence, in and about the writing, drawing, and making out of divers other policies of insurance of divers other ships and vessels, goods, merchandize, and chattels, of and for the said defendant, and also in and about the causing and procuring divers other persons to insure divers other sums of money upon the said ships and vessels, goods, chattels, and merchandize, and had also, at the like instance and request of the said defendant, advanced and paid divers other sums of money for the said defendant to divers other persons, as and for certain premiums and rewards for their underwriting and subscribing of the said last-mentioned policies of insurance before that time under-written and subscribed by them for the insurance of divers other sums of money upon the said last-mentioned ships and vessels, goods, merchandize, and chattels, during certain voyages undertaken by the said last-mentioned ships and vessels; and had also, at the like instance and request of the said defendant, bestowed other his trouble, and used other care and diligence for the said defendant, he the said defendant undertook," &c. (*Conclude as an-*

[*79]
As an insurance broker (n).

(n) As to these counts, see 1 Hen. Bla. 241. This count is proper where the plaintiff, in the character of broker, has got a policy effected by third persons for the defendant. When the action is at the suit of the under-writer for the premiums, the counts are as in the next precedent. The policies must be produced at the trial, 1 Stark. 139. In *Broad v. Thomas*, C. P. 9th July, 1830,

where an action was brought by a broker against the captain of a ship for brokerage and reward for endeavoring to effect a charter-party, and with the authority of defendant, who afterwards refused to proceed on the voyage and execute charter-party; the jury found, that by usage of merchants, as the charter-party was not effected, plaintiff could not recover.

FOR SER-
VICES IN
GENERAL.

te, 38.)—[Add *one *indebitatus count* for work and labor generally—the money counts—account stated—and breach.]

For pre-
miums of
insurance
(o).

The indebitatus count is as ante, 37, inserting these words, "for certain premiums of insurance before that time and then due and payable from the said defendant to the said plaintiff, upon, for, and in respect of his the said plaintiff having before then, at the special instance and request of the said defendant, underwritten and subscribed divers policies of insurance for and on the behalf and on the account of the said defendant, for the insurance of divers large sums of money upon divers ships and vessels, and also divers goods, merchandize, chattels, and effects by the said plaintiff before that time insured for the said defendant, and at his special instance and request, and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon, which is sometimes added, though unnecessarily, is as ante, 37, inserting as follows, "had before that time insured divers other ships and vessels, also divers goods, merchandize, chattels, and effects, (or, 'divers other large sums of money upon divers other ships and vessels,' &c.) for the said defendant, he the said defendant undertook," &c. (Conclude as ante, 38.)

As a sur-
veyor (p).

[*81]

*The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, diligence, and attendance of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed, as a surveyor, in and about the drawing divers plans, elevations, and sections of buildings, *for the said defendant, and at his request, and in and about the surveying and superintending the erection thereof, and of divers other works for the said defendant, and at his special instance and request, and in and about the appraisement, admeasurement, and valuation of certain works, and the payment of certain workmen's bills for the said defendant, and in and about other the business of the said defendant, and at his like instance and request, and for divers journies and attendances before then made, performed, and given by the said plaintiff, in and about the business of the said defendant, and at his like instance and request; and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time done, performed, and bestowed other his work and labor, care, diligence, and attendance, as a surveyor, in and about the drawing of divers other plans, elevations and sections of buildings, for the said defendant, and in and about the surveying and superintending the erection thereof, and of divers other works for the said defendant, and in and about*

(o) This count is sufficient, 2 Lev. 153. Park. 26. In *Hobson v. De Tastet*, before Abbott, C. J. Guildhall, 14th Feb. 1823, the declaration was precisely in the above form; and upon Scarlett and Littledale, for defendant, objecting that the same was insufficient, because the policies were for the benefit of third persons, and not for defendant; though on his retainer, Abbott, C. J. said, "This count has existed for upwards of fifty years. It is true the defendant is a broker, but still the business is done in the employment of defendant, and therefore the policies, as to him, are for money had and received; if the broker had not received monies from his

principal, then the plaintiff could not recover." 2 Starkie, 294; Chitty, Jun. on Contr. 2d ed. 462.

(p) A surveyor is to be paid according to his labor, and not according to the amount of the bills which he looked over, Peake, 103; and where a surveyor claimed 5*l.* per cent. on the money laid out by him as such, Lord Ellenborough left it to the jury to say, whether this mode of charging was vicious or unreasonable, and if they thought it was, to deduct accordingly. 2 Stark. 294. See 1 C. & P. 352. (Chit. jun. on Contr. 2d ed. 462.

the appraisement, admeasurement, and valuation of certain works, and the payment of certain workmen's bills for the said defendant, and in and about other the business of the said defendant, and for the said defendant, and had also, at his like special instance and request, before then made, performed, and given divers other journeys and attendances in and about other the business of the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 38.)—[*Add one indebitatus assumpsit count for work and labor generally—the money counts—account stated—and breach.*]

FOR SERVICES IN GENERAL.

The indebitatus count is as ante, 37, *inserting these words*, "for the work and labor, care, diligence, and attendance of the said plaintiff, by the said plaintiff before then done, performed, and bestowed, as an auctioneer and appraiser, in and about the selling and disposing of, and endeavoring to sell and dispose, by auction and otherwise, of divers goods, chattels, and effects, for the said defendant, and on his retainer and request, and in and about the appraising and valuing of divers other goods, chattels, and effects, for the said defendant, and at his request, and in and about other the business of the said defendant, and for the said defendant, and at his request, and for divers journeys and attendances before then made, performed, and given by the said plaintiff in and about the business of the said defendant, and for the said defendant, and at his like request; and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting these words*, "had before then done, performed and bestowed other his work and labor, care, diligence, and attendance, as an auctioneer and appraiser in and about the selling and disposing, and endeavoring to sell and dispose of, by auction and otherwise, of divers goods, chattels, and effects for the said defendant, and on his retainer and request, and in and about the appraising and valuing of divers other goods, chattels, and effects for the said defendant, and at his like request, and in and about other the business of the said defendant, and for the said defendant, and at his request, and had also before then made, performed, and given divers other journeys and attendance for the said defendant, and at his request, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

As an auctioneer and appraiser (9).

The indebitatus count is as ante, 37, *inserting these words*, "for the work and labor, care, diligence, journeys, and attendances of the said plaintiff, by him the said plaintiff before that time done, performed, and bestowed, as an accountant and otherwise, in and about the investigating, copying, writing, making extracts from, making out, settling, arranging, managing, and adjusting, and endeavoring to investigate, copy, write, make extracts from, make out, settle, arrange, manage, and adjust, divers accounts, bills, debts, documents and writings for the said defendant, and at his request, and in and about other the business of the said defendant, and for the said defendant, and at his like request; and also for divers materials, quantities of paper, pens, ink, and other necessary things before then found and

As an accountant.

(9) If an auctioneer, employed to sell an estate, is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to any compensation for his services, 3 Campb. 451. M'Clel. Rep. 25.

FOR SERVICES IN GENERAL.

provided, and used and applied by the said plaintiff in and about the said work and labor, care, and diligence of the said plaintiff for the said defendant, and at his special instance and request; and being so indebted," &c. (*Conclude as ante*, 37.)—*The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time done, performed, and bestowed other his work and labor, care, diligence, journeys, and attendances as an accountant and otherwise, in and about the investigating, copying, writing, making extracts from, making out, settling, arranging, managing, and adjusting, and endeavoring to investigate, copy, write, make extracts from, make out, settle, arrange, manage, and adjust, divers other accounts, bills, debts, documents, and writings for the said defendant, and in and about other the business of the said defendant, and for the said defendant; and had also, at the like special instance and request of the said defendant, before then found and provided, and used and applied in and about the said work and labor, care, diligence, divers other materials, quantities of paper, pens, and ink, and other necessary things for the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 38.)—[*Add counts for work and labor generally—money counts—accounts stated—and breach.*]

As a school-master, and for books, board, and lodging, &c. (r).

The indebitatus count is as ante, 37, *inserting these words*, "for the work and labor, care, diligence and attendance of the said plaintiff, by him the said plaintiff and his servants and teachers before that time done, performed, and bestowed for the said defendant as a school-master, in and about the teaching and instructing of divers infants and persons (s), in reading, writing, arithmetic, and in divers languages, drawing, and dancing, good manners, and other necessary and useful accomplishments and qualifications, and at the special instance and request of the said defendant*, and for divers books, pens, chattels, and other necessary things, by the said plaintiff before that time found and provided, and used and employed in and about that work and labor for the said defendant, and at his like special instance and request, and also for meat, drink, washing, lodging, chattels, and other necessities by the said plaintiff before that time found and provided for the said infants and persons, and at the like special instance and request of the said defendant; and being so indebted," &c. (*Conclude as ante*, 37.)—*The *quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time done, performed, and bestowed other his work and labor, care, diligence, and attendance for the said defendant as a school-master, in and about the teaching and instructing of divers other infants and persons in reading, writing, arithmetic, and in divers languages, drawing, and dancing, good manners, and other useful and necessary accomplishments and qualifications; and had also at the like special instance and request of the said defendant, before that time found and provided divers other books, pens, chattels, and other necessary things, and used

[*82]

(r) See 2 New Rep. 333, and the precedent, Morg. 12. If there be a claim for taking away a scholar before notice, the plaintiff should declare specially, see post, 259; though according to 2 New Rep. 333, it may be recovered under the common count. The plaintiff may recover under the common counts for work and labor, &c.

for the whole quarter, though the defendant's child was taken away in the middle of it.—5 Bingh. 132.

(s) It is usual here to say, "of one E. F. the infant son of the said defendant," but this is unnecessary, and may be dangerous in proof.

and employed the same in and about the said last-mentioned work and labor for the said defendant, and had also at the like special instance and request of the said defendant, found and provided other meat, drink, washing, lodging, chattels, and other necessities for the said last-mentioned infants and persons he the said defendant undertook," &c. (*Conclude as ante*, 38.)—[*Add one indebitatus assumpsit count for work and labor generally—one for goods sold—money lent—paid—account stated—and breach.*]

FOR SERVICES IN GENERAL.

If there be a demand for entrance-money proceed as in the above indebitatus count, inserting, at the asterisk, the following words, "and for certain entrance-money before that time and then due and payable from the said defendant to the said plaintiff, upon, for, and in respect of the admission of the said infants and persons into the school of the said plaintiff, for the purpose of being taught and instructed as aforesaid. If the action be for instruction by the plaintiff's wife as a school-mistress, it is not advisable for her to join in the action, (unless the demand accrued before marriage) (t), and the account may as well state, "for the work, &c. of E. F. the wife of the said plaintiff," &c.—(If it be for taking children away without notice given, add a special count, as post, 259. 2 New Rep. 333.)

The like, and for entrance money.

**The indebitatus count is as ante*, 37, *inserting these words, "for the work and labor, care, diligence, journees, and attendance of the said plaintiff by the said plaintiff before that time done, performed, and bestowed, as a surgeon and apothecary for the said defendant, and at his special instance and request, in and about the healing and curing of the said defendant and divers other persons of divers diseases, disorders, and maladies under which they had before then respectively labored and languished, in and about the endeavoring to heal and cure the said defendant and divers other persons of divers other diseases, disorders, and maladies under which they had before then also respectively labored and languished, and for divers medicines, chattels and other necessary things before that time found and provided, administered, delivered, and applied by the said plaintiff on those occasions, for the said defendant, and at his like special instance and request; and being so indebted," &c. (Conclude as ante*, 37.)—*The quan-*

[*83] As a surgeon and apothecary, and for medicines &c. and for inoculating a child (u).

(t) 1 Salk. 114.

(u) See forms, Morg. 9, 14: Lil. Ent. 25, 36; Plead. Assist. 43, 63. If the demand be also for the inoculation of a child, say, "in and about the inoculation of a certain child of the said defendant, and in and about divers other chirurgical operations for the said defendant, and at his special," &c. The declaration must not state for curing the defendant of the venereal disease, 2 Wills. 20. —As to the rights of surgeons and apothecaries to recover their fees and attendances, see Chit. jun. on Cont. 163.—Chit. Col. Stat. vol. i. 20. A certificated surgeon cannot recover charges for attending in a fever, unless he also have a certificate from the Apothecaries' Company, 4 Bing. 619. A physician cannot maintain an action for his fees, they being considered as honorary, 4 T. R. 317.—3 B. & C. 745. (He may sue in *Pennsyl-*

vania, 5 Serg. & Rawle, 412.) When a surgeon assumes the character of a physician he cannot sue, 2 Campb. N. P. 441. If the patient has been injured rather than benefited in his health, in consequence of any gross unskilfulness or carelessness on the part of the plaintiff, the latter cannot sue for his fees, see 3 Stark. Rep. 6. If the plaintiff has professed to cure the patient in a specified time by means of sovereign medicines, and has induced him to continue to employ him by false and fraudulent professions of skill and success, he cannot recover for medicines and attendance in the event of no benefit being derived, 2 Stark. 8. If, however, the plaintiff has acted improperly through the advice of a physician called in, he may, notwithstanding, recover, Peake C. N. P. 59.

FOR SERVICES IN
GENERAL.

sum meruit thereon, is as ante, 37, inserting as follows, "had before that time done, performed, and bestowed other his work and labor, care, diligence, jourmies, and attendance as a surgeon and apothecary, in and about the healing and curing of the said defendant and divers other persons of divers other diseases, disorders, and maladies under which they had before then respectively labored and languished, and also in and about the endeavoring to heal and cure the said defendant and divers other persons of divers other diseases and disorders under which they had before then also respectively labored and languished, and had also at the like special instance and request of the said defendant, before that time found and provided, administered, delivered, and applied divers other medicines, chattels, and necessary things on those last-mentioned occasions for the said defendant, he the said defendant undertook," &c. (Conclude as ante, 38.) — [Add counts for work and labor, and jourmies—for goods sold—money paid—account stated—and breach.]

As a surgeon,
apothecary, and
man-mid-wife (w).

The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, diligence, and attendance of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed as a surgeon, apothecary, and man-mid-wife, at the special instance and request of the said defendant, in and about the visiting and attending upon (x) a certain female then pregnant and laboring with child, and languishing under divers sicknesses and maladies, and in and about the delivering of the said female of the child with which she was then pregnant, and in and about the healing and curing of the said female of divers disorders, sicknesses, and maladies with which she was during the time aforesaid and afterwards afflicted, and for divers medicines, chattels, and other necessary things before that time found and provided, and used and applied by the said plaintiff in and about the healing and curing the said female of the said sicknesses, disorders, and maladies, at the like special instance and request of the said defendant; and being so indebted," &c. (Conclude as ante, 37). — The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time done, performed, and bestowed other his work and labor, care, and diligence as a surgeon, apothecary, and man-mid-wife, in and about the visiting and attending upon the said female then pregnant and laboring with child, and languishing under divers sicknesses and maladies, and in and about the delivering of the said female of the child with which she was then pregnant, and in and about the healing and curing of the said female of divers other disorders, sicknesses, and maladies with which she was, during the time last aforesaid, and afterwards afflicted, and had also at the like special instance and request of the said defendant, before that time found and provided, and used and applied divers other medicines and necessary things in and about the healing and curing of the said female of the said last-mentioned sicknesses, disorders, and maladies, he the said defendant undertook," &c. (Conclude as ante, 38.) — (Add one indebitatus count for work generally — one ditto for goods sold — money paid — account stated — and breach.)

(w) See forms, Plead. Assist 63.—Morg. 10.

(x) A misnomer seems immaterial, 2 Marsh. Rep. 159, but it may be advisable

not to mention the name, and it is as well not to state the female was the defendant's wife.

*The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, and diligence of the said *plaintiff, by the said plaintiff before that time done, performed, and bestowed as a nurse for the said defendant, and at his special instance and request, in and about the nursing, attending, and taking care of the said defendant and of divers persons, whilst he and they were sick and laboring under divers diseases, disorders and maladies, and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time done, performed, and bestowed other her work and labor, care, and diligence as a nurse, in and about the nursing, attending, and taking care of the said defendant and divers other persons, whilst they were sick and laboring under divers other diseases, disorders, and maladies, he the said defendant undertook," &c. Conclude as ante, 38.)*

FOR SERVICES IN GENERAL.

As a nurse

The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, diligence, and attendance of the said plaintiff as an undertaker of funerals, before that time done, performed, and bestowed by the said plaintiff and his servants, in and about the funeral of one E. F. (or a certain person deceased) on the retainer, and at the special instance and request of the said defendant, and for divers hearses, coaches, horses, materials, chattels, and other necessary things used and applied in and about the furnishing and conducting of the said funeral by the said plaintiff before that time found and provided for the said defendant, and at his like special instance and request; and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time done, performed, and bestowed, other his work and labor, care, diligence, and attendance, as an undertaker of funerals, by himself and his servants, in and about the funeral of the said E. F. (or of a certain other person deceased) and had also at the like special instance and request of the said defendant, before that time found and provided divers other hearses, coaches, horses, materials, chattels, and necessary things for the said defendant, and used and applied the same in and about the furnishing and conducting of the said last-mentioned funeral, he the said defendant, undertook," &c. (Conclude as ante, 38.) [Add one indebitatus count for work and labor generally—one ditto for goods sold—one for the use and hire of hearses, coaches, and horses, goods, &c.—money paid—account stated—and breach.]

As an undertaker of funerals (y)

**The indebitatus count is as ante, 37, inserting these words, "for the work and labor, care, diligence, and attendance of the said plaintiff by the said plaintiff, before that time done and performed, and bestowed, in preaching and celebrating divine service in the parochial church of — for the said defendant, and at his special instance and request, and being so indebted," &c. (Conclude as ante, 37.)—The quantum meruit thereon is as ante, 37, inserting as follows, "had before that time done and*

[*36] As a curate (z).

(y) See forms, 1 Rich. C. P. 362.—Lil. Ent. 27, 31. When husband liable for, 1 Hen. Bla. 90; when representatives liable for, Toller, 4th edit. 246, 247. An executor is even liable to pay for the funeral as far as he has assets for that purpose, although he

gave no orders for it, the funeral being suitable to the degree of the testator, see 3 You. & Jerv. 28. (As to expenses of funeral in general, 1 Chit. Gen. Prac. 514.)

(z) See Cowp. 437.—Doug. 142.—1 T. R. 399.—3 Wentw. 68.

FOR SERVICES IN GENERAL.

performed and bestowed other his work and labor, care, diligence, and attendance, in preaching and celebrating divine service in the parochial church of — aforesaid, for the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For composing paragraphs for newspapers.

The indebitatus count is as ante, 37, *inserting these words*, "for the work and labor, care and diligence of the said plaintiff by the said plaintiff, before that time done, performed, and bestowed, in and about the composing and writing of certain paragraphs for the said defendant, and at his special instance and request, and for the insertion and publication of such paragraphs by the said plaintiff, in a certain newspaper called the — for the said defendant, and at his like special instance and request, and being so indebted," &c. (*Conclude as ante*, 37.) — *The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time done, performed, and bestowed other his work and labor, care, and diligence, in and about the composing and writing certain other paragraphs for the said defendant, and had also at the like special instance and request of the said defendant, before that time inserted and published such last-mentioned paragraphs in the said newspaper called the — for the said defendant, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

For booking, receiving, and keeping passengers and parcels, and the use of a shop.

[*87]

The indebitatus count is as ante, 37, *inserting these words*, "for the work and labor, care, diligence, and attendance of the said plaintiff by the said plaintiff, before that time done, performed, and bestowed, in and about the taking an account of places for passengers, and the booking and keeping of parcels, to be carried and conveyed, in and by certain coaches of the said defendant, and for the use of a certain shop, in and parcel of a certain dwelling-house of the said plaintiff, before that time occupied and used by and with the *said passengers and parcels, by and with the sufferance and permission of the said plaintiff, and at the special instance and request of the said defendant, and being so indebted," &c. (*Conclude as ante*, 37.) — *The quantum meruit thereon is as ante*, 37, *inserting as follows*, "had before that time done, performed, and bestowed other his work and labor, care, diligence, and attendance, in and about the taking an account of places for divers other passengers, and the booking and keeping divers other parcels, to be carried and conveyed in and by certain other coaches of the said defendant, and had suffered and permitted a certain other shop of the said plaintiff to be occupied and used, and that the same had accordingly been occupied and used by and with the said last-mentioned passengers and parcels, he the said defendant undertook," &c. (*Conclude as ante*, 38.)

IV. RESPECTING MONIES.

For money lent (a).

The indebitatus count is as ante, 37, *inserting these words*, "for so much money by the said plaintiff before that time lent and advanced to

(a) See Lil. Ent. 29. — Plead. A. 1. — suffice, though the loan was made in foreign Rich. C. P. 119. — Morg. 6. — This form will coin, 1 Marsh. 33. 5 Taunt. 228. As to

the said defendant, at his special instance and request, and being so indebted," &c. (*Conclude as ante*, 37.)

RESPECT-
ING MO-
NIES.

The indebitatus count is as ante, 37, inserting these words, "for so much money by the said plaintiff before that time paid, laid out, and expended, to and for the use of the said defendant, at his like special instance and request. And being so indebted," &c. (*Conclude as ante*, 37.)

For money paid
(b).

The indebitatus count is as ante, 37, inserting these words, "for so much money by the said defendant before that time *had and received to and for the use of the said plaintiff. And being so indebted," &c. (*Conclude as ante*, 37.)

Money had and received
(c).
[*88]

The indebitatus count is as ante, 37, inserting these words, "for so much money before that time and then due and payable from the said defendant to the said plaintiff, for interest upon and for the forbearance of divers large sums of money before then [lent and advanced by the said plaintiff to the said defendant, at his special instance and request, and by him the said plaintiff forborne to the said defendant for divers long spaces of time before then elapsed, at the like special instance and request of the said defendant, and also for other money, before that time and then due and payable from the said defendant to the said plaintiff, for interest upon, and

For interest (d).

when this count lies, see fully, ante, vol. i. 304. For laws relating to contracts of loan, see 3 Chit. Com. Law, 309. Chit. jun. on Contr. 2 edit. 464 to 466.

(b) See Form, Plead. A. 1 Morg. 6—Lil. Ent. 31. 43—See fully, ante, vol. i. as to when this count lies, 304, 5; and see Chit. jun. Contr. 2 edit. 466 to 474.

(c) See Forms, Lil. Ent. 23, 24.—Plead. A. 2. 245. As to the application of this count, see fully, ante, vol. i. 305. Chit. jun. Contr. 2 edit. 474 to 503.

(d) 1 Ventr. 198.—1 Wentw. 196.—5 T. R. 533.—Palm. 291.—2 Rol. Rep. 240. As to when a special count for, is necessary, see ante. vol. i. 308. It is a general rule that the law does not *imply* a contract on the part of the debtor to pay interest on the sum he owes, although the payment of the principal or debt may have been frequently demanded.—1 Camp. 50. 2d Id. 420.—1 B. & P. 307. 4th Id. 472.—Chit. jun. on Contr. 195. But after a lapse of time and repeated demands, and wrongful withholding the debt, a jury may give interest as damages, see 3 Bingh. 353; see vide 9 B. & Cres. 380. When recoverable on bills, see Chit. on Bills, 7th ed. 420. 5 B. & A. 204. 40.—2 Chit. R. 234.—1 D. & R. 16.—Interest is not recoverable on a debt for goods sold, even on limited credit. (12 East, 419.—2 Campb. 429; but see 2 B. & P. 337.—3 Wils. 205.—2 Bla. Rep. 761. S. C. 1 H. Bla. 305.—1 Campb. 51.) but in some cases it is recoverable where the vendee neglects to give a bill in payment, 13 East, 98.—It is not recoverable for work and labor (1 H.

Bla. 305.—3 Wils. 205.—2 Bla. Rep. 761.—S. C. 1 Campb. 51); but damages in the nature of it might, under circumstances, be given, 9 Price, 134.—It is not recoverable for money had and received, lent, or on account stated (15 East, 223.—1 Rose, 399.—3 Campb. 496.—4 Taunt. 346); or for money paid, (3 Stark 132); unless there was a course of dealing allowing it, or some other implied or express contract to pay it, or unless the defendant made use of the money he received, and did not merely withhold it, (5 B. & A. 815.—3 Campb. 103.—1 B. & P. 306.—1 Campb. 50. 129. 2 Campb. 426.) Bankers and merchants, by custom, are allowed interest upon an account stated (see 15 East, 223.—4 Taunt. 298. 346.) Money awarded to be paid on a particular day carries interest from that day if duly demanded.—3 Camp. 468.—When recoverable on affirmance of judgment in error, 4 Taunt. 346.—2 J. B. Moore, 195, 206.—7 Taunt. 458, 592.—1 J. B. Moore, 322, 481.—8 Taunt. 245.—1 Jac. & Walk. 168. An auctioneer is not in general liable to pay interest on a sum deposited in his hands on a sale by auction.—8 Taunt. 45.—A bond conditioned for the payment of money, without naming any day, carries interest from the date, 7 T. R. 124.—15 East, 225; when interest stops, Chit. on Bills, 7th edit. 422; as to the amount of, see Id. 76, 83 to 89.—3 Chit. on Com. Law, 316; and see more fully, Chit. jun. on Contr. (2d edit. 503. 3 & 4 W. 4. c. 42. s. 28. 1 Chit. Gen. Pract. 498.)

RESPECT-
ING MO-
NEY.

for the forbearance of divers other large sums of money before then](e) due and owing from the said defendant to the said plaintiff, and by the said plaintiff forborne to the said defendant, for divers long spaces of time, before then elapsed, at the like special instance and request of the said defendant, and being so indebted, he the said defendant," &c. (*Conclude as ante*, 37.)

[*89]
For work,
goods sold
and on the
money
counts in
one count
(f) (1).

**The indebitatus count is as ante*, 37, *inserting these words*, "for the work and labor, care and diligence of the said plaintiff by the said plaintiff, before that time done, performed, and bestowed, in and about the business of the said defendant, and for the said defendant, and at his special instance and request, and also in the further sum of £—of like lawful money, for divers goods, wares and merchandize, by the said plaintiff before that time sold and delivered to the said defendant, and at his special instance and request and also in the further sum of £— of like lawful money, for money by the said plaintiff, before that time lent and advanced to and paid, laid out, and expended for the said defendant, and at his like special instance and request, and also in the further sum of £—of like lawful money, for other money by the said defendant, before that time had and received to and for the use of the said plaintiff, and being so indebted, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said several sums of money in this count mentioned, when he the said defendant should be thereunto afterwards requested."

On an
award
made by
an arbitra-
tor (g).

The indebitatus count is as ante, 37, *inserting these words*, "upon and by virtue of a certain award made by E. F. upon and by virtue of a certain submission before that time made by the said plaintiff and the said defendant to the award, order, and determination of the said E. F. of and concerning all matters in difference then depending between the said plaintiff and defendant, and upon and by virtue of which said reference, the said E. F. had then and there awarded that the said defendant should pay a certain sum of money, to wit, the said last mentioned sum of money to the said plaintiff, and being so indebted, he the said defendant, in consideration thereof," &c. (*Conclude as ante*, 37.)

[*90]
On an
award or
umpirage
(h).

**The indebitatus count is as ante*, 37, *inserting these words*, "upon and by virtue of a certain award or umpirage made by one E. F. upon and by virtue of a certain submission before that time made and entered into

(e) If brevity be desired leave out the words between brackets.

(f) This count is usually used immediately before the account stated, and breach. In order to avoid expense, it may frequently be advisable, especially against a prisoner, to adopt this count, which is recommended in 2 Saund. 122. a. n. 2, and is clearly sustainable, see Cro. Jac. 245.—Yelv. 175.—1 Brownl. Ent. 71.—2 Bl. Rep. 910. Any number of causes of action, to which the

indebitatus count is applicable, may be included in one count, and the plaintiff will succeed *pro tanto*, though he only prove one of such contracts, ante, vol. i. 301.

(g) This count is frequently added to the special count on an award, post, 241; see the notes there. (That the common count is sustainable see observation of Bayley, B. in *Crump v. Udnay*, 3 Tyr. 279.)

(h) See the note to the last count.

by the said plaintiff and the said defendant to the award, order, and determination of G. H. and I. K. of and concerning all matters in difference then depending between the said plaintiff and the said defendant, and thereby empowering the said G. H. and I. K. in case they should not agree in making such award, to appoint a third person to award, determine, and finally settle the said matters in difference, and whereupon the said G. H. and I. K. not agreeing in making the said award, and by virtue of the aforesaid power, by and with the consent and approbation of the said plaintiff and defendant, nominated and appointed the said E. F. as an umpire, to award, order, and finally determine of and concerning all matters in difference between the said plaintiff and the said defendant; and upon and by virtue," &c. (*Conclude as in the last precedent.*)

RESPECT-
ING NO-
TICES.

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff before that time due and owing, and then in arrear and unpaid, and upon such accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of £— of like lawful money, and being so found in arrear and indebted, he the said defendant undertook," &c. (*Conclude as ante, 37.*)

On an
account
stated (i).

Nevertheless the said defendant not regarding his said several promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff (although often requested so to do (l)) (or, "*although he the said defendant, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid was requested by the said plaintiff so to do,*" (m) ; but the said defendant to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, To *the damage of the said plaintiff of £—and therefore he brings his suit, &c.

Common
breach
(k).

[*91]

Pledges to prosecute { John Doe,
and
Richard Roe,

[Or, if in C. P. omit the Pledges.]

(i) See forms, Plead. A. 3, 4. Morg. 7. Of its utility and form in general, ante, vol. i. 308.

(k) See forms, Plead. A. 32, 3.—Rich. C. P. 119.—Morg. 8.—This breach, from the language of it, is obviously only applicable to counts on promises to *pay money*. If the declaration be at the suit of several, it does not seem necessary to aver, that the defendant did not pay *either* of the plaintiffs, 1

Saund. 235, n. 6. 1 Stra. 231. As to this common breach in general, see ante, vol. i. 300.

(l) This is termed the *licet sapius requisitus*, Com. Dig. Pleader, C. 70.

(m) Sometimes this special request is necessary, see Com. Dig. Pleader, C. 69, 70.—1 Saund. 34, n. 2.—See ante, vol. i. 287.

V. RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES, OR THE DEFENDANT IS SUED.

First.—Surviving Partners.

By a surviving partner, on promises to both partners (n).

The commencement is as in ordinary cases, see the forms, ante, 12 to 20. State the subject-maker of complaint thus, "For that whereas the said defendant in the life-time of one E. F. since deceased (o), to wit, on, &c. (v) at, &c. (venue) was indebted to the said plaintiff and the said E. F. in the sum of £— (p) of lawful money of Great Britain, for the work and labor, care, and diligence, of the said plaintiff and E. F. by the said plaintiff and E. F. before that time done, performed, and bestowed for the said defendant, and at his special instance and request. (*Any other debt, 'as for goods sold,' &c. is to be described in the same manner.*) And being so indebted, he the said defendant in consideration thereof, afterwards, and in the life-time of the said E. F. to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, undertook," &c. (*laying the promises to both the partners as ante, 37.*)—*The quantum meruit is as follows,* "and whereas also afterwards, and in the life-time of the said E. F. since deceased, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, in consideration that the said plaintiff and E. F. at the like special instance and request of the said defendant, had before that time done, &c. [*Here state the *subject-matter of the debt, and the promise to have been made to both the partners.*] And the said plaintiff avers, that he the said E. F. in his life-time, therefore reasonably deserved to have, &c. (*as ante, 38.*) whereof the said defendant afterwards, and in the life-time of the said E. F. to wit, on the day and year aforesaid, there had notice. [*Here insert the account stated, with both the partners, and the promise to them; and if the transaction be for goods sold, &c. or on the money counts, such counts are to be framed as above. State the breach thus.*] Nevertheless the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff and E. F. in the life-time of the said E. F. and the said plaintiff, since the death of the said E. F. in this behalf, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff and E. F. or either of them, (although often requested so to do; but he to do this hath hitherto wholly refused, and still doth refuse* to pay the same to the said plaintiff, To the damage of the said plaintiff of £— and therefore he brings his suit," &c.—Pledges &c. (*Omit pledges if the action be in C. P.*

Breach (g).

(n) See forms, Lil. Ent. 34.—Plead. A. 4. As to this count in general, see 2 Saund. 121, 122.—5 Esp. Rep. 32.—Vin. Ab. Partners, D.—3 T. R. 433.—5 T. R. 593.—Ante, vol. i. 11, 183.—The plaintiff must sue as a surviving partner, 4 B. & A. 374.—6 J. B. Moore, 332.—2 Stark. 356.—See 2 Marsh. 319.—6 Taunt. 597. S. C. Ante, vol. i. 11.—The survivor may include a demand due in his own right, ante, vol. i. 12, 183.

(o) It would be fatal in an affidavit, and untechnical in a declaration, merely to de-

scribe the party as a *late partner*, without showing his death. See 1 Har. & Wol. 108; but according to Underhill v. Hurney, 3 Dowl. 495, the omission of the words "*since deceased*," in a declaration is no ground of demurrer.

(v) It is usual to insert a day before the death of the deceased partner, but the precise day, whether before or after the death, is immaterial.

(p) Any sum enough to cover the real demand.

(g) See forms, Plead. A. 35.

If the debt be considerable, or the deceased partner has been dead six years ; or it may on any other account be advisable for the plaintiff to avail himself of a promise or acknowledgment to him since the death of his partner, insert, at the above asterisk, before the conclusion, the following counts. See 3 East, 409.

BY SURVIV-
ING
PARTNERS.

And whereas also the said defendant afterwards, and in the life-time of the said E. F. deceased. to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, was indebted to the said plaintiff and E. F. in the further sum of £—of like lawful money, for the work and labor, care, and diligence, of the said plaintiff and E. F. by them before that time done, performed, and bestowed for the said defendant, and at his special instance and request ; and also in the further sum of £—of like lawful money, for divers goods, merchandize and chattels, by the said plaintiff and E. F. before that time sold and delivered to the said defendant, *and at his like special instance and request ; and also in the further sum of £—of like lawful money, for money by the said plaintiff and the said E. F. before that time lent and advanced to, and paid, laid out, and expended for the said defendant, and at his like special instance and request ; and also in the further sum of £—of like lawful money for the money by the said defendant before that time had and received, to and for the use of the said plaintiff and the said E. F. And the said defendant being so indebted, and the said several sums of money in this count mentioned, being and remaining wholly due, unpaid and unsatisfied, he the said defendant in consideration thereof afterwards, and after the death of the said E. F. to wit, on, &c. (r) at, &c. (venue) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said several sums of money in this count mentioned, when he the said defendant should be thereunto afterwards requested.—[Add the account stated with the plaintiff of monies due to him only, and in the breach refer only to the counts in which the promises are stated to have been made to the plaintiff alone, and conclude as usual.] To the damage of the plaintiff of £—and therefore he brings his suit, &c.

[*93]

If the plaintiff declare in other counts, as he may (1 B. & A. 29. 2 Chit. Rep. 436. 3 T. R. 433. 5 T. R. 493. 1 Esp. Rep. 47. 2 T. R. 476. 6 T. R. 532.) for money due to him after the death of his partner, and on a contract merely with himself, insert those counts after the conclusion to the others, at the asterisk, or if the last set of counts be also inserted, introduce the following counts immediately before the last count stated.

Counts on
promises
for work,
&c. by the
plaintiff
only.

And whereas also the said defendant, to wit, on, &c. at, &c. was indebted to the said plaintiff, &c. [Proceed in the usual form at the suit of one plaintiff only, making the breach to these counts only, and not noticing the deceased parties.]

*[Commencement as usual as in forms, ante, 12 to 20.] “For that whereas the said defendant and one E. F. in his life-time, now deceased,

[*94]
Against a
surviving
partner for
goods sold
&c. (s).

(r) It is usual to insert a day after the death of the deceased partner, but any day before the title of declaration will do.

(s) See forms, 2 Rich. C. P. 92.—Lil.

AGAINST A
SURVIVING
PARTNER.

Breach.

and whom the said defendant hath survived, on, &c. (t) at, &c. were indebted to the said plaintiff for the work and labor, care, and diligence, of the said plaintiff by the said plaintiff before that time done, performed, and bestowed, for the said defendant and E. F. at their special instance and request; and being so indebted, they the said defendant, and E. F. in consideration thereof, afterwards, and in the life-time of the said E. F. to wit, on the day and year aforesaid, at, &c. aforesaid, undertook," &c. (as ante, 37.)—*Quantum meruit as follows*: "And whereas also afterwards, and in the life-time of the said E. F. to wit, on the day and year aforesaid, at, &c. aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant and E. F. had before that time done, performed, and bestowed other his work and labor for the said defendant and E. F. they the said defendant and E. F. undertook, and then and there faithfully promised the said plaintiff to pay him so much money as he therefore reasonably deserved to have of the said defendant and E. F.; and the said plaintiff avers, that he therefore reasonably deserved to have of the said defendant and E. F. the further sum of £—whereof the said defendant and E. F. afterwards, and in the life-time of the said E. F. on the day and year aforesaid, there had notice. Nevertheless the said defendant and E. F. in the life-time of the said E. F. and the said defendant, since the death of the said E. F. not regarding the said several promises so by them made as aforesaid, but contriving to deceive and defraud the said plaintiff, have not, nor hath either of them as yet paid the said several sums of money, or any or either of them, or any part thereof to the said plaintiff (although often requested so to do). But to pay the same or any part thereof, to the said plaintiff, the said defendant and E. F. in the life-time of the said E. F. wholly refused, and the said defendant hath ever since the death of the said E. F. hitherto wholly refused, and still refuses so to do." [See observations, ante, 92. It may be advisable here to insert the following counts on promises by the surviving partner, which may be joined (u).]

Counts on
promises
by defend-
ant after
the death
of his
partner.

[*95]

And whereas also the said defendant and E. F. afterwards, and in the life-time of the said E. F. now deceased, to wit, on the day and year, aforesaid, at, &c. (venue) aforesaid, were indebted to the said plaintiff in the further sum *of £— of like lawful money, for the work and labor, care, and diligence, of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed, in and about the business of the said defendant and E. F. and for the said defendant and E. F. and at their special instance and request; and also in the further sum of £— of like lawful money, for divers goods, wares, and merchandize, by the said plaintiff before that time sold and delivered to the said defendant and E. F. and at their like special instance and request; and also in the further sum of £— of like lawful money, for money by the said plaintiff before that time lent and advanced to, and paid, laid out, and expended for the said defendant and E. F. and at their like special instance and request; and

Ent. 34. against one partner after outlawry of the other, ib. 44.—Ante, 8.—As to these counts, Comb. 383.—Vin. Ab. Partners, D.—2 T. R. 478.—6 T. R. 363.—4 Campb. 34.—The defendant need not be declared against as surviving partner, 1 B. & A. 29.—2 Chit. Rep. 406. [Johns. Ca. 406.]

(t) It is usual to insert a day before the death of the deceased partner, but any day before the title of the declaration will do.

(u) 5 T. R. 493.—1 Esp. Rep. 47.—2 T. R. 476.—6 T. R. 512.—1 B. & A. 29.

also in the further sum of £—of like lawful money, for other money, by the said defendant and E. F. before that time had and received to and for the use of the said plaintiff, and being so indebted, and the said several sums of money in this count mentioned being and remaining wholly due and owing, unpaid and unsatisfied, he the said defendant in consideration thereof afterwards, and after the death of the said E. F. to wit, on, (v) &c. at &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in this count mentioned when he the said defendant should be thereunto afterwards requested. (*Add an account stated, and breach.*)

AGAINST A
SURVIVING
PARTNER.

[*If there be any cause of action arising against defendant otherwise than as surviving partner, insert it, not noticing the deceased, and conclude with the account stated, and breach.*]

Secondly,—Husband and Wife.

BY HUSBAND AND
WIFE.

— (to wit.) A. B. and C. his wife, complain of D. E. being, &c. (*or if in C. P. or Exchequer, state the commencement as in forms, ante, 17, 20.*) For that whereas the said defendant, whilst the said C. was sole and unmarried, to wit, on, &c. (x) at, &c. was indebted to the said C. in the sum of £—of lawful &c. for the work and labor of the said C. by the said C. before that time done, performed, and bestowed for the said defendant, and at his special instance and request (*or, for divers goods, wares, and merchandize, by the said C. before that time sold and delivered to the said defendant, &c.*) and being so indebted, he the said defendant in consideration thereof afterwards, and whilst the said C. was sole and unmarried, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said C. to pay her the sum of money when he the said defendant should be thereunto afterwards requested.—*The quantum meruit thereon is as follows:*—And whereas also afterwards, and whilst the said C. was sole and unmarried, to wit, on the day and year aforesaid, at, &c. aforesaid, in consideration that the said C. at the like special instance and request of the said defendant, had before that time done, performed, and bestowed other her work and labor for the said defendant, he the said defendant undertook, and then and there faithfully promised the said C. to pay her so much money, as she therefore reasonably deserved to have of the said defendant; and the said plaintiffs aver that the said C. whilst she was sole and unmarried, therefore reasonably deserved to have of the said defendant the sum of, &c. whereof, &c. (*As ante, 38. Add the money counts, and the account stated with the feme before marriage.*) Yet the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said C. whilst she was sole and unmarried, and the said plaintiffs since

By husband and wife for work, &c. by wife before marriage (w).

Breach.

(v) See ante, n. (a), p. 93.

(w) Whenever the wife joins, her interest must appear, 2 Bla. Rep. 1236. How to sue, and when husband and wife may join, see ante, vol. i. See a form at the suit of

Baron and Feme, sole trader, 1 Wentw. 381, ante, 22.

(z) It is usual to insert a day before the marriage, but any day before the title of the declaration will suffice.

DECLARATIONS IN ASSUMPSIT.

INTER-
MARRIAGE
AND
WIFE.

intermarriage, in this behalf, hath not as yet paid the said sums of money, *or any part thereof, to the said plaintiffs (y), or either of them (although often requested so to do). But he to do this hath hitherto wholly refused, and still doth refuse to pay the same, or any part thereof, to the said plaintiffs, To the damage of the said plaintiffs of £—and therefore they bring their suit, &c.

Pledges, &c. (*Omit pledges if in C. P.*)

Against
husband
and wife
for work,
&c. done
before
marriage
(z).

— (to wit.) A. B. complains of C. D. and E. his wife being, &c. (*or if in C. P. or Exchequer, state the commencement accordingly.*) For that whereas the said E. whilst she was sole and unmarried, to wit, on, &c. (a) at, &c. was indebted to the said plaintiff for the said work and labor, &c. before that time done, &c. by the said plaintiff, for the said E. and at her (b) special instance and request, and being so indebted, she the said E. in consideration thereof afterwards, and whilst she the said E. was sole and unmarried, to wit, on the day and year aforesaid, at &c. aforesaid, undertook, &c. *as ante*, 37, *stating the promise to have been by the wife only. The quantum meruit thereon is as follows:—*And whereas also afterwards, and whilst the said E. was sole and unmarried, to wit, on the day and year aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said E. had before that time done, performed, &c. for the said E. she the said E. undertook, &c. and the said plaintiff avers that he therefore reasonably deserved to have of the said E. whilst she was sole and unmarried, the further sum of &c. whereof the said E. afterwards, and whilst she was sole and unmarried, to wit, on the day and year aforesaid, there had notice. (*Add monies and account stated by the feme before marriage.*) Yet the said E. whilst she was sole and unmarried, and the said defendants since their intermarriage, not regarding the said several promises and undertakings of the said E. but contriving to deceive and defraud the said plaintiff in this behalf, have not nor hath either of them as yet paid the said several sums of money, [*97] or any of them, or any part thereof, to the said *plaintiff, (although often requested so to do) but to pay the same or any part thereof to the said plaintiff, the said E. whilst she was sole and unmarried, wholly refused, and the said defendants have, ever since their intermarriage, hitherto wholly refused, and still doth refuse so to do, to the damage of the said plaintiff," &c. (*as usual.*)

Breach.

BY AS-
SIGNEES.

Thirdly,—*Assignees of Bankrupts or Insolvents.*

By assign-
ees of a
bankrupt
for work,
&c. before
the bank-
ruptcy(c).

Commencement as ante, 33, and then proceed thus. For that whereas

(y) As to the language of the breach, see 3 Wils. 208.—1 Ld. Raym. 284.—1 Vent. 119.—2 Rich. C. P. 293.

(z) See form, Ld. Ent. 27. No count on a promise by the feme, or by the husband during the coverture should be added. 1 Taunt. 212.—Palm. 313.

(a) See ante, n. (b).

(b) This is a material averment, 3 J. B. Moore, 303.—1 J. B. Moore, 126.

(c) See form, Plead, A. 44. This form of declaring, without setting out the petitioning creditor's debt, commission, &c. is settled to be good. Lutw. 274. 277.—2 Ld. Raym. 1548.—Carth. 29. When an assignee has been removed, the last assignee may sue as assignee generally, without naming the former assignee, 6 G. 4. c. 16. s. 67.—10 East, 61.—When assignees should declare without naming themselves assignees, see

the said defendant, on, &c. (d) at, &c. was indebted to the said E. F. (e) *(the bankrupt)* before he became bankrupt, in the sum of £— (f) of lawful money of Great Britain, for the work and labor, care, and diligence, of the said E. F. by the said E. F. before that time done, performed, and bestowed for the said defendant, and at his special instance and request, and being so indebted, he the said defendant, in consideration thereof, afterwards, and before the said E. F. became bankrupt, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, &c. *(Conclude as ante, 37, stating the promise to have been to the bankrupt.)* —**The quantum meruit is as follows:—*And whereas also, afterwards, and before the said E. F. became bankrupt, to wit, on the day and year aforesaid, at, &c. *(venue)* aforesaid, in consideration that the said E. F. at the like special instance and request of the said defendant, had before that time done, performed, &c. *(stating the promise to have been to the bankrupt.)* And the said plaintiffs aver that the said E. F. before he became bankrupt, therefore reasonably deserved to have, &c. whereof the said defendants afterwards, and before the said E. F. became a bankrupt, to wit, on the day and year aforesaid, at, &c. aforesaid, had notice. *(Add other counts, according to the claim in dispute, and an account stated, and state a breach thus:—)* Yet the said defendant, not regarding his promises and undertakings, but contriving to deceive and defraud the said E. F. before he became bankrupt, and the said plaintiffs, as assignees as aforesaid, since the said E. F. became bankrupt, in this behalf, hath not as yet paid the several sums of money or any or either of them, or any part thereof, to the said E. F. before he became bankrupt, or to the said plaintiffs, or either of them, since the said E. F. became bankrupt (although often requested so to do.) But he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiffs.* To the damage of the said plaintiffs, as assignees as aforesaid, of £——— and therefore they bring their suit, &c.

BY AS-
SIGNERS
OF BANK-
RUPT.

[*98]

Breach.

Pledges, &c. *(Omit pledges if in C. P.)*

As to the joinder of different counts in an action by assignees, see 3 T. R. 433, 779; ante, vol. i. 184. When there has been any promise or acknowledgment to the assignees, or cause of action accruing after the act of bankruptcy, it is expedient, at the asterisk, to add the following counts:

*And whereas also the said defendant, before the said E. F. *(the bankrupt)* became bankrupt, to wit, on, &c. (h) at, &c. was indebted to the

[*99]
The like
on promis-
es to the
assignees
after the
bankrupt-
cy (g).

Cowp. 569, ante, vol. i. 16. As to joinder of different demands, see 3 T. R. 433, 779, ante, vol. i. 16, 184. The assignees of two persons may describe themselves as assignees of one for a separate demand, 3 Campb. 399, and as to how assignees should describe themselves, see ante, vol. i. 16. Where the plaintiffs sue as assignees of several bankrupts, for money had and received, and some of the money was received before the bankruptcy of either of the parties, and some after the bankruptcy of one, and before that of the others, the counts must be framed accordingly, 3 B. & P. 465; and see a form of commencement of declaration by assignees of several bankrupts, under seve-

ral commissions, to recover a debt due to the joint estate, ante, 33.

(d) It is usual to insert a day before the bankruptcy, but any day before the title of the declaration will do.

(e) The bankrupt might be described throughout under the terms of "*the said bankrupt*," or if there be several, "*the said bankrupts*," and in the latter case, for brevity sake, it would be desirable.

(f) Any sum enough to cover the real claim.

(g) When not necessary, Cowp. 569. Wightw. 65.

(h) It is usual to insert a day before the bankruptcy, but any day before the title of the declaration will suffice.

BY AS-
SIGNEES
OF BANK-
RUPT.

Account
stated.

[*100]

Breach.

said E. F. in the further sum of £—— of like lawful money for the work and labor, care and diligence of the said E. F. by him before that time done, performed, and bestowed, in and about the business of the said defendant, and for the said defendant, and at his special instance and request, and also in the further sum of £—— of like lawful money, for divers goods, wares, and merchandize, by the said E. F. before that time sold and delivered to the said defendant, and at his special instance and request, and also in the further sum of £—— of like lawful money, for money by the said E. F. before that time lent and advanced to, and paid, laid out and expended for the said defendant, and at his like special instance and request, and also in the further sum of £—— of like lawful money, for other money, by the said defendant before that time had and received, to and for the use of the said E. F. and being so indebted, and the said several sums of money in this count mentioned, being and remaining wholly due and unpaid, he the said defendant, in consideration thereof afterwards, and after the said E. F. became bankrupt, to wit, on, &c. (i) at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiffs, as (k) assignees as aforesaid, to pay them the said several sums of money, in this count mentioned, when he the said defendant should be thereunto afterwards requested (k). — And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, accounted with the said plaintiffs, as (k) assignees as aforesaid, of and concerning divers other sums of money from the said defendant to the said plaintiffs, as (k) assignees as aforesaid, before that time *due and owing and then in arrear and unpaid, and upon that accounting the said defendant was then and there found to be in arrear, and indebted to the said plaintiffs as (l) assignees as aforesaid, in the further sum of £—— of like lawful money, and being so found in arrear and indebted, and the said last-mentioned sum of money being and remaining wholly unpaid and unsatisfied, he the said defendant, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiffs, as (l) assignees as aforesaid, to pay them the said sum of money last-mentioned, whenever afterwards he the said defendant should be thereunto requested. Yet the said defendant, not regarding his said several (three) (n) last-mentioned promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiffs, as assignees as aforesaid in this respect, hath not as yet paid the several sums of money in the last (three) (n) counts mentioned, or either of them, or any part thereof, to the said plaintiffs (although often requested so to do.) But the said defendant, to pay the same or any part thereof hath hitherto altogether refused, and still doth refuse, To the damage of

(i) It is usual to insert a day after the bankruptcy, but any day before the title of the declaration will suffice.

(k) See forms, Lil. Ent. 42.—Plead. A. 311. If the assignees have in that character sold goods to the defendant, or he has, since the bankruptcy, received money for their use, here add counts for goods sold by them as assignees, or for money had and received to their use as assignees, as in form, post, 100; as to the propriety of which counts, see 2 Show. 250.—6 East, 405.—It is now

not unusual to declare, stating that the defendant being indebted to the plaintiffs, as assignees, for goods sold, &c. by the bankrupt, the defendant promised the plaintiffs, as assignees, to pay them, without stating any promise to the bankrupt, as in the above form.

(l) As to the materiality of the word *as*, see 5 East, 150.

(n) According to the number of counts in which the promises are laid to the assignees

the said plaintiffs, as assignees as aforesaid, of £——and therefore they bring their suit, &c.

Pledges, &c. (*Omit pledges if in C. P.*)

BY ASSIGNEES OF BANKRUPT.

And whereas also the said defendant, heretofore and after the said E. F. became a bankrupt, to wit, on &c. (p) at, &c. was indebted to the said plaintiff, as assignee as aforesaid, in the sum of £—— for divers goods and chattels by the said plaintiff as assignee as aforesaid, before then sold and delivered to the said defendant, and at his request—or for money by the said defendant before then had and received, to and for the use of the said plaintiff, as assignee as aforesaid, (*inserting such counts in this way as may be applicable to the claim arising after the bankruptcy, and insert an account stated and breach to the plaintiff, as assignee, as ante 99.*)

The like on causes of action arising after the bankruptcy (o).

If the plaintiff be a surviving assignee, call him so throughout, and conclude as follows: — Yet the said defendant, not regarding, &c. but contriving, &c. to deceive and defraud the said E. F. before he became bankrupt and the said plaintiff, and one B. in his life-time now deceased, and whom the said plaintiff hath survived (which said plaintiff *and B. in the life-time of the said B. were assignees of the estate and effects of the said E. F. according to the force, form, and effect of the several statutes concerning bankrupts) after the said E. F. became bankrupt, and the said plaintiff, as surviving assignee as aforesaid, since the death of the said B. hath not as yet paid to them, or any or either of them, the said several sums of money, &c. (*as in the precedent, ante, page 97.*)

By a surviving assignee.

[*101]

Commencement as ante, 33, third form. For that whereas the said defendant on, &c. (r) at, &c. was indebted to the said A. B. and E. F. before the said E. F. became bankrupt, in the sum of £—— of lawful, &c. for the work, and labour, &c. by the said A. B. and E. F. before that time done, &c. and being so indebted, he the said defendant, in consideration thereof afterwards, and before the said E. F. became bankrupt, to wit, on the day and year aforesaid, at &c. [*laying the promise to both the partners, and so with other counts.*] Yet the said defendant, not regarding his said promise and undertaking, but contriving to deceive and defraud the said A. B. and E. F. before the said E. F. became bankrupt, and the said A. B. and C. D. as assignee as aforesaid, after the said E. F. became bankrupt in this behalf, hath not as yet paid to them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof (although often requested so to do.) But he to do this hath hitherto wholly refused and still refuses to pay the same or any part thereof to the said plaintiffs, To the damage of the said A. B. and of the said C. D. as assignee as aforesaid, of £—— and therefore they bring their suit, &c.

By one partner and the assignee of another, being bankrupt for work and labor, &c. before the bankruptcy (g).
Breach.

Commencement as ante, 33. For that whereas the said defendant here-

By the assignee of

(o) As to the propriety of these counts, see ante, vol. i. 15, 184.—2 Show. 250.—6 East, 405.

(p) Any day before the title of the declaration.

(q) See 12 Mod. 447.—8 T. R. 140.—10 East, 418.

(r) It is usual to insert a day before the bankruptcy, but any day before the title of the declaration will do.

an insolvent debtor or on promises to insolvent (s)

Breach.

tofore and before the said E. F. (*the insolvent*) subscribed his petition for his discharge from imprisonment, as such insolvent debtor as aforesaid, according to the provisions of the said statute, to wit, on, &c. (t) at, &c. was indebted to the said E. F. in the sum of £—— of lawful money of Great Britain, for &c. (*here state the subject-matter of the debt arising to the insolvent, as usual,*) and being so indebted, he the said defendant afterwards, and before the said E. F. subscribed his said petition, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said E. F. &c. (*so continuing as usual laying the promises to the insolvent, and after the usual accounts stated with the insolvent, state a breach, thus:*)—Yet the said defendant, not regarding his said promises and undertakings so by him made as aforesaid, but contriving to deceive and defraud the said E. F. before he subscribed his said petition, and the said plaintiff, as assignee as aforesaid, after the said E. F. subscribed his said petition in this respect, hath not yet paid the several sums of money, or any of them, or any part thereof, to the said E. F. or the said plaintiff or either of them, although often requested so to do. But he so to do hath hitherto wholly refused, and still refuses to pay the same to the said plaintiff,* To the damage of the said plaintiff, as assignee as aforesaid, of £——, and therefore he brings his suit, &c.

The like on causes of action arising to the assignee after the insolvent's subscribing his petition.

Breach.

And whereas also the said defendant heretofore and after the said E. F. subscribed his petition for his relief and discharge from imprisonment, as such insolvent debtor as aforesaid, according to the provisions of the said statute, to wit, on, &c. (u) at &c. was indebted to the said plaintiff, as assignee aforesaid, in the sum of £—— of like lawful money for divers goods and chattels by the said plaintiff, as assignee as aforesaid, before then sold and delivered to the said defendant, and at his request, [*or, for money by the said defendant before then had and received, to and for the use of the said plaintiff, as assignee as aforesaid, inserting such other counts in this manner as may be necessary to cover the plaintiff's claim and add an account stated, and breach, thus:*] And whereas also the said defendant, heretofore, and after the said E. F. subscribed his said petition, to wit, on the day and year last aforesaid, at &c. aforesaid, accounted with the said plaintiff, as assignee as aforesaid, of and concerning divers sums of money before then due and owing to the said plaintiff, as assignee as aforesaid, and upon that accounting the said defendant was then and there found in arrear and indebted to the said plaintiff, as assignee as aforesaid, in the sum of £—— and being so found in arrear and indebted, he the said defendant, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff, as assignee as aforesaid, to pay him the said last-mentioned sum of money when he the said defendant should be thereunto afterwards requested. Yet the said defendant, not regarding his said last-mentioned (*two*) promises and undertakings, so by him made as aforesaid, but contriving to deceive and defraud the said plaintiff, as assignee as aforesaid, in this respect, hath not as yet paid the said plaintiff the said

(s) The act now in force relative to insolvents, is the 7 Geo. 4. c. 57. As to actions, by, ante, vol. i. 17, 61. See a form at the suit of the provisional assignee, 6 Bingh. 486.

(t) It is usual to insert a day before the petition, but any day before the title of the declaration will do.

(u) Any day before the title of the declaration.

last-mentioned (*two*) sums of money, any part thereof, although often requested so to do, but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse, To the damage of the said plaintiff, as assignee as aforesaid, of £— and therefore he brings his suit, &c.

BY ASSIGNEE OF INSOLVENT DEBTORS.
Breach.

Fourthly,—Executors.

BY EXECUTORS.

*Commencement as ante, 34, then proceed thus:—*For that whereas the said defendant heretofore and in his life-time of the said E. F. on; &c. (x) at, &c. was indebted to the said E. F. in the sum of £— of lawful money of Great Britain, for the work and labor of the said E. F. by him, before that time done, &c. and being so indebted, he the said defendant, in consideration thereof, afterwards, and in the life-time of the said E. F. to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said E. F. to pay him the said sum of money, when he the said defendant should be thereunto afterwards requested. *The quantum meruit is as follows:—*“And whereas also afterwards and in the life-time of the said E. F. to wit, on the day and year aforesaid, at, &c. aforesaid, in consideration that the said E. F. had before that time done, &c. he the said defendant undertook, &c. And the said plaintiff avers, that the said E. F. in his life-time, therefore reasonably *deserved to have, &c. whereof the said defendant, in the life-time of the said E. F. to wit, on the day and year aforesaid, to wit, at, &c. had notice. Yet the said defendant, not regarding his said several promises and undertakings, but contriving to deceive and defraud the said E. F. in his life-time, and the said plaintiff, as executor as aforesaid, since the death of the said E. F. in this behalf, hath not as yet paid the said several sums of money, or any or either of them or any part thereof to the said E. F. in his life-time, or to the said plaintiff since the death of the said E. F. (although often requested so to do;) but he to do this hath wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiff,* To the damage of the said plaintiff, as executor as aforesaid (1), £— and therefore he brings his suit, &c. And the said plaintiff brings into court here the letters testamentary of the said E. F. deceased, whereby it fully appears to the said court here, that the said plaintiff is executor of

By an executor for work, &c. on promises to testator (w).

[*102]

Breach.

Profert. (y).

(w) See Forms, Lil. Ent. 50, 83.—Plead. A. 9. As to the joinder of demands by, and rights of executors, &c. to sue, see ante, vol. i. 12.

(z) Some day just before the death of the testator, but the precise time is not material, Cro. Car. 130, and any day before the title of the declaration will suffice.

(y) See other Forms of Profert, ante, 35. See Form, 2 Saund. 209 a, it concludes, “administrators,” instead of “executors there-

of,” &c. but either way will suffice. If the profert be omitted in a declaration of *sci. fa.* the defendant may demur specially, see 4 & 5 Ann. c. 16. s. 1.—2 Saund. 9, n. 12.—Com. Dig. Plead. O. 3, 17.—2 Dougl. 1: so in the other cases. The pledges are added after the profert, and if, as sometimes happens in Common pleas, a profert of a deed be stated at the end of a declaration, the profert of the letters testamentary follows it.

(1) The words *as executor as aforesaid*, are unnecessary. 5 Binney, 16, 21.

BY EXECUTORS. the said last will and testament of the said E. F. deceased, and hath the execution thereof, &c.

Pledges, &c. (*if in C. P. omit pledges.*)

Counts on promises to the plaintiff as executor (z).

[*103]

And whereas also, the said defendant afterwards, and in the life-time of the said E. F. deceased, to wit, on the day *and year aforesaid, at &c. aforesaid, was indebted to the said E. F. in the further sum of £— of like lawful money, for the work and labor, care and diligence, of the said E. F. by the said E. F. before that time done, performed, and bestowed, in and about the business of the said defendant, and for the said defendant, and at his special instance and request, and also in the further sum of £— of like lawful money, for divers goods, wares, and merchandize, by the said E. F. before that time sold and delivered to the said defendant, and at his like special instance and request, and also in the further sum of £— of like lawful money, for money by the said E. F. before that time lent and advanced to, and paid, laid out, and expended for the said defendant, and at his like special instance and request, and also in the further sum of £— of like lawful money, for other money by the said defendant before that time had and received, to and for the use of the said E. F.— And the said defendant, being so indebted, and the said several sums of money being and remaining wholly due and owing, unpaid, and unsatisfied, he the said defendant, in consideration thereof, afterwards, and after the death of the said E. F. to wit, on, &c. (a) at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff, *as* executor as aforesaid, (b), to pay him the said sum of money in this count mentioned, when he the said defendant should be thereunto afterwards requested (c).

Account stated (d).

[*104]

And whereas also the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, accounted with the said plaintiff *as* (e) executor as aforesaid, of and concerning divers other sums of money from the said defendant to the said plaintiff, *as* executor as *aforesaid (f),

(z) These counts are to be inserted at the arterisk in the last precedent; they are proper whenever, on account of the Statute of Limitations, &c. it may be expedient to rely on any promise or acknowledgment since the death of the testator. See 3 East, 409.—6 Taunt. 455.—Willes, 29. [5 Binn. 573.] But unless there be some substantive promise or cause of action, arising to the plaintiff after the death of his testator, it is best not to insert them, as they in all cases render plaintiff liable to costs if he do not succeed, and which he would not otherwise be liable to. See 9 B. & Cress. 667. and K. B. June, 1830, Tidd, 9th edit. 978. 1 Baro. & Adolph. 6. In support of these counts, the plaintiff should, on the trial, produce the probate; and even under the general issue it should seem, that as to these counts the inadequacy of stamp would constitute no objection 2 M. & S. 553—2 Saund. 47 k. 68 f. g. 117 d. 208. The 3 & 4 W. 4. c. 42. s. 31, however, now subjects executors and administrators, when plaintiffs, to costs, unless the court or judge otherwise directs, without regard to the form of declaration; and see 1 Hodges' Rep. C. P. 1; 10 Bing.

563; 1 Adol. & El. 338; see fully Chitt. Gen. Prac. 2d edit. 530

(a) It is usual to insert a day after the death of the testator, but any day before the title of the declaration will do.

(b) The words "*as* executor," are here omitted in 2 Saund. 208, but such omission is bad; see 5 East, 150. (See 5 Binn. 16. 21.)

(c) If the plaintiff, in the character of executor, has sold goods to the defendant, or paid money for him, here add counts for goods sold &c. by the plaintiff *as* executor. 6 East, 415—3 East, 104. And if the defendant has received money since the death of testator, add a count for money had and received, to the plaintiff's use *as* executor.

(d) See form, Lil. Ent. 84. This count may be joined with the count for goods sold by a testator. 1 Taunt. 322.—6 East, 406, 403—5 East, 154.

(e) As to this word, see 5 East, 150. 2 Saund. 208.

(f) In 8 J. B. Mo. 103, it seems to have been considered, that if, instead of those words, "*to the said plaintiff as executor, &c.*" the averment was, "*to the said E. F.*"

before that time due and owing, and then in arrear and unpaid; and upon that accounting the said defendant was then and there found to be in arrear, and indebted to the said plaintiff, *as* executor as aforesaid, in the further sum of £—of like lawful money; and being so found in arrear and indebted, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff, *as* executor as aforesaid, to pay him the said sum of money last-mentioned, whenever afterwards he the said defendant should be thereunto requested. Yet the said defendant, not regarding his said several *three* (*h*) last-mentioned promises and undertakings, so by him in manner and form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff, *as* executor as aforesaid, in this respect, hath not as yet paid the several sums of money in the said (*three*) last-mentioned counts specified, or any or either of them or any part thereof, to the said plaintiff, (although often requested so to do.) But the said defendant, to pay the same, or any part thereof, hath hitherto altogether refused, and still doth refuse. To the damage, &c. *as ante* page 102, adding *profert*.

BY EXECUTORS.

Breach. (g).

[*In action at the suit of a surviving executor, describe him accordingly in the beginning, as* "plaintiff, surviving executor of the last will and testament of E. F. deceased, complains," &c. (*or, if in C. P. or Exchequer, state the commencement accordingly.*)—*State the breach thus* :]— Yet the said defendant, not regarding his promises and undertakings, but contriving to deceive and defraud the said E. F. in his life-time, and the said plaintiff and one G. H. in his life-time now deceased, and whom the said plaintiff hath survived, (which said plaintiff and G. H. in the life-time of the said *G. H. were executors of the last will and testament of the said E. F. deceased,) after the death of the said E. F. and the said plaintiff, *as* surviving executor as aforesaid, since the death of the said G. H. in this behalf; hath not as yet paid to them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof, (although often requested so to do,) but he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiff, surviving executor as aforesaid (*k*), to the damage of the said plaintiff, *as* surviving executor as aforesaid, of £—and therefore he brings his suit, &c. And he brings into court here the letters testamentary of the said E. F. deceased, whereby it fully appears to the said court here, that the said plaintiff, and G. H. in the life-time of the said G. H. were executors of the last will and testament of the said E. F. deceased; with this, that the said plaintiff will verify that the said G. H. is deceased, and that he the said plaintiff hath thereby become and is the surviving ex-

By a surviving executor (i).

Breach.

[*105]

Special profert and verification.

in his life-time," the plaintiff would not, on account or otherwise, be subject by such a count to costs; but this was held otherwise in *K. B. June, 1830. 1 Barn. & Adol. 6. 803.*

(g) See Form, Plead. A. 33.

(k) This depends on the number of counts in which the promises are laid to the executor.

(i) See Form, Lil. Ent. 83; and see a

form by the executor of a surviving executor against an executor; Co. Ent. 1.

(k) It may sometimes be advisable to add counts on promises to the plaintiff *as* executor, as in the last precedent; but observe the note, ante, 104, and take care not to add such counts unless there has been some substantive promise or cause of action arising to the executor.

BY EXECUTORS. executor of the last will and testament of the said E. F. deceased, and hath the execution thereof, &c.

Pledges, &c. (*Omit the Pledges if in C. P.*)

By husband and wife executrix, before marriage.

Breach.

— (to wit.) A. B. and C. his wife, (which said C. is executrix of the last will and testament of D. deceased,) complain of E. F. being, &c. (*or if in C. P. or Exchequer, state the commencement accordingly.*) For that whereas the said defendant, on, &c. at, &c. was indebted, &c. [*as in the common case at the suit of an executor, as ante, 101.*] Yet the said defendant not regarding his said promises and undertaking, but contriving to deceive and defraud the said D. in his life-time, and the said C. as executrix as aforesaid, after the death of the said D. and whilst she was sole and unmarried, and the said A. B. and C. his wife, as executrix as aforesaid, since their intermarriage, in this behalf, hath not as yet paid to them, or any or either of them, the said several sums of money, or any part thereof, (although often requested so to do.) But he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiffs, or to either of them, To the damage of the said A. B. and C. his wife, as executrix as aforesaid, of — and therefore they bring their suit.—[*Add profert and pledges, as ante, 102.*]

By husband and wife executrix after marriage.

[*106]

[*As in the last precedent to the conclusion, which is as follows:*]—Yet the said E. F. not regarding, &c. but contriving, &c. to deceive and defraud the said D. in his life-time, and the said A. B. and C. his wife, as executrix as aforesaid, [*if there be another executor, say, “and the said G. and the said A. B. and C. his wife, as executor and executrix *as aforesaid,”*] since the death of the said D. in this behalf, hath not as yet paid to them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof, (although often requested so to do.) But he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiffs or to either of them, To the damage of the said, &c.—[*As in the last precedent, adding profert.*]

AGAINST EXECUTORS.

Ellenborough.

Michaelmas Term, 1 Will. 4.

Against an executor for work, &c. on promises by testator (l).

— (to wit.) A. B. complains of C. D. executor of the last will and testament of E. F. deceased, being in the custody, &c. (*if the action be in C. P. begin the form as directed in note (m), infra.*) For that where-

(l) See in general as to how a debt due to the wife in the representative character is to be stated, 4 Mod. 376. Com. Dig. Pleader, 2 A. 1.

(m) See a form, 2 Rich. C. P. 83, 94, and 1 Saund. 112, n. 1, 2. It does not seem necessary to declare as surviving executor. 2 Stark. 356.—4 B. and A. 374.—6 J. B. Moore, 332.—The form against an executor *de son tort* is the same as above, 1 Saund. 265. In *debt*, whether by or against an exe-

cutor or administrator, omit the words, “*owes to and*,” though if introduced it is no ground of demurrer, Collett v. Collett, 3 Dougl. 211. In the common pleas the form runs thus:—“(to wit.) C. D. executor of the last will and testament of G. H. deceased, was attached to answer A. B. of a plea of trespass on the case, upon promises, and thereupon the said A. B. by — his attorney, complains. For that whereas,” &c.

as the said E. F. in his life-time, to wit; on, &c. (n), at, &c. was indebted to the said plaintiff in the sum of —l. for the work and labor, care, and diligence of the said plaintiff by him before then done, performed, and bestowed, for the said E. F. and at his special instance and request, and being so indebted, he the said E. F. in consideration thereof, afterwards, and in his life-time to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money when he the said E. F. should be thereunto afterwards requested. *(Add other counts as the claim may suggest, and an account stated, on the same principle as the count for promises by the testator) state the breach thus:—*Yet the said E. F. in his life-time, and the said defendant as executor as aforesaid, since the death of the said E. F. not regarding his said several promises und undertakings of the said E. F. but contriving to deceive and defraud the said plaintiff in this respect, have not, nor hath either of them as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do. But to pay the same, or any part thereof, to the said plaintiff, the said E. F. and the said defendant, have hitherto wholly refused, and the said defendant still refuses so to do. *[See note, ante, 102, n. b. as to the propriety of here adding the following counts on promises by the executor as such, to take the case out of the Statute of Limitations, &c.]* To the damage of the said A. B. of £— and therefore he brings his suit, &c.

AGAINST
EXECU-
TORS.

Breach.

*And whereas also the said E. F. deceased, in his life-time, to wit, on the day and year aforesaid, at, &c. aforesaid, was indebted to the said plaintiff in the further sum of —l. of like lawful money, for the work and labor, care, and diligence of the said plaintiff, by the said plaintiff before that time done, performed, and bestowed, in and about the business of the said E. F. and for him, and at his special instance and request, and also in the further sum of —l. of like lawful money, for divers goods, wares, and merchandize, by the said plaintiff before that time sold and delivered to the said E. F. since deceased, and at his like special instance and request, and also in the further sum of —l. of like lawful money, for money by the said plaintiff before that time lent and advanced to, and paid, laid out, and expended for the said E. F. and at his like special instance and request, and also in the further sum of —l. of like lawful money, for other money by the said E. F. before that time had and received, to and for the use of the said plaintiff. And the said E. F. since deceased, in his life-time, being so indebted, and the said several sums of money in this count mentioned, being and remaining wholly due and unpaid, the said defendant, as executor as aforesaid, in consideration thereof, afterwards, and after the death of the said E. F. to wit, on (o), &c. at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sums of money in this count mentioned, when he the said defendant, as executor as aforesaid, should be thereunto afterwards requested.—

[*107]
Against
an execu-
tor, on
promises
by him in
that ca-
pacity (1).

(n) It is usual to insert a day before the death of the testator, but any day before the title of the declaration will do.

(o) It is usual to state a day after the death of the testator, but any day before the title of the declaration will suffice.

AGAINST
EXECU-
TORS.

Account
stated by
defendant
as execu-
tor (p)(1).

[*108]

Breach.
(g).

And whereas also the said defendant, as executor as aforesaid, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, accounted with the said plaintiff of and concerning divers other sums of money from the said defendant as executor as aforesaid, and at the time of the said accounting to the said plaintiffs due and owing, and then in arrear and unpaid, and upon that accounting, the said defendant, as executor as aforesaid, was found to be in arrear and indebted to the said plaintiff in the further sum of £— of like lawful money, and being so found in arrear and indebted, he the said defendant, as executor as *aforesaid, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money last mentioned, whenever afterwards he the said defendant, as executor as aforesaid, should be thereunto afterwards requested. Yet the said defendant, as executor as aforesaid, not regarding his several promises and undertakings, so by him in manner and form aforesaid made, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this respect, hath not as yet paid the several sums of money in the said last (*three*) counts mentioned, or any or either of them, or any part thereof, to the said plaintiff (although often requested so to do); but the said defendant, to pay the same, or any part thereof, hath hitherto wholly refused, and still doth refuse, To the damage of the said plaintiff of £— and therefore he brings his suit, &c.

Pledges, &c.

Against a
surviving
executor.

In an action against a surviving executor describe him accordingly at the beginning, and conclude as follows, "Nevertheless the said E. F. in his life-time, and the said defendant, and G. H. in his life-time, now deceased, and whom the said defendant hath now survived (which said defendant and G. H. in the life-time of the said G. H. were executors of the last will and testament of the said E. F. deceased) after the death of the said E. F. and the said defendant surviving executor as aforesaid, since the death of the said G. H. not regarding the said several promises and undertakings of the said E. F. but contriving to deceive and defraud the said plaintiff in this behalf, have not, nor hath any or either of them, as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff (although often requested so to do.) But the said E. F. in his life-time, and the said defendant and G. H. executors as aforesaid, after the death of the said E. F. and in the life-time of the said G. H. wholly refused, and the said defendant, surviving executor as aforesaid, hath, ever since the death of the said G. H. hitherto wholly refused, and still refuses so to do. To the damage, &c.

[*109]
Against
husband

*A. B. complains of C. D. and E. his wife, (which said E. is executrix of

(p) As to this count see Forest's Rep. 98. 1 J. B. Moore, 305.—2 Saund. 117 d, e, n. 1 Taunt. 322. 6 East, 406.—7 Taunt. 580.— (g) See form, Plead. A. 31, 33.

(1) That these counts cannot be joined, see Reynolds v. Reynold's Admr., 3 Wend. 244.

the last will and testament of F. G. deceased,) being, &c. (*ante*, 12, or, if in C. P. or Exchequer, alter the form accordingly.) For that whereas the said F. G. in his life-time, to wit, on, &c. at &c. was indebted, &c. [as in the usual form against an executor, as *ante*, 105.] Yet the said F. G. in his life-time, and the said E. executrix as aforesaid, after the death of the said F. G. and whilst she was sole and unmarried, and the said defendants since their said intermarriage, not regarding the said several promises and undertakings of the said F. G. but contriving to deceive and defraud the said plaintiff in this respect, have not, nor have, nor hath any or either of them, as yet paid the said plaintiff the said several sums of money, or any of them, or any part thereof (although often requested so to do.) But to pay the same, or any part thereof, to the said plaintiff, the said F. G. in his life-time, and the said E. executrix as aforesaid, after the death of the said F. G. and whilst she was sole and unmarried, respectively refused, and the said defendants ever since their said intermarriage, have hitherto wholly refused, and still refuse so to do, To the damage, &c.

AGAINST
EXECU-
TORS.
and wife
executrix,
before
marriage
(r).

[As in the last precedent to the conclusion, which is as follows :]—Yet the said F. G. in his life-time, and the said C. D. and E. his wife, executrix as aforesaid, since the death of the said F. G. not regarding the said several promises and undertakings of the said F. G. but contriving, &c. have not, nor have, nor hath any or either of them, as yet paid, &c. (although often requested so to do.) But to pay the same, or any part thereof to the said plaintiff, the said F. G. in his life-time wholly refused, and the said C. D. and E. his wife, (which said E. is executrix as aforesaid,) have, ever since the death of the said F. G. hitherto wholly refused, and still refuse so to do, To the damage, &c.

Against
husband
and wife
executrix,
after mar-
riage (s).

Fifthly.—Administrators.

[Commencement by an administrator, as *ante*, 35, and then proceed thus :]—For that whereas the said defendant, heretofore, and in the life-time of the said E. F. to wit, *on, &c. at &c. (u) was indebted to the said E. F. in the sum of £— of lawful money of Great Britain, for the work and labor, care, and diligence of the said E. F. by him before then done, performed, and bestowed, for the said defendant, and at his special instance and request, and being so indebted he the said defendant, in consideration thereof, afterwards, and in the life-time of the said E. F. to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said E. F. to pay him the said sum of money when he the said defendant should be thereunto afterwards requested.—[Add other counts as the claim may suggest, and as account stated, on the same principle as the above count, laying the promises to the said E. F.,

ADMINIS-
TRATORS.

By an ad-
ministra-
tor on
promises
to the in-
testate (t).
[*110]

(r) See a form in debt on bond, 1 Wentw. 370, and Plead. A. 31. As to what may be joined, 3 B. & A. 101.—*Ante*, vol. i. 47.

(s) See a form, Plead. A. 31.

(t) As to this form, see 3 Wils. 380.—*Ante*, 35.

(u) It is usual to insert a day before the death of the intestate, but any day before the title of the declaration will do.

BY ADMIN-
ISTRATORS.

Breach
(w).

Grant of
adminis-
tration (z).

and the breach will be as follows:] Yet the said defendant not regarding his said several promises and undertakings, but contriving, &c. to deceive and defraud the said E. F. in his life-time, and the said plaintiff as administrator as aforesaid, after the death of the said E. F. (to which said plaintiff after the death of the said E. F. to wit, on, &c. (date of grant) at, &c. aforesaid, administration of all and singular the goods, chattels, and credits, which were of the said E. F. deceased, at the time of his death, who died intestate, by —, (Christian name of the grantor of the letters of administration) by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, in due form of law was granted (y)), in this behalf, hath not as yet paid the said sums of money, or any part thereof to the said E. F. in his life-time, or to the said plaintiff since the death of the said E. F. (although often requested so to do;) but he so to do hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiff. [It may be sometimes advisable here to add counts on promises to the administrator as such, and which will run precisely as in the precedent, ante, 102, using the word "administrator," instead of "executor," but unless there be some substantive promise or cause of action arising to the plaintiff as administrator after the intestate's death, it is best not to insert such counts as they in all cases render the plaintiff liable to costs if he does not succeed, and which he would not otherwise be liable to, 9 B. & C. 667; and K. B. June, 1830. Tidd, 9th edit. 973, conclude thus:] —To the damage of the said plaintiff as administrator as aforesaid, of —l. and therefore he brings his suit, &c. And the said plaintiff brings into court here the letters of administration of the said archbishop, (or, "bishop," &c. as the grant is) which give sufficient evidence to the said court here, of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above-mentioned, &c.

Profert
(z).

Pledges, &c.

By an ad-
ministra-
tor du-
rante mi-
nore aetate
[*111]

*If the plaintiff be an administrator, with the will annexed, or durante aetate of an executor or next of *kin, he must be described accordingly, as in the letters of administration, and, in the latter case, at the end of the declaration, there must be an averment that the executor or next of kin is under age.*

By a sur-
viving ad-
ministra-
tor.

In an action at the suit of a surviving administrator, describe him accordingly throughout, and conclude as follows:— Yet the said defendant not regarding, &c. but contriving, &c. to deceive and defraud the said E. F. in his life-time, and the said plaintiff and one G. H. in his life-time, now deceased, and whom the said plaintiff hath survived (to which said plaintiff and G. H. in the life-time of the said G. H. and after the death of the said E. F. to wit, on, &c. at, &c. aforesaid, administration of all, &c. as in the last precedent), and after the death of the said E. F. and

(w) See a form, Plead. A 34.

(z) See forms, ante, 35, 6.

(y) This is to be taken from the form of the grant of the letters of administration. The words "*cui pertinuit*" are not necessary. Lutw. 408.

(z) The omission of the profert of the letters of administration is aided after verdict by 16 & 17 Car. 2. c. 8. s. 1. and upon a general demurrer, by the 4 Anne, c. 16, but it is bad on special demurrer.

the said plaintiff as surviving administrator as aforesaid, since the death of the said G. H. in this behalf, hath not as yet paid them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof (although often requested so to do.). But he so to do hath hitherto wholly refused and still refuses to pay the same, or any part thereof, to the said plaintiff, surviving administrator as aforesaid, To the damage of the said plaintiff, as surviving administrator as aforesaid, of £— and therefore he brings his suit, &c.—[*Add profert of letters of administration, with averment, as in the case of a surviving executor, ante, 105.*]

BY ADMIN-
ISTRATORS.

[*Commencement as ante, 35, and proceed thus :*] — For that whereas the said defendant on, &c. at, &c. was indebted, &c. (*as in other cases, laying the promises to the intestate, as ante, 109. State the breach thus.*) Yet the said defendant not regarding, &c. but contriving to deceive and defraud the said E. F. in his life-time and the said G. H. in his life-time now deceased, and which said G. H. in his life-time, and at the time of his death, was executor of the last will and testament of the said E. F. deceased, and the said plaintiff after the death of the said G. H. (to which said plaintiff, after the respective deaths of the said E. F. and G. H. to wit, on &c. at, &c. aforesaid, administration of all and singular the goods, chattels, and credits, which were of the said E. F. deceased, at the time of his death, left unadministered by the said G. H. deceased, executor as aforesaid, with the will of the said E. F. annexed, by *Charles, by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, in due form of law was granted) in this behalf, hath not as yet paid to them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof (although often requested so to do.) But he so to do hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiff, administrator as aforesaid, To the damage of the said plaintiff, as administrator as aforesaid, of £— and therefore he brings his suit, &c. [*Add profert of letters of administration as ante, 36.*]

By an ad-
ministra-
tor de bo-
nis non,
with will
annexed.

Grant of
letters of
adminis-
tration.

[*112]

— (to wit.) A. B. and C. his wife, which said C. is administratrix of all and singular the goods, chattels, rights, and credits, which were of D. deceased, at the time of his death, who died intestate, complains of E. F. being, &c. For that whereas the said defendant on, &c. at, &c. was indebted, &c. (*as in the common case at the suit of an administrator.*) Yet the said defendant not regarding, &c. but contriving, &c. to deceive and defraud the said D. in his life-time, and the said C. after the death of the said D. and whilst she was sole and unmarried, (to which said C. whilst she was sole and unmarried, and after the death of the said D. to wit, on, &c. at, &c. administration, &c. (*as ante, 110*) in due form of law was granted); and the said A. B. and C. his wife, which said C. is administratrix as aforesaid, since their intermarriage in this behalf, hath not as yet paid, &c.

By hus-
band and
wife, ad-
ministra-
trix, before
marriage.

Breach.

[*As in the last precedent to the conclusion, which is as follows :*]—Yet the said defendant not regarding, &c. but contriving, &c. to deceive and defraud the said D. in his life-time, and the said plaintiffs, after the death of the said D. (to which said C. after the death of the said D. to wit, on,

By baron
and feme,
adminis-
tratrix, af-
ter mar-
riage.

BY ADMIN- &c. at, &c. administration, &c. (*as ante*, 110) in due form of law was
ISTRATOR. granted), in this behalf, hath not as yet paid, &c.

Against
an admin-
istrator.

[*113]
Breach.

— (to wit.) A. B. complains of C. D. administrator of all and singular the goods and chattels, rights, and credits (*a*) of E. F. deceased, at the time of his death, who died intestate, being, &c. For that whereas the said E. F. in his *life-time, to wit, on, &c. at, &c. was indebted, &c. (*laying the promises by the deceased.*) Yet the said E. F. in his life-time, and the said defendant, administrator as aforesaid, after the death of the said E. F. not regarding, &c. but contriving, &c. to deceive and defraud the said plaintiff in this behalf, have not, nor hath either of them, as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff (although often requested so to do). But to pay the same, or any part thereof, to the said plaintiff, the said E. F. in his life-time wholly refused, and the said defendant hath, ever since the death of the said E. F. hitherto wholly refused, and still refuses so to do. [*It may here be expedient to insert counts on promises by the defendant "as" administrator, as in an action against an executor, see ante, 107.*] To the damage of the said plaintiff of £— and therefore he brings his suit, &c.

Against
an admin-
istrator du-
rante mi-
nore ætate,
&c.

Against a
surviving
adminis-
trator.

In an action against administrator durante minore ætate, of an executor or next of kin, the same mode of description is to be adopted as in an action at the suit of such an administrator, see ante, 110.

[*In an action against a surviving administrator describe him accordingly at the beginning, and conclude as follows:*] Yet the said E. F. in his life-time, and the said defendant, and one G. H. in his life-time, now deceased, and whom the said defendant hath survived, and which said defendant and G. H. in the life-time of the said G. H. were administrators of all and singular the goods, chattels, and credits, which were of the said E. F. deceased, at the time of his death, who died intestate after the death of the said E. F. and the said defendant surviving administrator as aforesaid, after the death of the said G. H. not regarding the said several promises and undertakings, but contriving and intending to deceive and defraud the said plaintiff in this respect, have not, nor hath either of them, as yet paid the said plaintiff the said several sums of money, or any or either of them, or any part thereof (although often requested so to do.) But to pay the same, or any part thereof, to the said plaintiff, the said E. F. in his life-time, and the said defendant and G. H. administrators as aforesaid, after the death of the said E. F. and in the life-time of the said G. H. wholly refused, and the said defendant hath, ever since the death of the said G. H. hitherto wholly refused, and still refuses so to do, To the damage, &c.

Against
an admin-
istrator *de
bonis non*,
with will
annexed.

— (to wit.) A. B. complains of C. D. administrator of all and singular the goods, chattels, and credits, which were of E. F. deceased, at the time of his death, left unadministered *by G. H. in his life-time,

[*114]

(a) This description is sufficient, 2 Stra. 781.

now also deceased (and which said G. H. in his life-time, and at the time of his death, was executor of the last will and testament of the said E. F. deceased), with the will of the said E. F. annexed, being, &c. (*ante*, 12.) For that whereas the said E. F. in his life-time, to wit, on, &c. at, &c. was indebted, &c. Yet the said E. F. in his life-time, and the said G. H. in his life-time, now deceased, after the death of the said E. F. and which said G. H. in his life-time, and at the time of his death was executor of the last will and testament of the said E. F. deceased, and the said defendant, administrator as aforesaid, after the death of the said G. H. not regarding, &c. have not, nor have nor hath any or either of them as yet paid, &c. (although often requested so to do.) But to pay the same, or any part thereof, to the said plaintiff, the said E. F. in his life-time, and the said G. H. executor as aforesaid, in his life-time, and after the death of the said E. F. respectively refused, and the said defendant, administrator as aforesaid, hath, ever since the death of the said G. H. hitherto wholly refused, and still refuses so to do, To the damage, &c.

AGAINST
ADMINIS-
TRATORS.

— (to wit.) A. B. complains of C. D. and E. his wife, which said E. is administratrix, of all and singular the goods, chattels, and effects, which were of G. H. deceased, at the time of his death, who died intestate, being, &c. For that whereas the said G. H. in his life-time, to wit, on, &c. at, &c. was indebted, &c. Yet the said G. H. in his life-time, and the said E. administratrix as aforesaid, after the death of the said G. H. and whilst she was sole and unmarried, and the said defendant and E. his wife (which said E. is administratrix as aforesaid), since their intermarriage, not regarding, &c. but contriving, &c. have not, nor have nor hath any or either of them, as yet paid, &c. (although often requested so to do.) But to pay the same, or any part thereof to the said plaintiff, the said G. H. in his life-time, and the said E. administratrix as aforesaid, after the death of the said G. H. and whilst she was sole and unmarried, respectively refused, and the said defendant and E. his wife, administratrix as aforesaid, have, ever since their intermarriage, hitherto wholly refused, and still refuse so to do, To the damage, &c.

Against
husband
and wife,
adminis-
tratrix, be-
fore mar-
riage.

[*As in the last precedent to the conclusion, which is as follows :*—Yet the said G. H. in his life-time, and the said C. D. and E. his wife, which said E. is administratrix as aforesaid, since the death of the said G. H. not regarding, &c. but contriving, &c. have not, nor have nor hath any or either of them, as yet paid, &c. (although often requested so to do.) But to pay the same, or any part thereof, to the said plaintiff, the said G. H. in his life-time wholly refused, and the said C. D. and E. his wife, which said E. is administratrix as aforesaid, have, ever since the death of the said G. H. hitherto wholly refused, and still refuse so to do, To the damage, &c.

Against
husband
and wife,
adminis-
tratrix, af-
ter mar-
riage.

*II. SPECIAL COUNTS.

[*For the commencement in K. B., C. P., or Exchequer, or other Courts, ante, 12 to 24, or by or against a person in a particular character, ante,*

[*115]
ON PRO-
MISSORY
NOTES.
Payee
against

ON PROMISSORY NOTES.
—
maker on a note payable generally, and not at a particular place (a).

24 to 38, and then proceed as follows:—For that whereas the said defendant, heretofore, to wit, on, &c. (b) at London (c), that is to say, at, &c. (d) made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid (e) and thereby then and there promised to pay, two months after the date thereof, to the said plaintiff (f), or order, the sum of £— (g) for value received (h), and then and there delivered the said promissory note to the said plaintiff; by means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, according to the tenor *and effect thereof (i). — [Then add common counts on the consideration or debt for which the note was given, and the common money counts, interest, and account stated, and usual breach, laying the day in all the common counts after the note was due and some day before the title of the declaration.]

[*116]

Against one of the makers of a joint, and several note (k).

For that whereas the said defendant and one G. H. heretofore, to wit, on, &c. (date of note) at, &c. made their certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the same day and year aforesaid, and thereby then and there jointly and severally promised to pay (two) months after the date thereof, to the said plaintiff, or his order, £— for value received, and the said defendant, and the said G. H. then and there delivered the said promissory note to the said plaintiff. By reason whereof, &c. [State the defendant's liability and promise to pay, according to the tenor and effect of the note, as ante, 115, and add a count as on a note made by defendant alone, without noticing the other party.]

On a note made by a firm, or by one of several partners in name of firm.

For that whereas the said defendants, by and under the names, style,

(a) See precedents and notes. Chitty on Bills, 7th ed. 409.

(b) Date of note, or if no date the day it was made or issued. See Chitty on Bills, 7th ed. 409. If the note bear date a day different from that intended, state it, as in form, post, 117.

(c) Place of date, but this need not be stated, 3 Campb. 304.—Chitty on Bills, 7th ed. 355, 489, n. d.—If the note be drawn at Dublin in Ireland, it should perhaps be so stated, 2 B. & A. 301.—1 Chit. Rep. 23, S. C.—1 B. & C. 16—2 D. & R. 15, S. C.

(d) The venue in the action

(e) If there be no date, or the real date be doubtful, omit the words "bearing date." See 6 M. & S. 73—3 B. & P. 173.

(f) It is usual here to state, "by the name and addition of J. B. esquire," but this is unnecessary, and if there be a variance, fatal. If however, the payee be misdescribed in the note, it may then be advisable in one count to adopt such description.

(g) If the note be payable in Irish currency, it must be expressly so stated. 2 D. & R. 15.—1 B. & C. 16, S. C.—4 B. & A. 246.—The omission of the word "sterling" is immaterial. 2 B. & A. 301. See Creswell v. Crisp, 2 Dougl. 633.

(h) This should agree with the note. What a variance in this, Chitty on Bills, 7th ed. 356. It is not necessary to state the words "value received" in a declaration in assumpsit, 2 Chit. Rep. 333.

(i) This mode of laying the promise is proper, though the plaintiff relies on a subsequent promise, 16 East, 420.—See 3 East, 481.

(k) The parties may be sued jointly or separately; and, if sued separately, the note may be, and usually is, stated as made by the defendant alone. Chitty on Bills, 7th ed. t. 346. When a contract is joint and several in an action against one, it is not necessary to notice the other. 4 Campb. 34.—5 Co. 119 b.—1 B. & A. 224.

and firm of Jonathan Dubbins and Co. (or "by and under the style and description of the Iron Company") heretofore, to wit, on, &c. (date of note) at &c. made their certain promissory note in writing, bearing date, &c. and thereby, &c. (*proceed as in the form, ante, 115.*) If the action be against an indorser on a note so made, then the names of the makers need not be stated; and though there was only one maker, the count may run thus:—"For that whereas certain persons using or 'trading under' the names, style, and firm of Jonathan Dubbins and Co., (or 'using the style and description of the Iron Company,') heretofore, to wit, on, &c. at, &c. made, &c." and afterwards describing the parties as "the said makers of the said promissory note." It is not necessary to state that one partner made or indorsed *a note for himself and co-partners, and it is better to state that all were made or indorsed. 4 Campb. 78. [¶117]

ON PROMISSORY NOTES.

For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. by one E. F. his then agent in that behalf, made his certain promissory note in writing, bearing date, &c. [*as ante, 115. The agent's name is not afterwards noticed.*] On a note made by an agent (i).

For that whereas the said defendant, on the (1st) day of (January,) in the year of our Lord (1825,) at, &c. made his certain promissory note in writing bearing date, by mistake, the (1st) day of (January,) A. D. (1824,) when in truth and in fact the said promissory note was, at the time of the making thereof, meant, intended, and understood by the said defendant and said plaintiff to be dated on the (1st) day of January, A. D. (1825,) and thereby promised to pay the said plaintiff or order, (two) months after the date thereof, that is to say, two months after the said (1st) day of January, (1825,) when the said promissory note was so made and meant, and intended, and understood to be as aforesaid, £— for value received, and then and there delivered, &c.—[*proceed as directed in the precedent, ante, 115.*] On a note wrongly dated (m).

For that whereas the said defendant heretofore, to wit, on, &c. (date of note) at (place where made) that is to say, at, &c. made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay at (Messrs. Drummonds and Co.'s bankers, Charing-cross) (*as in the note*) (two) months after the date thereof, to the said plaintiff (o) or order, the sum of £— for value received and then and there delivered the said *promissory note to the said plaintiff; and the said plaintiff in fact saith, that afterwards, and when the said note became due and payable according to the tenor and effect thereof, to wit, on the — day of — in the year aforesaid (p), at the said (Messrs. Drummonds and Co.'s bankers, Charing-cross,) aforesaid, to wit, at, &c. Payee against maker of a note payable at a particular place (n). [¶118]

(l) Though usual, it is not necessary to state that the party made the note by agent; it may be stated generally that the maker drew it himself, Chitty on Bills, 7th edit. 357.

(m) See Chitty on Bills, 7th edit. 354, 420, n. (c).

(n) See notes, Chitty on Bills, 7th edit. 409. When the note is, in the body of it, made payable at a particular place, this count is necessary, 3 Campb. 247, 304.—4

Campb. 201.—14 East, 500.—5 Taunt. 30 —3 M. & S. 152; otherwise it is not; and when only one count is inserted it should be as on a note payable generally, as ante, 115. The statute 1 & 2 Geo. 4. c. 78, relating to the acceptance of bills, making them payable at a particular place, does not relate to promissory notes.

(o) As to statement of the addition there is no necessity for it. See ante, 115, n. (f).

(p) Calculate the two months exclusive

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NOTES.

(*venue*) aforesaid, the said promissory note was duly presented and shown (*q*) for payment thereof, and payment of the said sum of money therein specified, was then and there duly required according to the tenor and effect of the said promissory note; but that neither the said (Messrs. Drummonds and Co.) nor the said defendant, nor any other person or persons on behalf of the said defendant, did or would, at the said time when the said promissory note was so presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do (*r*), of all which said several premises the said defendant, afterwards, to wit on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice (*s*). By means whereof, and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified when he the said defendant should be thereunto afterwards requested; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, when he the said defendant should be thereunto afterwards requested.—

[*119] [*It is advisable then to add a count, as *ante, 115, as on note payable generally, and the common counts, as there directed.*]

On a note
payable
on de-
mand.

(*t*).

[*120]

[*Proceed precisely as in the precedent Payee v. Maker, ante, 115, to the end, showing that the note was payable on *demand and stating the liability and promise to pay, according to the tenor and effect of the promissory note, and then conclude as follows:*]—And the said plaintiff in fact saith, that afterwards, to wit, on, &c. (*the day of demand, or any day before the title of the declaration,*) to wit, at, &c. aforesaid, payment of the said sum of money, in the said promissory note specified, was duly demanded by the said plaintiff of the said defendant, according to the tenor and effect of the said promissory note.—[*Add a count on a note payable on demand without the above averment, and the money counts and account stated, alleging a special request in the breach.*]

On a note
payable
by instal-
ments for
the whole
sum upon
one de-
fault (*u*).

For that whereas the said defendant, heretofore, to wit, on the (1st) day of (January,) in the year of our Lord (1830,) at, &c. made his certain promissory note in writing, bearing date a certain day and year therein

of the day of the date, and then add three days of grace, and if the last be a Sunday or Good Friday, or Christmas day, aver the presentment to have been made on the day before, but a mistake in the day seems of no consequence; and at all events it is immaterial, if the words "when the said note became due and payable according to the tenor and effect thereof," are inserted. 1 Bing. 23.

(*q*) It need not be stated who made the presentment. 1 Gow, 55. It need not be stated it was presented to the bankers, &c., 2 Chit. Rep. 300.

(*r*) An allegation of non-payment at the

particular place seems unnecessary. 3 M. & S. 150, and see the next precedent.

(*s*) This is usually averred, but it is said, need not be proved. 3 Campb. 261.

(*t*) It seems advisable, in one count, to aver a demand, 3 Campb. 459. Chitty on Bills, 7th edit. 361. But *semble*, that it is not necessary. Bayl 187. Selw. N. P. 3d edit. 321.—Ry. & Moo. 363. King v. Roxbrough, 2 Tyr. 468; 2 Crom. & T. 418, S. C.

(*u*) See the precedent, Plead. A. 11. Bayl. on Bills, 190. If when the action is commenced, all the instalments are due by effluxion of time, it will suffice to declare gen-

ON PROMISSORY NOTES.

mentioned, to wit, the same day and year aforesaid, and then and there delivered the said note to the said plaintiff, and thereby then and there promised to pay to the said plaintiff, or order, the sum of (20*l.*) in manner following, (that is to say,) (5*l.*) part thereof, on the — day of — then next, (5*l.*) other part thereof, on the — day of — then next, and (10*l.*) residue thereof, on the — day of — then next, and that, in case default should be made in any or either of the said payments, then the whole of the said sum of 20*l.*, should become due on demand. By means whereof, and by force of the Statute in such case made and provided, the said defendant then and there, to wit, on the day and year first aforesaid, became liable to pay to the said plaintiff the said sum of (20*l.*) in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, he the said defendant in consideration thereof, afterwards, to wit, on the day and year first above mentioned, at, &c. aforesaid, undertook, and then and therefore faithfully promised the said plaintiff to pay him the said sum of 20*l.*, in the said promissory note specified, according to the tenor and effect of the said promissory note. And the said plaintiff in fact saith, that after making of the said promissory *note, to wit, on the — day of — next ensuing the date thereof, default was made by the said defendant in the payment of 5*l.*, in the said promissory note specified, which had then become due and payable, to wit, at, &c. aforesaid, whereby, and according to the tenor and effect of the said promissory note, and his said promise and undertaking, the said defendant then and there became liable to pay to the said plaintiff the whole of the said sum of 20*l.*, in the said promissory note specified, when he the said defendant should be thereunto afterwards requested.—[*Add count on original consideration, the money counts, account stated, and breach.*]

[*121]

For that whereas the said defendant, heretofore, to wit, on, &c. (*the date*) at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the same day and year aforesaid, and then and there delivered the said promissory note to the said plaintiff, by which, &c.—[*State the note according to its form and then state the liability, and promise to pay the whole sum, according to the tenor and effect of the note as in the last precedent, and proceed as follows;*]*—And the said plaintiff in fact saith, that after the making of the said promissory note, to wit, on the — day of — in the year aforesaid (*w*), at, &c. aforesaid, a certain sum of money, to wit, the sum of £5, part of the said sum of £20, in the said promissory note specified, became and was due and payable from the said defendant to the said plaintiff, upon and by virtue of the said last-mentioned note, and which said last-mentioned sum of £5 he the said defendant then ought to have paid to the said plaintiff, according to the tenor and effect of the said promissory note, and of his said promise and undertaking, to wit, at

On a note for one instalment due in which there is a clause that the whole shall be payable on one default.

erally on the note, setting it out, and without averring any default. If the note be payable by instalments, without any clause as to the whole becoming due on one default, then the next precedent will be proper. The

instalments become due three days after the day named for the payment of each of them.

(*w*) If any one of the days on which an instalment became due be mis-stated, it is fatal. 1 Gow, 21.—3 J. B. Moore, 79. S. C.

ON PROMISSORY NOTES. &c. aforesaid.—[*Insert counts on the consideration of the note, and the money counts, account stated, and breach.*]

The like for several instalments due. [Proceed as directed in the preceding form, to the* and then as follows:] And the said plaintiff in fact saith, that afterwards, to wit, on the ——— day of ——— A. D. aforesaid, a large sum of money, to wit, the sum of £— for divers, to wit, three of the instalments payable by the said promissory note then last elapsed, became and was due and payable from the said defendant to the said plaintiff, upon and by virtue of the said promissory note, to wit, at, &c. aforesaid.

On a note for less than 5*l*. (z). For that whereas the said defendant, heretofore, to wit, on, &c. (*date of note*) in a certain place called (Clifford's Inn,) to wit, at, &c. (*venue*) according to the form of the Statute in such case made and provided, made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and signed by him, the said defendant, in the presence of one A. B. a subscribing witness, who in due manner, and according to the form of the Statute in such case made and provided, attested such signature, and the said defendant thereby, twenty-one days after the date of the said promissory note, promised to pay the said plaintiff, (by the name of, &c. at, &c. cabinet maker, being the then place of abode of the said plaintiff, to whom or to whose order, the money contained in the said note was to be paid) or his order, the sum of (£4,) for value received, and then and there delivered the said promissory note to the said plaintiff, by reason whereof, and by force of the Statute in such case made and provided, he the said defendant then and there became liable, &c.—[*State liability and promise to pay, according to the tenor and effect of the note, as ante, 115, and counts on the consideration of the note, and money counts, account stated, and breach.*]

[*122] On a note made abroad for the payment of guilders (y). *For that whereas the said defendant, heretofore, to wit, on, &c. in parts beyond the seas, to wit, at (Amsterdam,) that is to say, at, &c. (*venue*) made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, (nine) months after the date thereof, to the order of the said plaintiff, one hundred and one guilders holl value, that day received in cash, and then and there delivered the said promissory note to the said plaintiff, by means whereof the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof. And the said plaintiff avers, that the said one

(z) See 17 Geo. 3. c. 30. s. 1. made perpetual by 27 Geo. 3. c. 16. 1 Wentw. 363. Chit on Bills, 7th ed. 42, 59, 60.

(y) As to notes made abroad, see Chit. on

Bills, 7th ed. 327, n. e. and as to declarations relative to foreign money, see 1 Marsh. 33. —5 Taunt. 228.—2 D. & R. 15—1 B. & C. 16. S. C.

hundred and one guilders holl, in the said promissory note mentioned, at the time of making the said promissory note and also at the time the same became due and payable, according to the tenor and effect thereof, were and still are of great value, to wit, the value of £— (z) *of lawful money of Great Britain, to wit, at, &c. aforesaid (a).—[*Add counts on the consideration of the note, and money counts, account stated, and breach.*] ON PROMISSORY NOTES. [#123]

For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. made his certain promissory note in writing, bearing date the same day and year aforesaid, and thereby then and there promised to pay, three days after the arrival of the ship *Britannica*, at her moorings in the river Thames to the said plaintiff, the sum of £— being for a sum of money due from the said ship *Britannica*. And the said defendant then and there delivered the said promissory note to the said plaintiff. And the said plaintiff avers, that the said ship *Britannica*, afterwards, to wit, on, &c. (*day of arrival or about it.*) arrived at her moorings in the river Thames aforesaid, to wit, at, &c. (*venue*) aforesaid, of all which said several premises the said defendant afterwards, to wit on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice; by means whereof, &c.—[*State the liability, and promise to pay, according to the tenor and effect, as ante, 115.*] On a note payable on the contingency of a ship's arrival (b).

For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. made his certain promissory note in writing, and thereby acknowledged himself to have borrowed and received of the said plaintiff the sum of £— being for the purchase for himself of a lieutenant's commission in the first regiment of foot guards, under the command of the Right Honorable the Duke of Marlborough, and which said sum of £— he the said defendant by the said promissory note, promised to pay as soon as E. his wife should attain the age of 21 years, and then and there delivered the said promissory note to the said plaintiff, by means, &c.—[*State the liability, and promise to pay, according to the tenor and effect, as ante, 115, and then proceed as follows:*]—And the said plaintiff, in fact, saith, that although the said E. the wife of the said defendant, afterwards, to wit, on, &c. (*the day of her coming of age or about it.*) did attain the age of 21 years, to wit, at, &c. (*venue*) aforesaid. Yet the said defendant, not regarding his said promise and undertaking, *did not, as soon as his said wife so attained the age of 21 years as aforesaid, or at any time before or since, pay the said sum of £— or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, to wit, at, &c. aforesaid. On a note payable on defend- ant's wife attaining the age of 21 (c). Breach. [#124]

For that whereas the said defendant, heretofore, to wit, on, &c. (*date of note*) at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year afore-

(z) State enough to cover the value in English money.

(a) In some of the precedents, this averment is introduced before the statement of the liability and promise to pay.

(b) As to this contingency, see Chitty on Bills, 7th edit. 42, 336.—Bayl. 15.—Selw.

N. P. 344, 347, and note 71.—Plead. A. 12. see form of note, payable on a person's arrival, 1 Wentw. 366.

(c) See precedent, 1 Wentw. 350.—Plead. A. 20.—1 Burr. 226—2 B. & P. 413.—Willes, 393.—2 Stra. 1217.—Chitty on Bills, 7th edit. 42, 336.

By payee against maker of a note payable six months after the death of another.

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said, and thereby then and there promised to pay, (six) months after the decease of his father, E. F. to the said plaintiff or order, the sum £— for value received, and then and there delivered the said promissory note to the plaintiff, by means, &c.—[*State liability, and promise to pay, according to tenor and effect, as ante, 115, and then proceed.*] And the said plaintiff in fact saith, that afterwards, and after the making of the said promissory note, to wit, on, &c. the said E. F. died, to wit, at, &c. aforesaid. And although six months from the time of the decease of the said E. F. have long since elapsed, to wit, at, &c. yet the said defendant, although he was afterwards, to wit, on, &c. at, &c. aforesaid, requested by the said plaintiff so to do, hath not as yet paid the said sum of £— or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to wit, at, &c. aforesaid.—[*Add counts on original consideration, money counts, account stated, and breach.*]

First indorsee
against
maker,
payable
generally,
and not at
a particu-
lar place
(d).

For that whereas the said defendant, heretofore, to wit, on, &c. at (London) that is to say, at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, two months after the date thereof, to one E. F. or order, the sum of £— for value received, and then and there delivered the said promissory note to the said E. F. And the said E. F. to whom or to whose order the payment of the said sum of money in the said promissory note specified, was to be made after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, indorsed the said promissory note, by which said indorsement, he the said E. F. then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, and then and there delivered the said promissory note so indorsed as aforesaid to the said plaintiff, by means whereof, and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff, the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and *then and there faithfully promised the said plaintiff, (1) to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof.—[*Here insert the money counts, and account stated, and common breach; as there is no privity of contract between indorsee and maker of a note, it is not usual to add any other counts, as in the preceding forms.*]

[*125]

First indorsee
against
maker
where
note paya-
ble at a
particular
place (e).

For that whereas the said defendant heretofore, to wit, on, &c. at (London) that is to say, at, &c. made his certain promissory note in writing,

(d) See notes, Chitty on Bills, 6th ed. 494, &c. and the notes which should be observed, 14 East, 500.—4 Campb. 201.—5 Taunt. 30.
(e) See the two forms, ante, 117, 118,

(1) See Banks v. Camp. 2 Moo. & Scott, 734.

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bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay at (Messrs. Drummonds and Co's, Charing-cross,) (two) months after the date thereof, to one E. F. or order, the sum of £—for value received, and then and there delivered the said promissory note to the said E. F.; and the said E. F. to whom or to whose order the payment of the said sum of money, in the said promissory note specified, was to be made, after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, (venue) aforesaid indorsed the said promissory note, by which said indorsement, he the said E. F. then and there ordered and appointed the said sum of money in the said promissory note specified, to be paid to the said plaintiff, and then and there delivered the said promissory note, so indorsed as aforesaid, to the said plaintiff*. And the said plaintiff avers, that afterwards, and when the said note became due and payable, according to the tenor and effect thereof, to wit, on the said — day of — in the year aforesaid, at the said Messrs. Drummonds and Co's, to wit, at, &c. (venue) aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money therein specified was then and there duly required, according to the tenor and effect of the said promissory note, but that neither the said Messrs. Drummonds and Co. nor the said defendant, nor any other person or persons on behalf of the said defendant, did or would, at the said time when the said promissory note was so presented and shown for payment thereof as aforesaid, or at any other *time before or afterwards, pay the said sum of money therein specified or any part thereof, but wholly neglected and refused so to do, of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, had notice, by means whereof, and by force of the Statute in such case made and provided, and the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, when he the said defendant should be thereunto afterwards requested; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, when he the said defendant should be thereunto afterwards requested.—[Insert a count as on a note payable generally, and the common money counts, account stated, and breach.]

[*126]

For that whereas the said defendant, heretofore, to wit, on, &c. at (London) that is to say, at, &c. (venue) made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay, (two) months after the date thereof, to one E. F. or order, the sum of £— for value received, and then and there delivered the said promissory note to the said E. F.; and the said E. F. to whom

Second or remote indorsee, against maker (1).

(1) It has been held, that a remote indorsee may declare as the immediate indorsee of the first indorser, or of any intermediate indorsee, striking out on the trial the indorsements not stated. 4 Esp 211; Bayley on Bills, 114; Chitty on Bills, 8th edit. 508; but from *Stein v. Yglesias*, 1 Gale, 98, it would seem that if plaintiff wish to take the benefit of any intermediate indorser's title, this indorsement must be stated.

ON PROMISSORY NOTES.

First indorsement.

Second indorsement.

[*127]

or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. aforesaid, indorsed the said promissory note, by which said indorsement, he the said E. F. then and there ordered and appointed the said sum of money in the said promissory note specified, to be paid to one G. H. and then and there delivered the said promissory note so indorsed, to the said G. H.; and the said G. H. (f), to whom or to whose order the payment of the said sum of money in the said promissory note specified, was by the said indorsement directed to be made, after the making of the said *promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. aforesaid indorsed the said promissory note, by which said last-mentioned indorsement, he the said G. H. then and there ordered and appointed the said sum of money in the said promissory note specified, to be paid to the said plaintiff, and then and there delivered the said promissory note to the said plaintiff (g); by means whereof, and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money, in the said promissory note specified, according to the tenor and effect thereof.—[Add the usual money counts, account stated, and breach.]

Short indorsement (h).

And the said G. H. (*the payee*) then and there indorsed and delivered the said promissory note to one J. K. who then and there indorsed and delivered the same to the said plaintiff. (*Or if the action be against the payee or maker, say, "and the said G. H. then and there indorsed and delivered the said note to the said plaintiff."*)

[*128]

On a note indorsed for residue after part payment (i).

[*After stating an indorsement to G. H. proceed as follows:] And the said defendant, after the said indorsement so made to the said G. H. as aforesaid, to wit, on the day and year aforesaid, at, &c. aforesaid, paid to the said G. H. a certain sum of money, to wit, 10*l.*, in part payment of the said sum of 50*l.*, in the said note specified, and the said G. H. afterwards, and before the payment of the residue of the said sum of 50*l.*, in

(f) A variance between the real name and what appears on the bill, is immaterial.—1 Stark, 47, as to description and proof of indorsement, by persons trading under a firm, &c. see 2 D. & R. 251 (1).

(g) If there were other indorsements between defendant and plaintiff, here describe them, the same as the second indorsement. It is usual in the first count to state *all* the indorsements on the bill before the plaintiff's name, and then, if it be apprehended that one or more of such indorsements cannot be

proved, to add a count or counts omitting the statement of such indorsements.—4 E.p. Rep. 211. Chitty on Bills, 7th ed. 359—Bayl. 174. In such second count, in order to avoid prolixity, state the indorsement shortly, as in the next precedent.

(h) This concise mode of stating the indorsements, will in all cases suffice, and it is usual to adopt them in a second count.

(i) As to the law, Chitty on Bills, 7th edit. 130. See precedent, Pleadings A. 22.

the said note specified, or any part thereof, to wit, on the day and year aforesaid, at, &c. aforesaid, indorsed the said promissory note, and by the said last mentioned indorsement, the said G. H. then and there ordered and appointed the said residue of the said sum of money in the said note specified, to be paid to the plaintiff, and then and there delivered the said promissory note so indorsed to the said plaintiff, and by reason of the premises, and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay the said residue of the said sum of money in the said promissory note specified to said plaintiff, according to the tenor and effect of the said promissory note, and the said several indorsements so made thereon as aforesaid; and being so liable, the said defendant in consideration thereof, afterwards to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said residue of the said sum of money in the promissory note specified, according to the tenor and effect of the promissory note, and the said indorsements so made thereon as aforesaid.—[*Add a count as upon a note remaining wholly unpaid, and the common counts.*]

ON PROMISSORY NOTES.

[*After stating the promissory note, payable to one E. F. as ante, 126, proceed as follows:*—And the said E. F. to whom or to whose order the payment of the said sum of money mentioned in the said promissory note was to be made afterwards, and before the payment of the said sum of money in the said promissory note specified, to wit, on the day and year aforesaid, at, &c. aforesaid, indorsed the said promissory note, and by that indorsement the said E. F. ordered and appointed the said sum of money in the said promissory note specified to be paid to one G. H. in his lifetime, since deceased, or order, and then and there delivered the said promissory note, so indorsed, to the said G. H. And the said plaintiff further saith, that heretofore, to wit, on, &c. (*date of will, or about it*) at, &c. aforesaid, the said G. H. made his last will and testament, in writing, and thereby then and there made and appointed J. K. executor thereof, and *the said G. H. afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, died, and thereupon the said J. K. afterwards, to wit, on the day and year last aforesaid, at &c. aforesaid, duly proved the said last will and testament of the said G. H. deceased, and took upon himself the burden of the execution thereof; and the said J. K. so being executor of the said last will and testament of the said G. H. afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, as such executor as aforesaid, indorsed the said promissory note, and by the said last-mentioned indorsement appointed the said sum of money in the said promissory note specified, to be paid to the said plaintiff, and then and there delivered the said promissory note, so indorsed, to the said plaintiff; by means, &c.—[*State liability, and promise to pay, as ante, 127.*]

By indorsement of an executor against maker (k).

[*129]

For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. made his certain promissory note in writing, bearing date (a certain day

By indorsement of an administrator after the death of the payee (l).

(k) A profert of the probate need not be made. Willes, 359. See precedents, 1 Wentw. 329, 332, 337, 338.

(l) No profert of the letters of administration is necessary, Willes, 359.—1 Wentw. 388.

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and year therein mentioned,) to wit, the same day and year aforesaid, and thereby promised to pay, (twelve) months after the date thereof, to one E. F. or order, the sum of £— value received, and then and there delivered the said promissory note to the said E. F.; and the said plaintiff in fact saith, that after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on, &c. (*the date of the letters of administration, or about it,*) to wit, at, &c. (*venue*) aforesaid, the said E. F. died intestate; and that afterwards, to wit, on the day and year last aforesaid, at &c. aforesaid, administration of all and singular the goods and chattels, rights and credits, of the said E. F. deceased, at the time of his death was granted to one G. H. and the said G. H. so being such administrator as aforesaid, afterwards, and before the payment of the said sum of money in the said promissory note specified, to wit, on the day and year last aforesaid, at &c. aforesaid, indorsed the said promissory note, by which said indorsement, he the said G. H. as such administrator as aforesaid, then and there ordered and appointed the said sum of money in the said promissory note specified, to be paid to the said plaintiff, and then and there delivered the said promissory note, so indorsed as aforesaid, *to the said plaintiff; by means, &c. —[*State the liability, and promise to pay, as ante, 127.*]

[*130]

By the
bearer of a
note pay-
able to E.
F. or bear-
er (m).

[*After statement of the note payable to E. F. or bearer, proceed as follows, as ante, 115.*].—And the said E. F. to whom or to the bearer of the said promissory note, the payment of the said sum of money therein specified, was by the same note to be made after the making of the said note, and before the payment of the said sum of money therein specified to wit, on the day and year aforesaid, at, &c. aforesaid, duly assigned over and delivered the said promissory note to the said plaintiff, who thereby and then and there became and was and still is the lawful bearer thereof, and entitled to receive and demand payment of the said sum of money therein specified, whereof the said defendant afterwards, to wit, on the day and year aforesaid, at &c. aforesaid, had notice by means, &c.—[*State the liability and promise to pay, according to the tenor, as ante 115, 16.*]

By bearer
of a coun-
try bank-
er's note,
payable at
London
banker's,
or in coun-
try, aver-
ring pre-
sentment
at both.

For that whereas the said defendants heretofore, to wit on, &c. (*date of note*) at the Brighton Union Bank, at Brighton, to wit, at, &c. (*venue*) made their certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay No.— or bearer, on demand, the sum of £— there, that is to say, at the said Brighton Union Bank, or at Messrs. Weston, Sir John Pinhorn & Co.'s London, value received: and the said — afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, became and was the lawful bearer of the said note, and entitled to receive and demand payment of the said sum of money therein specified, whereof the said defendants, afterwards, to wit, on the day and year aforesaid, there had notice; and the said plaintiff in fact saith, that afterwards, to wit on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, the said promissory note was duly presented to the said Messrs.

(m) The assignment may be stated more concisely, as ante, 127.

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Weston, Sir John Pinhorn and Co.'s bankers, London aforesaid, for payment thereof, according to the tenor and effect of the said promissory note, and payment of the said sum of money in the said promissory note specified, was then and there duly demanded and required; yet neither the said Messrs. Weston, Sir John *Pinhorn and Co.'s nor the said defendants, nor any person or persons on behalf of the said defendants, did or would, at the said time when payment of the said sum of money in the said promissory note specified, was so demanded as aforesaid, pay the same, or any part thereof, but wholly neglected and refused so to do, to wit, &c. (*venue*) aforesaid; whereof the said defendants afterwards, to wit, on the day and year last aforesaid, there had notice. And the said plaintiff in fact further saith afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, the said promissory note was duly presented to the said defendants, to wit, at the Brighton Union Bank, according to the tenor and effect of the said promissory note, and payment of the said sum of money in the said promissory note specified, was then and there duly demanded and required; but that neither the said defendants, nor any other person or persons on their behalf, did or would, when payment of the said sum of money in the said promissory note specified, was so demanded as last aforesaid, pay the same, or any part thereof, but wholly neglected and refused so to do; whereof the said defendants, afterwards, to wit, on the day and year aforesaid, there had notice; by means, &c.—[*State liability, and promise to pay on request, as ante, 118; add a count stating presentment only on the London Bank, and a third count, stating presentment only at the Country Bank.*]

[*131]

For that whereas one E. F. (*the maker*) heretofore, to wit, on, &c. at (London) that is to say, at, &c. (*venue*) made his certain promissory note in writing, bearing date a. certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay at Messrs. *Drummonds and Co. bankers, Charing Cross (o)*, (two) months after the date thereof to the said defendant (*p*), or order, the sum of £— for value received, and then and there delivered the said promissory note to the said defendant; and the said defendant, &c. [*state indorsement and delivery to plaintiff as *ante, 124*]; and the said plaintiff avers, that afterwards, when the said promissory note became due and payable according to the tenor and effect thereof, to wit, on the — day of — in the year of our Lord — aforesaid, at the said Messrs. *Drummonds and Co. bankers, at Charing Cross aforesaid*, to wit, at, &c. (*venue*) aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money therein specified, was then and there duly required, according to the tenor and effect of the said promissory note, but that neither the said Messrs. Drummonds and Co. nor the said E. F. nor any person or persons on behalf of the said E. F. did, or would, at the said time when the said promissory note was presented and shown for payment thereof as aforesaid, or at any time before or after

First indorsee against first indorser, on a note payable at a particular place (*n*).

[*132]

(n) If the latter, see the precedents and notes, ante, 117 and 119. See Chitty on Bills, 7th edit. 492.

(o) If not payable at a particular place, omit the words in italics.

(p) The statement of the addition is in no case necessary or advisable, unless the party be misdescribed in the note; see ante, 115, n. (*f*).

ON PROMISSORY NOTES.

wards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do* (q), of all which said several premises the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, had notice (r); by means whereof, and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, when he the said defendant should be thereunto afterwards requested; and being so liable, he the said defendant in consideration thereof, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, when he the said defendant should be thereunto afterwards requested.—[*When the first count is on a note, made by memorandum at the foot, payable at a particular place, add a count, as on a note payable generally, and with a short indorsement, as ante, 127, and averring a presentment to the maker, and insert common counts, laying the day after the note was due, viz. counts for the original debt between plaintiff and defendant, the money counts, account stated, and breach.*]

[*133] First indorsee against first indorser, with averment of want of effects, to excuse notice of non-payment (s).

*[*Proceed precisely the same as the last precedent to the asterisk, and then proceed as follows:*]—And the said plaintiff avers, that at the time of making of the said promissory note as aforesaid, and from thence until and at the time when the same was so presented and shown for payment thereof as aforesaid, the said E. F. (the maker) had not in his hands any effects of the said defendant, nor had the said E. F. received any consideration from the said defendant for the making, or paying the said promissory note, but, on the contrary, the said E. F. made the said promissory note as aforesaid, for the accommodation, and at the special instance and request of the said defendant; and the said defendant hath not sustained any damage for or by reason of his not having had any notice of the non-payment by the said E. F. of the said sum of money in the said promissory note specified.—[*Conclude as in the last precedent, from the asterisk to the end.*]

By indorsee of a note payable to bearer thirty days after sight, delivered over by the payee to the defendant, who indorsed it to plaintiff.

For that whereas one E. F. heretofore, to wit, on, &c. at &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the same day and year aforesaid, and then and there delivered the said note to one G. H. and thereby then and there promised to pay to the said G. H. or bearer, the sum of £—thirty days after sight thereof, which said promissory note afterwards, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. aforesaid, had been and was delivered to the said defendant, who was then and there the bearer thereof, and entitled to the said sum of money therein specified; and the said defendant, so be-

(q) This asterisk is a reference from the next precedent.

(r) Under this averment plaintiff may show that the defendant could not be found to give him the notice in the usual time, see 8 B. & C. 387.

(s) See the precedent on a bill of exchange and notes, Chitty on Bills, 7th ed. 505. 15

East, 216. 12 East, 171. The first count should be framed as ante, 131; and then insert the above count, with a short indorsement, to excuse the want of due notice of non-payment by maker. When the defendant could not be found to give him the notice in the usual time, it was held not necessary to aver that fact, 8 B. & C. 387.

ing the bearer of the said promissory note, and entitled to the said sum of money therein specified, he the said defendant, afterwards, and before the payment of the said sum of money in the said note specified, to wit, on the day and year aforesaid, at, &c. aforesaid, indorsed the said promissory note, by which said endorsement, he the said defendant, then and there ordered and appointed the said sum of money in the said promissory note specified, to be paid to the said plaintiff, and then and there delivered *the said promissory note, so indorsed as aforesaid, to the said plaintiff; and the said plaintiff in fact saith, that the said E. F. afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, had sight of the said note, that afterwards, when the said note did become due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. aforesaid, the said note was presented and shown to the said E. F., &c.—[*State presentment, refusal, notice, liability, and promise, as ante, 132.*]

ON PROMISSORY NOTES.

[*134]

[*To the end of the indorsement to plaintiff, as ante, 132.*] And the said plaintiff avers, that afterwards, when the said promissory note became due and payable, according to the tenor and effect thereof, to wit, on, &c. (*day when it became due*) diligent search and inquiry was made after the said E. F. at, &c. aforesaid (*u*), and elsewhere, to wit, at &c. (*venue*) aforesaid, in order that the said promissory note might be presented and shown to the said E. F. for payment thereof, but the said E. F. could not, on such search and inquiry, be found, nor did the said E. F. then, or at any time before or since, pay, or cause to be paid, the said sum of money in the said promissory note specified, or any part thereof, but hath wholly neglected so to do, to wit, at, &c. aforesaid; of all which said premises the said defendant afterwards, to wit, on the day and year last aforesaid, there had notice; by means, &c.—[*State liability, and promise to pay on request, as ante, 132. Then add a count averring a presentment for payment, refusal and notice of non-payment, as ante, 132, and the money counts, account stated, and breach.*]

Against indorser, where maker could not be found when the note became due. (t).

For that whereas the said defendant, heretofore, and in the life-time of one E. F. since deceased, to wit, on, &c. at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, two months after the date thereof, to the said plaintiff and the said E. F. since deceased, or their order, the sum of £50, for value received, and then and there delivered the said promissory note to the said plaintiff and the said E. F. since deceased; by means whereof, and by force *of the Statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff and the said E. F. since deceased, in his life-time, the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note, and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff and

By a surviving payee against maker (w).

[*135]

(t) See the precedents and notes, Chitty on Bills. 7th edn. 504. Bayley, 187.—5 Taunt. 30.—1 Wentw. 322, 331.

(w) The place where the note is payable. (w) See ante, 91. n. (a).

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the said E. F. since deceased, in his life-time, to pay them the said sum of money in the said promissory note specified, according to the tenor and effect thereof.—[*Add money counts, account stated, and breach, as in the form by a surviving partner, ante, 91, and if it be material to give in evidence a promise or acknowledgment since the death of the partner, add counts accordingly, see ante, 92.*]

Payee
against a
surviving
maker (x).

For that whereas the said defendant and one E. F. since deceased, heretofore, to wit, on, &c. at, &c. made their certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, two months after the date thereof, to the said plaintiff or order, the sum of £50, for value received, and then and there delivered the said promissory note to the said plaintiff; by means whereof, and by force of the statute in such case made and provided, the said defendant and the said E. F. since deceased, in his life-time, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, they the said defendant and the said E. F. in his life-time, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof.—[*Add money counts, account stated, and breach, against surviving partner, as ante, 94, and if it be material to give in evidence a promise or contract since the death of the partner, add counts accordingly, ante, 94.*]

[*136]
By hus-
band and
wife on a
note paya-
ble to her
whilst sole
(y).

*[*Commencement by husband and wife, ante, 95.*—For that whereas the said defendant, heretofore, and whilst the said E. was sole and unmarried, to wit, on, &c. at, &c. that is to say, at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, two months after the date thereof, to the said E. now the wife of the said A. B. (by her then name and addition of E. F.) or order, the sum of £—value received, and then and there delivered the said promissory note to the said E.; by means whereof, and by force of the Statute in such case made and provided, he the said defendant then and there became liable to pay, to the said E., whilst she was sole and unmarried, the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said E. whilst she was sole and unmarried, to pay her the said sum of money in the said promissory note specified, according to the tenor and effect thereof.—[*Add count on promise to the wife before marriage, as directed, ante, 95.*]

(x) See ante, 94, n. (a). It might be described as the note of the survivor only, 1 B. & A. 29.

(y) See Chitty on Bills, 7th edit. 19, 342. See precedent, post, 163, on bill of wife, where husband married before it fell due. The husband and wife may join, 2 M. & S.

393. If the husband sue alone, on a note given to the wife during coverture, the note may be described as given to the husband, without noticing the wife, 4 T. R. 616. See 1 B. & A. 218.—Ante. vol. i. 179, as to Joinder of Actions, &c.

For that whereas the said defendant, heretofore and before the intermarriage of the said C. T. (the testator) with one Ann L. as hereinafter mentioned, to wit, on &c. (*date of note*) at (London) to wit, at, &c. made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there promised to pay to the said Ann L., or order, on demand, the sum of —*l.* together with lawful interest for the same, value received, and then and there delivered the said promissory note to the said Ann L. whilst she was sole and unmarried; and the said plaintiff avers, that afterwards, to wit, on, &c. (*day of marriage or about it*) to wit, at, &c. aforesaid, the said C. T. intermarried with the said Ann L.; by means whereof, and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay to the said C. T. the said sum of money and interest in the said promissory note specified, according to the tenor and effect of the said promissory note, and being so liable, and the said sum of money in the said promissory note specified being unpaid, he the said defendant, in consideration thereof, afterwards, and after the said intermarriage, to wit, on, &c. (*any day after the marriage*) at, &c. aforesaid, undertook and then and there faithfully promised the said C. T. to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

ON PROMISSORY NOTES.

By an executor on a note payable to the wife of the testator before their marriage, she not having indorsed it (z).

For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and then and there delivered the said promissory note to the said E. then and there, and still being the wife of the said plaintiff, and for the use and benefit of the said plaintiff; by which said promissory note, he the said defendant then and there promised to pay, two months after the date thereof, to the said E. so then being the wife of the said plaintiff, or order, £50, for value received by him the said defendant; by reason whereof, &c.— [*State liability, and promise to pay plaintiff, as ante, 115.*]

By husband alone, on a note made to wife during coverture (a).

[*Commencement against husband and wife, as ante, 96.*—For that whereas the said E. heretofore, and whilst she was sole and unmarried, to wit, on, &c. at, &c. made her certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay two months after the date thereof, to the said plaintiff, or order, the sum of £—for value received, and then and there delivered the said promissory note to the said plaintiff; by means whereof, and by force of the Statute in such case made and provided, the said E. then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor *and effect of the said promissory note; and being so liable, she, the said E., in consideration thereof, afterwards, and whilst she was sole and unmarried, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof. —[*Add money*

Against husband and wife, on her note before marriage.

[*137]

(z) That this action lies and in this form, see B. & A. 218.

(a) See ante, n. (y) preceding page.

ON PROMISSORY NOTES. *counts, and breach, as ante, 97. Lil. Ent. 27. A count on a promise after marriage cannot be added. 1 Trunt. 212.]*

By assignees of a bankrupt, against maker of a note, payable to bankrupt (b). [Commencement by assignees, as ante, 97.]—For that whereas the said defendant, heretofore, and before the said E. F. became a bankrupt, to wit, on, &c. (date of note) at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby, (twelve) months after the date thereof, promised to pay to the said E. F. or order £— value received, and then and there delivered the said promissory note to the said E. F.; by reason whereof, and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay to the said E. F. the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, he the said defendant, in consideration thereof, afterwards, and before the said E. F. became a bankrupt, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said E. F. to pay him the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note.—

[*188] [Add counts on the consideration of the note and money counts, *and account stated, on promises to the bankrupt, and breach, as ante, 98; and if it be material to give in evidence any debt, promise, or acknowledgment, since the bankruptcy, add counts accordingly, see ante, 99.]

By the trustees of a friendly society (c). — (to wit.) A. B. and C. D. stewards and trustees of a certain Friendly Society, commonly called — held at, &c. (according to the fact) complain of E. F. being, &c. For that whereas the said society was and is a society, established according to a certain act of parliament, made and passed in the 10th year of the reign of his late Majesty King George the Fourth, intituled, “An Act to consolidate and amend the laws relating to Friendly Societies;” and that before the making the promises and undertakings hereinafter mentioned, to wit, on &c. all the rules, orders, and regulations, under which the said society was thereafter to be governed, were duly, and according to the form of the Statute in such case made and provided, exhibited, confirmed, and filed at the General Quarter Sessions of the Peace, holden at, &c. on &c. (d) to wit, at &c. And whereas also, heretofore, to wit, on, &c. (date of note) at, &c. aforesaid, the said defendant made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year last aforesaid, and thereby then and there promised to pay to one — and the rest of the society held at, &c. (as in note) the sum of —l. and in one month’s notice to pay the principal, or any part thereof; which said promissory note was so made for the use and benefit of the said society and then and there belonged to the same; and by force of the Sta-

(b) See ante, 98, as to suit against assignees and joinder of action, &c. and ante, vol. i. 46, 184.

(c) The statute now in force relative to these societies is the 10 Geo. 4. c. 56. The prior acts were the 33 Geo. 3. c. 54. s. 10.—35 Geo. 3. c. 111.—49 Geo. 3. c. 125.—59 Geo. 3. c. 128. s. 7.—See 15 Ves. 280.—6

Ves. 441, 802, 98.—Burn. J. tit. Friendly Societies.

(d) Care must be taken that this corresponds with the caption or style of the Sessions. When the action is sustainable, though the rules of the society have not been confirmed at the Quarter Sessions, see 5 B. & A. 769.

ON PROMISSORY NOTES.

[*139]

Second count.

tute in such case made and provided, became and still is vested in the said plaintiffs, as such stewards and trustees as aforesaid, for the use and benefit of the said society; and whereby, and by force of the Statute in such case made and provided, he the said defendant then and there became, and was, and still is, liable to pay to the said plaintiffs, as such stewards and trustees as aforesaid, the said sum of money in the said note specified, and interest thereon as aforesaid, according to the tenor and effect of the said promissory note; and being so liable, he the said defendant in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiffs, then and there, and still being stewards and trustees of the said society as aforesaid, as such stewards and trustees, to pay them the said sum of money in the said note specified, and interest thereon, according to the tenor and *effect of the said promissory note; and the said plaintiffs aver, that afterwards to wit, on the day and year last aforesaid, at, &c. they the said plaintiffs so being such stewards and trustees as aforesaid, gave one month's notice to the said defendant to pay the said principal money of, &c. and then and there requested the said defendant to pay to them the said plaintiffs, as such trustees as aforesaid, for the use and benefit of the said society, the said sum of money in the said note specified, and interest thereon, according to the tenor and effect of the said promissory note. And whereas, also, the said society being so established, and all the rules, orders, and regulations of the said society having been so exhibited and confirmed, and filed at the General Quarter Sessions aforesaid, the said defendant, heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid made his certain other promissory note in writing, bearing date, &c. (*setting out note as before*), which said last-mentioned promissory note was so made for the use and benefit of the said society, and belonging to the same, and by force of the Statute became, and was, and still is, vested in the said plaintiffs, as such stewards and trustees as aforesaid, for the use and benefit of the said society; and thereby, and by force of the Statute in such case made and provided, the said defendant then and there became, and was liable to pay to the said plaintiffs, as such trustees as aforesaid, the said sum of money in the said last-mentioned promissory note specified, and interest thereon as aforesaid, according to the tenor and effect of the said last-mentioned note; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on, &c. at, &c. undertook, and then and there faithfully promised the said plaintiffs, so then and there, and still being stewards and trustees of the said society, as such stewards and trustees, to pay them the said sum of money in the said last-mentioned note specified, according to the tenor, &c. (*averment of request and notice, as in first count.*) And whereas, also, the said defendant afterwards, to wit, on, &c. at, &c. aforesaid, was indebted to the said society in the sum of —*l.* for so much money by the said society, before that time, lent and advanced to the said defendant at his special instance and request; and being so indebted, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiffs, as such stewards and trustees as *aforesaid, to pay them, for the use and benefit of the said society, the said sum of —*l.*, last-mentioned, whenever afterwards he the said defendant should be there-

Third count, for money lent by the society.

[*140]

ON PROMISSORY NOTES.

unto afterwards requested, (*other common counts similar to the last, and breach, as follows*;) Yet the said defendant contriving to deceive and defraud the said society in this behalf, hath not as yet paid the said plaintiffs, or either of them, for the use and benefit of the said society, or otherwise, the said sums of money, or any part thereof, although so to do, he the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, was requested by the said plaintiffs, as such stewards and trustees as aforesaid, but to pay the same, or any part thereof, he the said defendant hath hitherto wholly refused, and still doth refuse, To the damage of the said plaintiffs, as such stewards and trustees as aforesaid, of—l and therefore they bring there suit, &c.

By executor or administrator of payee against maker (e).

[*Commencement by executor or administrator, as ante, 101.*]—For that whereas the said defendant, heretofore, and in the life-time of the said E. F. since deceased, to wit, on, &c. at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the same day and year aforesaid, and thereby then and there promised to pay, two months after the date thereof, to the said E. F. or order, the sum of 50*l.* for value received; by means whereof, and by force of the Statute in such case made and provided, he the said defendant then and there became liable to pay to the said E. F. the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note; and being so liable, he the said defendant, in consideration thereof, afterwards, and in the life-time of the said E. F. to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and faithfully promised the said E. F. to pay him the said sum of money in the said promissory note specified, according to the tenor and effect of the said note.—[*Add counts on the consideration of the note, and all the money counts, and account stated, laying the promises to the deceased, and conclude with the breach at suit of an executor, and profert, as ante, 110, or, the breach at suit of an administrator, and profert, as ante, 110. If it be material to prove a promise since the death, add counts accordingly.*]

By executor or administrator on promise since the death (f).

[*141]

[*Same as in the last precedent, to the words "to the damage, &c." at the end of the breach, and then proceed as follows*:] And also for that whereas the said defendant, heretofore, *and in the life-time of the said E. F. to wit, on, &c. aforesaid, at, &c. aforesaid, made his certain other promissory note in writing, bearing date the day and year last aforesaid, and thereby then and there promised to pay, two months after the date thereof, to the said E. F. or order, the sum of 50*l.* for value received, and then and there delivered the said last-mentioned promissory note to the said E. F.; by means whereof, and by force of the Statute in that case made and provided, the said defendant then and there became liable to pay to the said E. F. the said sum of money in the said last-mentioned promissory note specified according to the tenor and effect of the said last-mentioned promissory note; and being so liable, and the sum of money

(e) As to actions by and against executors see ante, vol. i. 12.

(f) As to this count, see 3 East, 409.—Wills' Rep. 29. Some precedents state the proving the will formally, as ante, 129, 130,

and post, next precedent. It is dangerous to insert this count unless there has been some express promise since the death, as it subjects the plaintiffs to costs, see 9 B. & Cres. 166. Ante, 102, n. (z).

in the said last-mentioned note specified, being and remaining wholly unpaid and unsatisfied, he the said defendant, in consideration thereof, afterwards, and after the death of the said E. F. to wit, on, &c. (g) at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff as executor, (or "*as administrator as aforesaid*") to pay him the said sum of money in the said promissory note specified, according to the tenor and effect thereof. — [*Add other common counts, as directed ante, 102, and conclude with profert of probate, as ante, 102, or letters of administration, as ante, 110.*]

ON PROMISSORY NOTES.

[*Proceed to the end of the note, and liability and promise to pay testator, as ante, 140, and then as follows:*]— And the said plaintiff in fact says, that after the making of the said note, and before the payment of the sum of money therein specified, to wit, on the day and year aforesaid, at, &c. aforesaid, the said E. F. died, having duly made and published his last will and testament in writing, and thereby constituted and appointed the said plaintiff executor thereof, after whose death, and before the payment of the said sum of money in the said note specified, to wit, on the day and year aforesaid, at, &c. aforesaid, the said plaintiff duly proved the said last will and testament of the said E. F. and took upon himself the burden of the execution thereof, of all which said several premises the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, had notice; and thereupon the said defendant, in consideration thereof, then and there, and before the payment * of the said sum of money in the said note specified, to wit, on the day and year aforesaid, at &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff, as executor as aforesaid, to pay him the said sum of money in the said note specified, when he the said defendant should be thereunto afterwards requested. — [*Add counts, as directed in the last precedent.*]

The like in another form, stating the probate.

[*142]

[*For commencement against executors and administrators, ante, 106. 112.*]—For that whereas the said E. F. in his life-time, to wit, on, &c. at, &c. made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the same day and year aforesaid, and thereby then and there promised to pay, two months after the date thereof, to the said plaintiff, or order, the sum of 50*l.* for value received; by means whereof, and by force of the Statute in such case made and provided, the said E. F. in his life-time, then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note, and being so liable, he the said E. F. in his life-time, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, according to the tenor and effect of the said promissory note. — [*Then add counts on the consideration of the note, and the money counts, on promises of the deceased, and a breach against an executor, as ante,*

Payee against the executor or administrator of maker.

(g) Some day just before the commencement of the action.

ON PRO-
MISSORY
NOTES.

106, and against an administrator, as ante, 112. If it be material to give in evidence a promise of admission of defendant since the death, add counts accordingly, and which may be framed nearly as in the last precedent.]

[*143]

*II. ON CHECKS.

By payee
of a check
against
drawer
(h).

For that whereas the said defendant, heretofore, to wit, on, &c. (*date of check*) at, &c. (*venue*) according to the usage and practice of merchants, made his certain draft or order in writing for the payment of money commonly called a check on a banker, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and then and there directed the said draft or order to certain persons by the names, style, and firm of Messrs. E. F. and G. H. (*as in check*), and thereby then and there required the said Messrs. E. F. and G. H. to pay to the said plaintiff or bearer 50*l.*, and then and there delivered the said draft or order to the said plaintiff: and the said plaintiff avers, that after the making of the said* draft or order, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said draft or order was presented and shown to the said Messrs. E. F. and G. H. for payment thereof, according to the said usage and practice of merchants, and they were then and there requested to pay the said sum of money therein specified, according to the tenor and effect thereof; but that the said Messrs. E. F. and G. H. did not, nor would, at the said time when the said draft or order was so shown and presented to them for payment thereof as aforesaid, or at any time afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, whereof the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, had notice; by means whereof the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said draft or order specified, when the said defendant should be thereunto afterwards requested; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said draft or order specified, when he the said defendant should be thereunto afterwards requested.

[*144]
By bearer
of a check
against
drawer.

*For that whereas the said defendant, heretofore, to wit, on, &c. (*date of check*) at, &c. (*venue*) according to the usage and practice of merchants, made his certain draft, or order, in writing, for the payment of money, commonly called a check on a banker, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and then and there directed the said draft or order to certain persons, by the name, style, and firm of Messrs. &c. (*as in check*) and thereby then and there

(h) See Chitty on Bills, 7th edit. 322, 51. Mills v. Oddy, 3 Dowl. 722.
—See Form, id. 496. See a recent form in

requested the said Messrs. &c. to pay to one E. F. or bearer, 50*l.*, and then and there delivered the said draft or order to the said E. F.; and the said E. F. to whom, or to the bearer of the said draft or order, the payment of the said sum of money therein specified, was thereby directed to be made, after the making of the said draft or order, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, duly transferred, assigned, and delivered the said draft or order to the said plaintiff, who thereby then and there became and was, and from thence hitherto hath been, and still is, the lawful bearer (i) thereof, and entitled to the payment of the said sum of money therein specified, and the said plaintiff avers, that after the making of the said, &c.—[*As in the last precedent, from the asterisk to the end.*]

ON
CHECKS.

III. ON INLAND BILLS OF EXCHANGE (j).

ON INLAND
BILLS OF
EX-
CHANGE.

[*Commencement in K. B., C. P. or Exchequer, as directed ante, 12 to 20.*—For that whereas the said plaintiff, heretofore, to wit, on, &c. (*date of bill*) at, &c. (*place where bill dated*) (l), that is to say, at, &c. (*venue*) according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of *exchange, in writing, bearing date the same day and year aforesaid (m) and then and there directed the said bill of exchange to the said defendant (n), and thereby and then and there requested the said defendant (o), (*two*) months after the date thereof, to pay to the said plaintiff, or his order, the sum of £50 (p), for value received (q); which said bill of exchange the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants (r); by means whereof, and according to the said usage and custom of merchants, the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the

Drawer
against
acceptor,
on a bill
accepted
generally
by defend-
ant, or his
agent (k).
[*145]

(i) According to the form and observations in *Mills v. Oddy*, 3 Dowl. 722 and 726, it suffices to state a *delivery* to the plaintiff, without averring that he is the bearer.

(j) The Pleader should observe that the following Precedents on bills are framed upon bills as usually drawn—but bills frequently vary in form, and in such cases care should be taken not to follow the above precedents too closely for fear of a variance.

(k) The notes in the preceding precedents on promissory notes will, for the most part, be here useful and applicable.

(l) This however is not necessary in case of an inland bill. 3 Campb. 304—*Chitty on Bills*, 7th edit. 486, n. (d).—*Bayley*, 175. If the bill be drawn at Dublin in Ireland, it should be so stated, 2 B. & A. 301.—1 B. & C. 16.—2 D. & R. 15. S. C.

(m) If the bill has no date, or it be doubtful, omit the words "bearing date," &c. 6 M. & S. 73.

(n) Though usual, it is not necessary to state the address of the bill in an action against the acceptor, unless he is misdescribed therein, ante, 115, n. (f). 3 J. B. Moore, 91.

(o) The direction to the defendant need not be noticed. 3 J. B. Moore, 91. & Taunt. 739, S. C.

(p) See ante, 115, n. (f).

(q) See ante, 115, n. (g), as to what is a variance. The statement of the delivery to the acceptor is untechnical in an action against him, but not demurrable, 5 East, 476.

(r) An acceptance by agent may be described as made by the party himself, 2 Campb. 604. If the acceptance be dated on a day different to the date of the bill, it should be described accordingly. By the 1 and 2 Geo. 4. c. 78, an inland bill must be accepted by writing the acceptance on the face of the bill, but there is no necessity for stating in the declaration that it was so accepted. 6 Bingh. 529.

ON ISLAND
BILLS OF
EX-
CHANGE.

said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof.—[*Insert counts upon the consideration of the bill between the plaintiff and defendant, and all the money counts, count for interest, account stated, and breach, laying the day after the bill was due, and just before the action was commenced.*]

The like
on a bill
with a
wrong
date (s).

[*146]

For that whereas the said plaintiff, heretofore, to wit, on, &c. (t) at &c. according to the usage and custom of merchants, *made his certain bill of exchange, in writing, bearing date by mistake the — day of — A. D. — but then and there meant, intended, and understood by the said plaintiff and the said defendant to be dated on the said, &c. (u) and then and there directed the said bill of exchange to the said defendant, and thereby then and there requested, &c.—[*Proceed as usual.*]

By drawer
of a bill,
payable to
his order,
with aver-
ment that
he made
no order
(w).

[*State the bill payable to drawer's order, and the acceptance, as ante, 144, and then proceed as follows:*]—And the said plaintiff avers that he hath not, at any time since the making of the said bill of exchange, hitherto made any order for the payment of the said sum of money in the said bill of exchange specified, or any part thereof, to any other person or persons whomsoever, whereof the said defendant, afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, at, &c. had notice, by means whereof, &c.—[*State liability, and promise to pay, according to the tenor and effect of the bill, as ante, 145.*]

Drawer
against
acceptor
on a bill
payable at
a particu-
lar place
(x).

As in the precedent, ante, 144, to the statement of the acceptance, exclusive, and then proceed as follows:]—Which said bill of exchange the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants, payable at (Sir James Esdaile and Co.'s bankers, London, as in the bill;) and the said plaintiff avers, that afterwards, and when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on, &c. (y) at (z) the said Sir James Esdaile's *and Co. bankers, London, aforesaid, that is to say, at, &c.

[*147]

(s) See form and notes, ante, 117.

(t) This is to be the real day.

(u) The first-mentioned day.

(w) Though this averment is sometimes introduced, it is unnecessary, 5 East, 476, 2 Smith, 43. Bayl. 190. Chitty on Bills, 7th edit. 490, n. (g).

(x) See the notes to the precedent, post, 150. Sometimes the declaration is drawn, as post, 150. See also ante, 117, 18.—Since the 1st August, 1821, this count, it should seem, would be of no avail, unless the bill be accepted at a particular place, and the words "only, and not elsewhere or otherwise" be introduced. 1 & 2 Geo. 4. c. 78,

and as to what is not a special acceptance within the Statute, see Chitty on Bills, 8 edit. 322; Selby v. Eden, 3 Bing. 611; 11 Moore, 511; Fayle v. Bird, 6 Bar. & Cres. 531; 2 Car. & P. 303; Turner v. Hayden, 4 Bar. & Cres. 1; Ry. & Mood. 215. If a bill be accepted in the terms of the act, then it is essential to aver a presentment accordingly, Gibb v. Mather, 1 Moo. & Scott, 387. (y) The day the bill became due, see ante, 118, n. (p), as to mistake in this respect.

(z) See ante, 115, n. (c). It need not be stated the bill was presented to the bankers, id.

(venue) aforesaid, the said bill of exchange was duly presented and shown for payment thereof, according to the said usage and custom of merchants, and payment of the said sum of money, in the said bill of exchange specified, was then and there required; but that neither the said Sir James Estdale and Co. (a) nor the said defendant, nor any person or persons on behalf of the said defendant, did or would, when the said bill of exchange was so presented and shown for payment as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, had notice; by means whereof, and according to the said usage and custom of merchants, he the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, when he the said defendant should be thereunto afterwards requested; and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, when he the said defendant should be thereunto afterwards requested.—[Add a count on a bill as accepted generally, as ante, 145, and all the common counts as there directed.]

ON INLAND
BILLS OF
EX-
CHANGE.

For that whereas the said plaintiffs, heretofore, to wit, on, &c. (date of bill) at London, (place where made) that is to say, at, &c. (venue) made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to the said defendants, and then and there requested the said defendants, two months after the date thereof, to pay to ["Messrs. James Atkins and Co." as in bill,] or order, the sum of £50, for value received, and then and there delivered the said bill of *exchange to the said [Messrs. James Atkins and Co.] which said bill of exchange the said defendants afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants; and the said plaintiffs aver, that afterwards, and when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on, &c. (the day it fell due) to wit, at, &c. aforesaid, the said bill of exchange, so accepted as aforesaid, was presented and shown to the said defendants for payment thereof, according to the said usage and custom of merchants; and the said defendants were then and there requested to pay the said sum of money therein specified, according to the tenor and effect of the said bill of exchange, and of their said acceptance thereof; but that the said defendants did not, nor would, at the said time when the said bill of exchange was so presented and shown to them for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, and thereupon afterwards, to wit, on the

On a bill payable to a third person and returned to and taken up by drawer (b).
[*148]

(a) There is no necessity for denying a non-payment by the bankers. 3 M. & S. 73.

(b) See precedent, 1 Wentw. 292, 3. When the drawer sues on a bill, payable to

a third person, in order to show his interest therein, it is necessary to state that it was dishonored, and taken up and paid by the plaintiff.

ON INLAND
BILLS OF
EX-
CHANGE.

day and year last aforesaid, to wit, at, &c. (*venue*) aforesaid, the said bill of exchange was returned to the said plaintiffs for non-payment thereof; and the said plaintiffs, as drawers of the said bill of exchange, were then and there called upon, and forced and obliged to pay, and did then and there pay to the said Messrs. James Atkins and Co. (c) the said sum of money in the said bill of exchange specified, whereof the said defendants afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice; by means whereof, and according to the said usage and custom of merchants, they, the said defendants, then and there became liable to pay to the said plaintiffs the said sum of money in the said bill of exchange specified, when they the said defendants should be thereunto afterwards requested; and being so liable, they the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said bill of exchange specified, when they the said defendants should be thereunto afterwards requested.—[*Add common counts, as directed in the last precedent.*]

Against
acceptor,
on his ac-
ceptance
varying as
to time
from the
bill (d).

[*After stating the bill payable at one month, proceed as follows:*]—Which said bill of exchange the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof accepted, payable two months after the date of the said bill; by means whereof, and according to the said usage and custom of merchants, he the said defendant then and there became liable to pay the said sum of money in the said bill of exchange specified, according to the tenor and effect of his said acceptance of the said bill of exchange; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, undertook, and *then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of his said acceptance thereof.—[*Add a count as on a general acceptance, ante, 144.*]

[*149]

Drawer
against
acceptor,
on an ac-
ceptance
payable
on a con-
tingency
(e)

[*State the drawing of the bill, as ante, 144, and then proceed as follows:*]—Which said bill of exchange he, the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants, payable (when he, the said defendant, should have received the second payment of the prize-money payable to one G. H. as an officer, and part) of the crew of a certain ship or vessel called the Gypsy, (*as in the bill.*) And the said plaintiff in fact saith, that the said defendant did, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, receive the second payment of the prize money aforesaid, amounting in the whole to a large sum of money, to wit, the sum of —l. (*the account, or enough to cover it,*) of lawful money of Great Britain; by means whereof, &c. —[*State liability, and promise to pay, on request, as ante, 146, 147, and the money counts, account stated, and breach.*]

(c) If to any other holder, state fact accordingly.

(d) See a precedent, 1 Wentw. 249.

(e) As to a conditional acceptance, see

Chitty on Bills, 7th ed. 180 to 182. It is necessary to declare specially, 4 Campb. 176. —1 Marsh. 176.

For that whereas one E. F. heretofore, to wit, on, &c. (*date of bill*), at [London,] that is to say, at, &c. (*venue*) according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there requested the said defendant (*f*) (two) months after the date thereof, to pay to the said plaintiff (*g*) or order, the said sum of £— for value received, and then and there delivered the said bill of exchange to the said plaintiff (*h*), which said bill of exchange the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof, according to the said usage and custom of merchants; by means *whereof, &c.—[*State liability and promise, as ante*, 144, 145. *As there is not in general any contract between the payee and the acceptor, except that founded on the bill, it is not usual to add more than the common money counts, count for interest, account stated, and breach.*]

ON INLAND
BILLS OF
EX-
CHANGE.

Payee
against
acceptor
on a gen-
eral ac-
ceptance.

[*150]

For that whereas certain persons, by and under the names, style, and firm of Jonathan Dubbins and Co. (or, "by and under the style and description of the Iron Company,") (*as in the bill*) heretofore, to wit, on, &c. (*date of bill*), at, &c. according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made their certain bill of exchange in writing, bearing date the day and year aforesaid, and thereby then and there requested, &c.—[*Proceed as usual, and the makers may be described throughout as "the said drawers of the said bill of exchange."*]*—It is not necessary to state the names of the parties to a bill of exchange; unless they be plaintiffs or defendants. It is not necessary to state that one partner drew or indorsed for himself and co-partners, but it may be stated that all drew or indorsed.* 2 Campb. 604. 4 Campb. 78.

By a pay-
ee of a bill
drawn by
a firm, or
by one of
several
partners
in name
of firm.

For that whereas one E. F. (or the said defendant,) heretofore, to wit, on, &c. at, &c. by one G. H. then and there being his agent in that behalf, according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date the day and year aforesaid; &c. &c. (*It is not necessary to notice the agency; it may be stated that the party himself drew.* 2 Campb. 604. 12 Mod. 346. 1 H. Bl. 313. 6 T. R. 659. Bayl. 175. Chitty on Bills, 7th ed. 489, n. (b).)

On a bill
drawn by
an agent.

For that whereas one E. F. heretofore, to wit, on, &c. at (London,) that is to say, at, &c. (*venue*) according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing; bearing date the day and year aforesaid, and thereby then and there requested the said defendant, (two) months after the date thereof, to pay to the said plaintiff, or order, (*i*)

Payee
against
acceptor
of a bill
payable at
a particu-
lar place

(*f*) It is unnecessary to state a direction to, or address of, the acceptor. Ante, page 145, note (b).

(*g*) It is not necessary to state the description of the payee, ante, 115, note (*f*).

(*h*) This allegation, though usual, is not

necessary. Ante, 145, note (e).

(*i*) As to this form, see ante, 146, note (z), see 1 Marsh. 80. 5 Taunt. 344.—3 Campb. 463. It should seem not to be necessary to aver or prove that the acceptor had notice of the dishonor, 3 Campb. 261.

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bill of exchange to the said plaintiff which said bill of exchange the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof, accepted, according to the usage and custom of merchants, payable at Sir James Esdaile's and Co. bankers, Lombard-street, London, (*as in the bill*.) And the said plaintiff avers that, afterwards, and when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on, &c. (*day when it fell due*) to wit, at the said Sir James Esdaile's and Co. bankers, in Lombard-street, London, aforesaid, that is to say, at, &c. (*venue*) aforesaid, the said bill of exchange was duly presented and shown for payment thereof, according to the usage and custom of merchants, and payment of the said sum of money, in the said bill of exchange specified, was then and there duly required; but that neither the said Sir James Esdaile and Co. nor the said defendant, nor any other person or persons on behalf of the said defendant, did or would, when the said bill of exchange was so presented and shown for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do (*k*); of all which said several *premises the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice (*l*); by means whereof, and according to the said usage and custom of merchants, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, when he, the said defendant, should be thereunto afterwards requested, and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, when he the said defendant should be thereunto afterwards requested. — [*Insert a count, stating that the defendant accepted the bill generally, as ante, 144, and then add all the money counts, interest, account stated, and breach.*]

[*151]
Liability,
and promise to pay
on request.

[*152]
The like
in another
form (*m*).

*[*State the bill and acceptance precisely as in the last precedent, and then state liability, and promise to pay, according to the tenor and effect of the bill, as ante, 145, and then proceed as follows:*]—And the said plaintiff avers, that afterwards, to wit, on, &c. at the said Sir James Esdaile's and Co. bankers, Lombard-Street, London, aforesaid, to wit, at, &c. aforesaid, the said bill of exchange was duly presented and shown for payment thereof, according to the said usage and custom of merchants, and payment of the said sum of money, in the said bill of exchange specified, was then and there duly required.—[*Add counts as directed in the last precedent.*]

First, second, or subsequent indorsee, against acceptor on a general acceptance.

For that whereas one E. F. heretofore, to wit, on, &c. (*date of bill*) at (London) that is to say, at, &c., (*venue*) according to the usage and custom of merchants, from time immemorial used and approved of within

(*k*) According to 3 M. & S. 150, it should seem that it is not necessary to aver a non-payment to the particular place, and see the next precedent; see also ante, 146, note (*z*)

(*l*) The averment of notice, it seems, is unnecessary. See 3 Campb. 261.

(*m*) See notes to last precedent, and 3 M. & S. 150.—3 Campb. 261; and ante, 146, note (*z*).

this kingdom, made his certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there requested the said defendant, (two) months after the date thereof, to pay to one G. H. or order the sum of —, for value received, and then and there delivered the said bill of exchange to the said G. H. which said bill of exchange the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof, accepted, according to the usage and custom of merchants. And the said G. H. to whom or to whose order the payment of the said sum of money in the said bill of exchange specified, was to be made after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid (*n*), at, &c. (*venue*) aforesaid, according to the said usage and custom of merchants, indorsed the said bill of exchange, by which said indorsement he the said G. H. then and there ordered and appointed the said sum of money, in the said bill of exchange specified, to be paid to one I. K. and then and there delivered the said *bill of exchange, so indorsed as aforesaid, to the said I. K. (*o*). And the said I. K. to whom or to whose order the payment of the said sum of money, in the said bill of exchange specified, was to be made after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, according to the said usage and custom of merchants, indorsed the said bill of exchange, by which said last-mentioned indorsement, he, the said I. K., then and there ordered and appointed the said sum of money, in the said bill of exchange specified, to be paid to the said plaintiff, and then and there delivered the said bill of exchange, so indorsed as last aforesaid, to the said plaintiff (*p*); by means whereof, &c.—[State liability, and promise to pay plaintiff, according to the tenor and effect of the bill, as ante, 345. If both indorsements cannot be proved, add a count stating plaintiff to be first indorsee, with a short indorsement, as post, 154. And add the money counts, interest, account stated, and breach.]

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EX-
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First in-
dorse-
ment.

[*153]
Second
indorse-
ment.

For that whereas one E. F. heretofore, to wit, on, &c. (*date of bill*) at, &c. (*place where made*) that is to say, at, &c. (*venue*) according to the usage and custom of merchants, from time immemorial, used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there requested the said defendant, (two) months after the date thereof, to pay to one G. H. or order, the sum of £—for value received, and then and there delivered the said bill of exchange to the said G. H. which said bill of exchange the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid,

First,
second, or
subse-
quent in-
dorsee
against
acceptor,
where bill
is payable
at a partic-
ular place
(*q*).

(*n*) If the indorsement be dated on a different day to the date of the bill, state the day accordingly, but even this is not necessary.

(*o*) If the plaintiff be first indorsee, he is to be described accordingly; and the second indorsement is, of course, not to be stated.

(*p*) If the plaintiff be a subsequent indorsee, add a third, or other indorsement, like the second.

(*q*) As to the averments of presentment and notice, see notes to the precedents, ante, 146, note (*c*), 150, 1. The declaration may be framed in another form, as ante, 151, 2.

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[*154]

upon sight thereof, accepted, according to the said usage and custom of merchants, payable at Sir James Esdaile's and Co. bankers, Lombard-street, London; (*as in the bill*) and the said G. H. to whom or to whose *order the said sum of money, in the said bill of exchange specified, was to be paid, after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, according to the said usage and custom of merchants, indorsed the said bill of exchange, by which said indorsement, he, the said G. H. then and there ordered and appointed the said sum of money in the said bill of exchange specified, to be paid to the said plaintiff (*r*); and the said plaintiff avers, that afterwards, and when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on, &c. to wit, at the said Sir James Esdaile's and Co. bankers, Lombard-street, London, aforesaid, that is to say, at, &c. (*venue*) aforesaid, the said bill of exchange was duly presented and shown for payment thereof, according to the usage and custom of merchants, and payment of the said sum of money in the said bill of exchange specified, was then and there duly required; but that neither the said Sir James Esdaile and Co. nor the said defendant, or any person or persons on behalf of the said defendant, did or would, when the said bill of exchange was so presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises, the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice; by means whereof, &c.—[*State liability, and promise to pay on request, as ante, 147, and then add a count on the bill as accepted generally, as ante, 144, stating the indorsement concisely, as below, and then add the money counts, count for interest, account stated, and breach.*]

Short in-
dorse-
ments.

[*In a second or subsequent count on the same bill it is advisable, in order to avoid unnecessary prolixity and expense, to state the indorsements concisely thus:*]—And the said E. F. then and there indorsed and delivered the said last-mentioned bill of exchange to G. H. who then and there indorsed and delivered the same bill to one I. K. who then and there indorsed and delivered the same bill to the said plaintiff.

Indorse-
ment by a
firm (*s*).
[*155]

And the said persons so using the name, style, and firm of G. H. and Co. (*or*, and the said G. H. and Co.) to whom *or to whose order the said sum of money in the said bill of exchange specified, was so directed to be paid as aforesaid, afterwards, and before the payment of the said sum of money in the said bill of exchange specified, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, indorsed the said bill of exchange, according to the said usage and custom of merchants, and by that indorsement then and there ordered and appointed the said sum of money in the

(*r*) If plaintiff be *second* indorsee, state the second indorsement, as in the last precedent.

(*s*) It is not necessary to state that one partner indorsed for himself and co-partners, it may be stated that all indorsed, 4 Campb.

78.—2 Campb. 604, as to statement and proof of indorsement being made by persons using a firm. 2 Dow. & Ry. 281.—1 B. & C. 146.—A variance in the description of indorser's name, is sometimes immaterial. 1 Stark. 47.

said bill of exchange specified, to be paid to the said plaintiff, and then and there delivered the said bill of exchange, so indorsed, to the said plaintiff.

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And the said E. F. to whom or to whose order the payment of the said sum of money in the said bill of exchange specified, was by the said bill of exchange to be made after the making of the said bill of exchange, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, &c. aforesaid, by one G. H. then and there being his agent in that behalf, indorsed the said bill of exchange, according to the usage and custom of merchants, by which said indorsement he the said E. F. then and there ordered and appointed the said sum of money in the said bill of exchange specified to be paid to the said plaintiff, and then and there delivered the said bill of exchange, so indorsed as last aforesaid, to the said plaintiff.

Indorse-
ment by
an agent
(t).

*The cases upon this subject are collected in Bailey on Bills, 22 and 23, a. b. Chitty on Bills, 7th edition, 64, 65. Selw. N. P. 287. 1 Campb. 130. and 180. The result of the decision seems to be, that the holder may recover against the drawer or acceptor, or other party aware at the time that the payee was fictitious, upon a count on the bill stating it to have been payable to bearer, or on the counts for money had and received; see Vere v. Lewis, 3 T. R. 183. Minet v. Gibson, 3 T. R. 481. 1 Hen. Bla. 659. Collis v. Emmet, *1 Hen. Bla. 313. Bennett v. Farnell, 1 Campb. 130 and 180, where see the form of other special counts. See other forms, 1 Wentw. 267, 270.*

By indor-
see or
holder of a
bill, paya-
ble to the
order of a
fictitious
payee,
against
drawer or
acceptor
privity to
the fact.

[*156]

The modes of declaring at the suit of an indorsee of an executor or administrator, may be collected from the precedents on promissory notes; ante, 128, 129, 140, 141, 142; and see 1 Wentw. 387.

By indor-
see of an
executor
or admin-
istrator.

The mode of stating a partial indorsement of a bill of exchange, will be the same as in the case of a promissory note, ante, 128.

Partial in-
dorse-
ment.

[Commencement as directed ante, 115.]—For that whereas the said defendant, heretofore, to wit, on, &c. at London, that is to say, at, &c. according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of exchange, in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to one E. F. (by name and addition of Mr. E. F. merchant, Tower Hill, London) by which said bill of exchange, he, the said defendant, then and there requested the said E. F. (two) months after the date thereof, to pay to the said plaintiff, or order, the sum of —l. for value received, and then and there delivered the said bill of exchange to the said plaintiff. And the said plaintiff avers, that after-

Payee
against
drawer,
on default
of accept-
ance (u).

(t) This form, though sometimes adopted, is not necessary; it may be stated that the principal indorsed without noticing the agent. 2 Campb. 694. — 4 Campb. 78. — Ante, 117. n. (a).

7th edit. 196 to 240. 8 edit. 370 to 373. It is no plea, that a reasonable time between the dishonor and plea had not elapsed. *Siggers v. Lewis*, 1 Crompt M. & Ross. 370, overruling *Walker v. Barnes*, 1 Marsh. Rep. 36; 5 Taunt. 240. 3 East, 481.

(u) As to this count, see *Chitty on Bills*,

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wards, and before the payment of the said sum of money in the said bill of exchange specified, to wit, on, &c. (w), at Tower Hill, London, aforesaid, to wit, at, &c. aforesaid, (x), the said bill of exchange was presented and shown to the said E. F. for his acceptance thereof according to the usage and custom of merchants, and the said E. F. was then and there required to accept the same; but that the said E. F. did not, nor would, at the said time when the said bill of exchange was so presented and shown to him for his acceptance thereof, as aforesaid, or at any time afterwards, accept the same, or pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do*, of all which said several premises, the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. *aforesaid, had notice (y); by means whereof, &c.—[*State liability, and promise to pay on request, as ante, 151, and if the drawer had no effects in hands of drawee, and notice of non-acceptance cannot be proved, add a count like the next precedent, and conclude with counts on the consideration of the bill, and the money counts, account stated, and breach.*]

The like
with aver-
ment, that
defendant
had no ef-
fects in
drawee's
hands. (z).

[*First count same as the last precedent, second count same as the last, to the asterisk, and then proceed as follows:*]—And the said plaintiff avers, that at the time of the making of the said last-mentioned bill of exchange, and from thence until, and at the time when the same was so presented and shown to the said E. F. for his acceptance thereof as aforesaid, he the said E. F. had not in his hands any effects of the said defendant, nor had he received any consideration from the said defendant for the acceptance or payment by him the said E. F. of the said last-mentioned bill of exchange, nor hath the said defendant sustained any damage, by reason of his not having had notice of the non-acceptance by the said E. F. of the said last-mentioned bill of exchange; of all which said several premises he the said defendant, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, had notice; by means, &c.—(*State liability, and promise to pay on request, as ante, 151.*)

Payee
against
drawer, on
default of
payment,
where bill
payable
generally.

[*Commencement as directed ante, 115.*]—For that whereas the said defendant, heretofore, to wit, on, &c. (*date of bill*) at London (*place where made,*) that is to say, at, &c. (*venue*) according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid (a), and thereby then and there requested one E. F. (*two*) months after the date thereof, to pay to the said plaintiff, or order, the sum of—l,

(w) The day of presentment, but the precise day is not material.

(x) The venue in the action.

(y) Under this averment plaintiff may show defendant could not be found to give him the notice in the usual time. 8 B. & C. 357.

(z) As to this count see Chitty on Bills, 7th edition, 506, 8th edit. 356 to 358, 468 to 462, and notes.—16 East, 43.

(a) It does not seem to be necessary to state the direction to, or addition of, the drawee, and as a variance would be fatal, it is better omitted. It seems to be advisable not to state acceptance; Harris v. Facker, Parkes v. Edge, 3 Tyrw. 370, 364; but in case of an acceptance payable at a particular place a presentment there or to the drawee in person must be proved, id. ibid.; Gibb v. Mather, 2 Tyrw. 189.

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for value received, and then and there delivered the said bill of exchange to the said plaintiff, which said bill of exchange the said E. F. afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants (*b*); and the said plaintiff avers, that afterwards, *when the said bill of exchange became due and payable, according to the tenor and effect thereof* (*c*), to wit, on, &c. (*d*), to wit, at, &c. aforesaid, the said bill of exchange was presented and shown to the said E. F. for payment thereof, according to the said usage and custom of merchants, and the said E. F. was then and there requested to pay the said sum of money therein specified, according to the tenor and effect of the said bill of exchange; but that the said E. F. did not, nor would, at the *said time when the said bill of exchange was so presented and shown to him for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendant afterwards, to wit, on, &c. last aforesaid; at, &c. aforesaid, had notice*; by means whereof, &c.—[State defendant's liability, and promise to pay on request, as ante, 151. *If it be doubtful whether due notice to the defendant of non-payment can be proved, and the defendant had no effects in the hands of the drawee, add a count like the precedent, post, 159, and then insert counts on the consideration of the bill between plaintiff and defendant, and the money counts, account stated, and breach.]

[*158]

[*Commencement as directed, ante, 115.*]—For that whereas the said defendant, heretofore, to wit, on, &c. (*date of bill*) at London (*place where made*) that is to say, at, &c. (*venue*) according to the usage and custom of merchants, from time immemorial used and approved of within this kingdom, made his certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there requested one E. F. (*two*) months after the date thereof, to pay to the said plaintiff, or order, the sum of —£. for value received, and then and there delivered the said bill of exchange to the said plaintiff, which said bill of exchange the said E. F. afterwards, to wit on the day and year aforesaid, at, &c. (*venue*) aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants, payable at Messrs. Esdaile and Co's bankers, Lombard-street, London (*as in the bill*); and the said plaintiff avers, that afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on, &c. to wit, at the said Messrs. Esdaile and Co's Bankers, Lombard-street, London, aforesaid, that is to say, at, &c. (*venue*) aforesaid, the said bill of exchange was duly presented and shown for

Payee
against
drawer,
on default
of pay-
ment
where bill
accepted
payable at
a particu-
lar place
(1).

(b) when the bill is accepted generally, though usual to state the acceptance as in this precedent, this is unnecessary; and if there be any doubt as to the proof of the acceptance, it is better to omit the allegation. The statement of it, however, would not render it incumbent on the plaintiff to prove the acceptance. 4 B. & C. 312.

(c) The words in italic are unnecessary, and may be omitted, and should be so when the presentment was on the proper day.

(d) This is to be the third day of grace, unless that was a Sunday or good Friday, or Christmas-day, and then on the day before, but a mistake in this respect is not fatal. 1 Bingh. 23. Ante, 118, n. (b).

(1) See ante, 167, n. (a).

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payment thereof, according to the said usage and custom of merchants, and payment of the said sum of money in the said bill of exchange specified, was then and there duly required; but that neither said Messrs. Esdaile and Co. nor the said E. F. nor any other person or persons on behalf of the said E. F. did or would, at the said time *when the said bill of exchange was so presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do; of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. had notice, by means whereof, &c.—[State liability, and promise to pay on request, as ante, 151, and add a count as on a bill presented for payment, omitting the acceptance; and if defendant had no effects in drawee's hands add counts like the next precedent, and counts on the original debt, money counts, account stated, and breach.]

Payee
against
drawer,
on default
of pay-
ment,
where de-
fendant
had no ef-
fects in
hands of
drawee.

[*Same as the precedents ante, 157, to the * in page 158, and then proceed as follows:*]—And the said plaintiff avers, that at the time of the making of the said last-mentioned bill of exchange, and from thence until and at the time when the same was so presented and shown to the said E. F. for payment thereof as aforesaid, he the said E. F. had not in his hands any effects of the said defendant, nor had he received any consideration from the said defendant, for the acceptance or payment by him the said E. F. of the said last-mentioned bill of exchange, nor hath he the said defendant sustained any damage by reason of his not having had notice of the non-payment by the said E. F. of the said sum of money in the said last-mentioned bill of exchange *specified; of all which said several premises he the said defendant afterwards, to wit, on the day and year last aforesaid, at &c. aforesaid, had notice; by means, &c.—[*State liability, and promise to pay on request, as ante, 151.*]

[*160]

Payee
against
drawer, or
indorser,
when
drawee
could not
be found
to accept
or pay (c).

[*After first count stating presentment for payment, and default, and notice, liability and promise, as ante, 157, add a count stating the bill and delivery to plaintiff, as ante, 157, and then proceed as follows:*]—And the said plaintiff avers, that afterwards, and before the payment of the said sum of money in the said last-mentioned bill of exchange specified, to wit, on the days and year aforesaid, and on divers other days and times between that day and the time when the said bill of exchange became due and payable, according to the tenor and effect thereof, and also at the time when the said bill of exchange did so become due and payable, to wit, on, &c. (*day when it fell due*), diligent search and enquiry was made after the said E. F. at, (No. 1, near the Chapel, Knightsbridge,) aforesaid, and elsewhere, in order that the said last-mentioned bill of exchange might be presented and shown to the said E. F. for his acceptance and payment thereof, according to the said usage and custom of merchants; but that the said E. F. could not on such search and inquiry be found, nor hath he at any time, since the making of the said bill of exchange, hitherto accepted the same, or paid the said sum of money therein specified, or any

(c) When this count is advisable, see Chitty on Bills, 7th edit. 504, in notes. See also 1 West. 323, 331. If the bill has been ac-

cepted, the allegation as to presentment for acceptance will of course be omitted.

part thereof; of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, had notice, by means whereof, &c.—[*State liability, and promise to pay on request, as ante, 151.*]

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[*After stating in one count the presentment and notice as usual, ante, 157, add a count stating the indorsement to plaintiff shortly, as ante, 154, and then proceed as follows:*—And the said plaintiff further saith, that, afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on, &c. he the said plaintiff was ready and willing, in due manner, to present and show the said bill of exchange to the said G. H. for payment thereof, and to demand of the said G. H. payment of the said sum of money therein specified, according to the tenor and effect thereof, and would accordingly have presented the same to the said G. H. and have demanded payment thereof, to wit, at, &c. aforesaid, whereof the said defendant then and there had notice; but the said defendant then and there requested the said plaintiff not to present the bill of exchange to the said G. H. for payment thereof, and then and there wholly dispensed with, and discharged the said plaintiff from the presentment of the said last-mentioned bill of exchange to the said G. H. for payment thereof; by means whereof, after the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the day and year last aforesaid, at, &c. aforesaid, the said defendant became liable, &c.—[*State defendant's liability, and promise to pay on request, as ante, 151.*]

By payee
or in-
dorsee,
against a
drawer or
indorser,
who has
dispensed
with pre-
sentment
for pay-
ment (f).

[*161]

[*State the drawing of the bill, and presentment for payment and dishonor as ante, 157, and then proceed as follows:*—And thereupon afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, the said bill of exchange was duly protested for non-payment thereof, according to the form of the Statute in such case made and provided, of all which said several premises the said defendant afterwards, and within fourteen days then next following, to wit, on the day and year last aforesaid, at, &c. aforesaid, had notice; by means whereof, &c.—[*State liability, and promise to pay on request, as ante, 151, and then add a count, omitting the statement of the protest, as ante, 157.*]

Payee
or indor-
see
against
drawer or
indorser,
stating
protest for
non-pay-
ment (g).

[*This count resembles that by the payee, ante, 156, inserting the indorsements, after the statements of delivery to the payee. See forms of indorsements, ante, 152 to 155. If the action is against an indorser, then, instead of stating that the defendant drew the bill, state that the drawer drew it, and show that the defendant indorsed it.*]

Indorsee
against
drawer or
indorser,
on default
of accept-
ance.

[*This count resembles that by the payee, ante, 156, stating the indorsements, as ante, 152 to 155, after the drawing the bill, and before the averment of presentment.*]

Indorsee
against
drawer, on
default of
accept-
ance.
Defend-
ant hav-
ing no ef-
fects in
hands of
drawee.

(f) See a different form, 1 Wentw. 322. 219, &c. 8 edit. 592, &c.—2 Esp. Rep 550.
(g) As to the statement of the protest for —Bayl. on Bills, 127. It is in general un-
the non-payment of an inland bill, see 9 & necessary.
10 W. 3. c. 17. Chitty on Bills, 7th edit.

Indorsee
against
drawer or
indorser
on default,
payment,
where bill
payable
generally.

Indorsee
against
drawer or
indorser
on default,
payment
at a par-
ticular
place.

Indorsee
against
drawer,
default,
payment,
where de-
fendant
had no
effects in
hands of
drawee.
By baron
and feme,
payee, or
indorsee
before
marriage,
against
acceptor

(h).
By baron
and feme,
payee or
indorsee,
against
drawer or
indorser,
where
bill be-
came due
after the
marriage

(i).
[*163]
By hus-
band
alone,
where he
married
before the
bill be-
came due

(k).

*[This count resembles that by the payee, ante, 157, inserting the indorsements. See form of indorsements, ante, 152 to 155. If the action be against an indorser, then, instead of stating that the defendant drew the bill, state that the drawer drew it, and show that the defendant indorsed it.]

[This count resembles that by the payee, ante, 157, inserting the indorsements. See form of indorsements, ante, 152 to 155. If the action be against an indorser, then, instead of stating that the defendant drew the bill, state that the drawer drew it, and show that the defendant indorsed it.]

[This count is to be framed like that at the suit of payee, ante, 159, stating that the defendant drew the bill, and showing the indorsements to the plaintiff; as ante, 152 to 155; and that the defendant had no effects in the hands of the drawee, as ante, 159.]

[*Commencement by baron and feme as ante, 95.*].—For that whereas one G. H. heretofore, and whilst the said E. was sole and unmarried, to wit, on, &c. at, &c. made, &c.—[Describe the making and delivery of the bill, acceptance, and indorsement, liability and promise to pay the bill to the wife whilst sole, as in the precedent, ante, 144; and when the wife's name is mentioned, say, "whilst she was sole and unmarried." Then add the money counts on promises to the wife when sole, account stated, and breach, as ante, 95.]

For that whereas the said defendant, heretofore, and whilst the said E. was sole, and unmarried, to wit, on, &c. at, &c. made, &c.—[Describe the making and delivery of the bill, and indorsements, as supra, and ante, 157, 152; and then aver, that after the intermarriage of the plaintiffs, the bill was presented for payment, and dishonored, and notice given to defendant, and that thereby defendant became liable to pay the plaintiffs, in right of the wife, and promise accordingly; and then add the money counts on promises to the wife while sole, and breach, as ante, 95, 136.]

*For that whereas one S. B. before the intermarriage of plaintiff with one A. J. to wit, on, &c. at, &c. according to the usage and custom of merchants, duly made her certain bill of exchange, and then and there directed the same to defendant, by which said bill the said S. then and there requested defendant to pay, three months after the date thereof, to A. J. or her order,—l. for value received, and delivered the said bill to the said A. which said bill the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants; and plaintiff avers, that after the making the said bill, and before the same became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. he the said plaintiff intermarried with the said A. J.; by means whereof the said defendant, after the intermarriage of the said plaintiff

(h) See ante, 136, and vol. i. 176.

(i) 1 B. & A. 218.

(k) See 1 B. & A. 218, showing the correctness of this form.

with the said A. to wit, on the day and year last aforesaid, at, &c. aforesaid, became liable to pay to the said plaintiff the said sum of money in the said bill specified, according to the tenor and effect of the said bill, and of his the said defendant's said acceptance thereof; and being so liable, he the said defendant, in consideration thereof, afterwards, and after the intermarriage of the said plaintiff with the said A. to wit, on the day and year last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill specified, according to the tenor and effect of the said bill, and of his the said defendant's said acceptance thereof.

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[*Commencement against baron and feme, as, ante, 96.*]—For that whereas one G. H. heretofore, and whilst the said E. was sole and unmarried, to wit, on, &c. at, &c. made, &c.—[*Describe the making of the bill, delivery to payee, and acceptance by E. while sole and unmarried, indorsement to plaintiff, and E.'s liability and promise to pay, whilst sole and unmarried, as ante, 149, &c.; and then add the money counts, and account stated by the feme, whilst sole and unmarried, and conclude with the breach, as ante, 97, Lil. Ent. 27. It seems that a count cannot be added on a promise by husband and wife, after the marriage, 1 Taunt. 212.*]

Against
baron and
feme on a
bill ac-
cepted by
her, before
her cov-
erture.

[*Commencement as ante, 91.*]—For that whereas one E. F. heretofore, and in the life-time of one G. H. since deceased, and whom the said plaintiff hath survived, to wit, on, &c. at, &c. made, &c.—[*Describe the making and delivery, acceptance and indorsement, as ante, 152, and then state the liability, and promise to pay plaintiff and the said G. H. since deceased in the life-time of the said G. H. according to the tenor of the bill as ante, 145.*]

By surviv-
ing part-
ner,
payee, or
indorsee,
against
acceptor.

*[*Commence the declaration with counts on the original debt, if any exist- between the defendant and the plaintiff, and his deceased partner with an appropriate breach, as ante, 91, and then proceed as follows:*]—And also for that whereas the said defendant, heretofore, and in the life-time of the said G. H. since deceased, and whom the said plaintiff hath survived, to wit, on, &c. at, &c. made, &c.—[*Describe the making and delivery of the bill, acceptance, and indorsement, as ante, 157, 162, and then aver, that after the death of the said G. H. the bill was presented for payment and refused, and notice given to defendant, as ante, 157, and then state the liability, and promise to pay plaintiff alone, as ante, 151. Insert the money counts, and account stated, on promises to plaintiff alone, with a corresponding breach as ante, 92.*]

[*164]
By surviv-
ing part-
ner,
payee or
indorsee,
against
drawer or
indorser,
where bill
became
due after
the death
of the de-
ceased
partner.

For that whereas one E. F. heretofore, and in the life-time of one G. H. since deceased, to wit, on, &c. at, &c. made, &c.—Describe the making, delivery, acceptance by defendant, "and the said G. H. since deceased, in his life-time," and indorsement and liability, and promise by defendant and G. H. since deceased, to pay according to the tenor and effect of the bill, as ante, 144, and then insert common counts on promises by defendant

Against a
surviving
acceptor
(1).

(1) There is no occasion to sue the defen- notice the deceased, see 1 B. & Ald. 224, 20.
dant as surviving acceptor, or in any way to

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and the deceased, and breach, as ante, 94, and if it be material to give in evidence a cause of action or acknowledgment since the death, add counts, as ante, 94.]

Against a
surviving
drawer or
indorser,
where bill
dishonor-
ed in life-
time of the
deceased.

For that whereas the said defendant and one E. F. since deceased, heretofore, and in the life-time of the said E. F. to wit, on, &c. at, &c. made, &c.—[Describe the making, delivery, acceptance, indorsement, presentment for payment, dishonor, notice to defendant and E. F. since deceased, and their liability, and joint promise to pay on request, as ante, 151, and then insert counts on promises by both partners, and breach, as ante, 94.]

Against a
surviving
drawer or
indorser,
where bill
was disho-
nored af-
ter the
death.

[If there was any contract between the plaintiff and the defendant, and his deceased partner, independently of the bill, begin the declaration with counts thereon, promises by both partners, and breach, as ante, 94, to the words "to the damage, &c." and then proceed as follows:—]—And whereas also the said defendant and the said E. F. since deceased, heretofore, and in the life-time of the said E. F. to wit, on, &c. at, &c. made, &c.—[Describe the making and delivery, acceptance, and indorsement, as ante, 157; then state the presentment for payment, after the death of the said *E. F. and notice to defendant or survivor, and his separate liability, and promise to pay on request, as ante, 162, and then insert common counts on his separate promise, and breach of the last set of promises.]

[*165]

By assign-
ees of a
bankrupt
indorsee
against ac-
ceptor
(m).

[*Commencement by assignees as ante, 97.*—For that whereas one G. H. heretofore, and before the said E. F. became bankrupt, to wit, on, &c. at, &c. made, &c.—[Describe the making and delivery to payee, defendant's acceptance, indorsement to E. F. before he became bankrupt, and defendant's liability, and promise to pay him, as ante, 152, and then add common counts on promise to bankrupt, before he became bankrupt, and breach, as ante, 97, and if it be material, to give in evidence a promise of admission since the bankruptcy, add counts, as ante, 99.]

By assign-
ees
against
drawer or
indorser,
where bill
was disho-
nored af-
ter the
bankrupt-
cy.

[If there was any contract between the bankrupt and the defendant, independently of the bill, begin the declaration with counts thereon, on promises to the bankrupt before his bankruptcy and breach, as ante, 97, then proceed as follows:—]—And whereas also the said defendant, heretofore, and before the said E. F. became bankrupt, to wit, on, &c. at, &c. made, &c.—[Describe the making of the bill, delivery to payee, acceptance, and indorsement to E. F. before his bankruptcy, the presentment for payment, after E. F.'s bankruptcy, and the dishonor and notice to defendant, and then state the defendant's liability, and promise to pay plaintiffs as assignees; and counts for money paid by plaintiffs as assignees, had and received to their use as assignees, account stated with them as such, and breach, as ante, 99.]

By execu-
tor or ad-
ministra-
tor of
payee or
indorsee
against
acceptor.

[*Commencement as ante, 101.*—For that whereas one E. F. heretofore, and in the life-time of the said G. H. since deceased, to wit, on, &c. at, &c. made, &c.—[Describe the making and delivery, acceptance, and indorsement of the bill, as ante, 152, and then state the liability, and promise

to pay to the deceased in his life-time, according to the tenor and effect of the bill, as ante, 144, and add money counts, and accounts stated on promises to the deceased, as ante, 101; then state breach and profert at the suit of the executor, as ante, 102; or at the suit of an administrator, as ante, 110.]

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*[If there was any debt between the deceased and the defendant, before the bill was given, commence the declaration with counts on promises to the deceased, and the proper breach thereof, as ante, 101, and then proceed as follows:—] And also for that the said defendant, heretofore, and in the life-time of the said E. F. deceased, to wit, on, &c. at, &c. made, &c.—[Describe the making of the bill, the delivery, acceptance and indorsement, as ante, 152, 162, and then aver the presentment for payment after the death, and the dishonor and notice, and the consequent liability, and promise to pay plaintiff, as executor or administrator, on request, as ante, 151: then add counts for money paid by plaintiff, as executor or administrator, money had and received to plaintiff's use in that character, and account stated with plaintiff as executor or administrator, and the breach, and profert applicable to these latter counts, as ante, 102, 103, 109.]

[*166]

By execu-
tor or ad-
ministra-
tor of
payee or
indorsee,
against
drawer or
indorser,
where bill
became
due after
the death.

[First set of counts on promise to the testator, and breach, to the words "to the damage, &c." and then proceed as follows:—] And also for that whereas one G. H. heretofore, and in the life-time of the said A. B. since deceased, to wit, on, &c. at, &c. made, &c.—[Describe the making, delivery, and defendant's acceptance, and the indorsement to A. B. as ante, 152, and then proceed as follows:—] By means whereof, and according to the said usage and custom of merchants, the said defendant then and there became liable to pay to the said A. B., in his life-time, the said sum of money in the said last-mentioned bill of exchange specified, according to the tenor and effect thereof; and being so liable, and the said sum of money in the last-mentioned bill of exchange specified, being and remaining wholly due and unpaid, after the death of the said A. B., to wit, on, &c. (o) at, &c. aforesaid, the said defendant, in consideration of the premises, undertook, and then and there faithfully promised the said plaintiff, as executor as aforesaid, to pay him as executor as aforesaid, the said sum of money in the said last-mentioned bill of exchange specified, when he the said defendant should be thereunto afterwards requested.

By execu-
tor or ad-
ministra-
tor,
against
acceptor,
on a prom-
ise to
plaintiff to
take case
out of the
statute of
limita-
tions (n).

*[Commencement against executor, as ante, 106.]—For that whereas one G. H., heretofore and in the life-time of the said E. F. since deceased, to wit, on, &c. at, &c. made, &c.—[Describe the making, delivery, E. F.'s acceptance, indorsement to plaintiff, and E. F.'s liability and promise to pay, according to the tenor and effect of the bill, as ante, 152, and add the money counts on E. F.'s promise, and breach, as ante, 107. If it be material to give in evidence a promise by defendant, as executor, add a count on the bill on defendant's promise, nearly as ante, 166, and an account stated, and breach, as ante, 107.]

[*167]

Against
an execu-
tor or ad-
ministra-
tor of ac-
ceptor.

(n) As to the use of this count, see notes, ante, 140; and 3 East, 409—Willes, 29. It is dangerous to insert it or any count on promises to the executors, unless there be some substantive promise to them, as it sub-

jects them to costs in the event of a verdict or nonsuit. See 9 B. & C. 667. Ante, 102.

(o) Any day before the title of the declaration will do.

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FOREIGN
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CHANGE.

IV. ON FOREIGN BILLS OF EXCHANGE.

Drawer
against
acceptor
of a bill
drawn
abroad,
for for-
eign coin,
payable at
usances
(p).

[*168]

For that whereas the said plaintiff, heretofore, to wit, on, &c. (q) in parts beyond the seas, to wit, at [Amsterdam (r)] that is to say, at, &c. (s) according to the usage and custom of merchants, from time immemorial used and approved of, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to the said defendant, by the name and addition of Mr. E. F. merchant, London (t); by which said bill of exchange, he, the said plaintiff, then and there requested the said defendant, at (two) usances, that is to say, at (two) calendar months after the date of the said bill of exchange (u), to pay that, his second bill of exchange, (first and third of the same tenor and date not paid (w)) to the said *plaintiff (x), or order, the sum of 700 ducats, value received (y); which said bill of exchange he the said defendant afterwards, to wit, on the day and year aforesaid (z), to wit, at, &c. (venue) aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants; by means whereof and according to the said usage and custom of merchants, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of the said defendant's said acceptance thereof; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at &c. (venue) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his the said defendant's said acceptance thereof. And the said plaintiff avers, that the said 700 ducats, in the said bill of exchange mentioned, at the time of the making of the said bill of exchange, and also at the time when the same became due and payable, according to the tenor and effect thereof, were and still are of great value, to wit, of the value of £— of lawful money of Great Britain, to wit, at, &c. aforesaid (a).

(p) Though the bill be in a foreign language, it may be stated in English. 1 Wightw. 9.

(q) As to the date see Chitty on Bills, 7th edit. 354.—Bayl. 174.—Ante, 115, 145.

(r) As to the place, see Chitty on Bills, 7th edit. 355.—Bayl. 175—3 Campb. 304. This need only be inserted when the bill is drawn abroad.

(s) The venue in the action.

(t) Though usual, it is not necessary, in an action against the acceptor, to state the addition, but it is usual to do so where he is misdescribed in the bill, ante, 145, n. (n).

(u) When a bill is payable at usance, the length of such usance must be stated on the declaration, see Chitty on Bills, 7th edit. 507, n. (k). 8th edit. 404.—Bayl. 184, 185; it may be described concisely as above, or more formally, as note (r), next page; and it may be better to adopt the latter. As to usances

in general, see Chitty on Bills, 7th ed. 266; and as to forms of averment, 1 Wentw. 214, 206, 319.—Chit. on Bills, 7th edit. 507, n. (k). 8th edit. 404, 582.—Bayl. 172.

(w) As to this allegation, see Chitty on Bills, 7th edit. 507, n. (i) 8th edit. 592; n. (i).—Bayl. 171, 180.

(x) It is not in general necessary to state the addition of the drawer or payee.

(y) In an action by the drawee, the delivery of the bill is not to be stated, 5 East, 476.

(z) If the acceptance be dated on a particular day, state it accordingly.

(a) When a bill is payable in foreign money, it is usual, though not necessary, to aver the value, 1 Wils. 185—4 Bro. Parl. Cas. 604.—Chitty on Bills, 7th ed. 507, but quære if not necessary, 2 B. & A. 301.—2 Dow. & Ry. 15.—1 B. & Cres. 16, S. C.—See precedents, 1 Wentw. 302, 312, 314.

*[This precedent may be the same as the last to the end, and then proceed with the following averment :]—And the said plaintiff, in fact, saith, that an usance mentioned in any bill of exchange, drawn at London and payable at Venice, is, and at the several times aforesaid was, three months from the date of the said bill, to wit, at, &c. (*venue*) aforesaid.

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[After stating the drawing of the bill, acceptance, delivery to payee, and his indorsement to G. H. proceed as follows :]—And the said plaintiffs, in fact, say, that the said G. H. afterwards, to wit, on, &c. at, &c. caused the said bill, so accepted and indorsed as aforesaid, to be shown and presented to the said defendant for payment thereof, and then and there required the said defendant to pay the said sum of money therein mentioned, according to the tenor and effect of the said bill, and of his said acceptance thereof, and of the said indorsement so made thereon as aforesaid ; but the said defendant, at the said time when the said bill was so presented to him for payment thereof as aforesaid, or at any time whatsoever, did not pay to the said G. H. the said sum of money mentioned in the said bill, but then and there wholly refused so to do, and therein wholly failed and made default ; whereupon the said G. H. afterwards, to wit, on, &c. at, &c. duly caused the said bill of exchange, to be protested for the said non-payment thereof, according to the said custom ; and afterwards, to wit, on, &c. at, &c. according to the said custom, certain persons residing, trading, and using commerce within this kingdom, to wit, at, &c. by and under the name of Messrs. B. B. and Co. appeared before J. B. then being a notary public, duly and by lawful authority admitted and sworn, dwelling in London, and being the same notary public by whom the said bill of exchange had been so protested, and according to the said custom, then and there declared before the said notary, that they would pay the said bill under the said protest, for honor and on account of the said plaintiffs, the drawers of the said bill, holding them the said drawers and the acceptors, their executors and administrators, and all others whom it might concern, always obliged unto them the said Messrs. B. B. and Co. for their reimbursement ; and thereupon the said Messrs. B. B. and Co. then and there, according to the said declaration and the said custom, paid the said bill under the said protest as aforesaid, together with five shillings and three pence for the charges of the said protest (*d*), and afterwards, to wit, on, &c. at, &c. returned the said bill so protested to the said plaintiffs ; and the said plaintiffs were then and there obliged to pay, and did pay to the said Messrs. B. B. and Co. for the said bill, and for the exchange *and re-exchange of the money therein contained, and the charge of protest, commission, and other charges attending the non-payment of the said bill, a large sum of money, to wit, the sum of —l. according to the said custom, of all which said premises the said defendant, afterwards, to wit, on, &c. at, &c. had notice ; and by reason of the premises, and by force of the said custom, and by the law of merchants, the said defendant then and there became liable to pay to the said plain-

The like in another form, averring more fully the duration of an usance at the end (b.) Drawer against acceptor, where bill paid *supra* protest by a third person, and drawer obliged to pay him the principal money, and charges (c).

[*170]

(b) As to this averment, ante, 167, n. (*f*).

(c) See precedent, 1 Wentw 294, 295.

(d) In an action on a bill where there are several indorsements, it is sufficient to state

that the plaintiff paid the bill according to the custom of merchants, without stating he paid it to the last indorsee, 3 B. & A. 430.—See 16 East, 391.

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tiff the said sum of money so by him paid to the said Messrs. B. B. and Co. as aforesaid, to wit, the said sum of —l. to wit, at, &c. in, &c. ; and being so liable, &c.—[*Promise to pay on request, as ante, 151 ; add a count, omitting the statement of the payment, supra protest.*]

By indorse-
ment
against
acceptor
of bill at
usance, in
two parts,
one ac-
cepted,
the other
indorsed.

For that whereas certain persons, to wit, Messrs. A. and B. heretofore, to wit, on, &c. in parts beyond the seas, to wit, at Memel, in the kingdom of Prussia, to wit, at London, according to the usage and custom of merchants, from time immemorial used and approved of, made their certain bill of exchange in writing, in divers, to wit, two parts, and then and there directed the said bill of exchange to the said defendant, and by the first part of the bill of exchange, then and there requested the said defendant, at one usance, (that is to say, at one month after the date thereof (e),) to pay that their first of exchange to the order of themselves, 100*l.* sterling value, with them, and by the second part of the said bill of exchange, then and there requested the said defendant, at one usance, that is to say, at one month after the date thereof, to pay that their second of exchange (the first not being paid), to the order of themselves, 100*l.* sterling value, with them, which said first part of the said bill of exchange, the said defendant, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, upon sight thereof, accepted, according to the usage and custom of merchants. And the said Messrs. A. and B. afterwards, to wit, on, &c. (f) aforesaid, at, &c. aforesaid, according to the said usage and custom of merchants, indorsed the said second part of the said bill of exchange, and by that indorsement then and there ordered and appointed the said sum of money in the said bill of exchange specified, to be paid to the said plaintiff, for value in account, *and then and there delivered the said second part of the said bill of exchange so indorsed, and the said first part of the said bill of exchange so accepted as aforesaid, to the said plaintiff ; whereof the said defendant, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, had notice ; by means whereof, and according to the said usage and custom of merchants, he the said defendant, then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, according to the tenor and effect of the same bill, and his said acceptance thereof, and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year first aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the same bill, and his said acceptance thereof.—[*A count may be added, not stating that the bill was drawn in sets.*]

[*171]

Special
indorse-
ment in
full of one
part of a
bill, stat-
ing time
and place
(g).

And the said Messrs. E. F. and Co. to whom, or to whose order the payment of the said sum of money in the said bill of exchange specified, was to be made, afterwards, and before the payment of the said sum of money in the said bill of exchange specified, to wit, on (h), &c. in parts beyond the seas, to wit, at Memel, that is to say, at London aforesaid, ac-

(e) See next precedent.

(f) The date of the indorsement, which, in case of foreign bills, frequently varies from the date of the bill.

(g) As to this form, see Bayley on Bills, 180.—Chitty on Bills, 7th edit. 507. n. (i).
(h) Supra, note (a).

ording to the usage and custom of merchants, indorsed the said second part of the said bill of exchange, by *which said indorsement they the said Messrs. E. F. and Co. then and there ordered and appointed the said sum of money in the said bill of exchange specified, to be paid to the order of Messrs. G. H. and Co. value in account, and then and there delivered the same second part of the said bill of exchange so indorsed, and the said first part of the said bill of exchange so accepted as aforesaid, to the said Messrs. G. H. and Co.

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EX-
CHANGE.

For that whereas the said E. F. heretofore, to wit, &c. in parts beyond the seas, to wit, at Jamaica, that is to say, at London, according to the usage and custom of merchants, from time immemorial used and approved of, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to G. H. (by the name and addition of Mr. G. H. merchant, London), by which said bill of exchange the said E. F. then and there requested the said G. H. two months after the date of that his the said E. F.'s second bill of exchange, first and third, of the same tenor and date, not paid, to pay to I. K. (by the name and addition of Mr. I. K. of Liverpool, merchant), or order, the sum of —*l.* value received, and then and there delivered the said bill of exchange to the said I. K.; and the said I. K. &c. —[*State indorsement to plaintiff as ante, 152;*] and the said plaintiff avers that afterwards, and before the payment of the said sum of money in the said bill of exchange specified, to wit, on (*i*), &c. to wit, at, &c. (*k*), that is to say, at, &c. aforesaid, the said bill of exchange was presented and shown to the said G. H. for his acceptance thereof, according to the said usage and custom of merchants; and the said G. H. then and there had sight of the said bill of exchange, and was then and there requested to accept the same, but that the said G. H. did not, nor would, at the said time when the said bill of exchange was so presented and shown to him, for his acceptance thereof as aforesaid, or at any time before or afterwards, accept the same, or pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do, nor did, nor would he then, *or at any other time, accept or pay the said first and third of exchange in the said bill of exchange mentioned, or either of them, but therein wholly failed and made default; whereupon the said bill of exchange, afterwards, to wit, on, &c. last aforesaid (*l*), to wit, at, &c. aforesaid, was duly protested for non-acceptance thereof, according to the said usage and custom of merchants; of all which said several premises the said defendant afterwards, to wit, on &c. last aforesaid, at, &c. aforesaid, had notice; by means whereof, &c.—[*State defendant's liability, and promise to pay on request, as ante, 151; and if defendant had no effects in hands of drawee, add a count stating that fact, as ante, 157.*]

Payee or indorsee against drawer or indorser, on refusal of drawee to accept, stating protest.

[*173]

[*State the drawing of the bill on G. H. delivery to payee, his indorsement to defendant, his indorsement to plaintiff and the latter's indorsement to another party, A. B. and then state presentment for acceptance,*

Second indorsee against first indor-

(i) The day of presentment, and date of the protest for non-acceptance.

(k) The place where the bill was addressed.

(l) Date of protest for non-acceptance.

ON
FOREIGN
BILLS OF
EX-
CHANGE.

mer of a bill
protested
for non-
accept-
ance by
drawee,
and plain-
tiff having
been obli-
ged to pay
principal,
re-ex-
change,
interest,
and char-
ges, to a
remote in-
dorsee.

&c. as follows :]—And the said plaintiff in fact saith, that afterwards, and before the payment of the said sum of money in the said bill of exchange mentioned, or any part thereof, to wit, on, &c. at, Cadiz aforesaid, to wit, at, &c. aforesaid, the said bill of exchange so indorsed as aforesaid, was presented and shown to the said G. H. for his acceptance thereof, according to the usage and custom of merchants ; and the said G. H. was then and there requested to accept the same, but that the said G. H. did not nor would, at the said time when the said bill of exchange was so presented and shown to him for his acceptance thereof as aforesaid, or at any time afterwards, accept the same, or pay the said sum of money therein specified ; or any part thereof, but wholly neglected and refused so to do ; and thereupon the said A. B. afterwards, to wit, on, &c. last aforesaid, at Cadiz aforesaid, to wit, at, &c. aforesaid, caused the said bill of exchange to be duly protested for non-acceptance thereof, according to the said usage and custom of merchants ; by means of which said several premises, and according to the said usage and custom of merchants, he the said plaintiff, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, as such indorser of the said bill of exchange as aforesaid, was called upon, and forced and obliged to pay, and did then and there necessarily pay to the said A. B. the said sum of money in the said bill of exchange specified, together with re-exchange, interest, and charges *thereon, amounting in the whole to a large sum of money, to wit, the sum of —*l.* of lawful money of Great Britain ; of all which said several premises the said defendant afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, had notice ; by means whereof, and according to the said usage and custom of merchants, he the said defendant then and there became liable to pay to the said plaintiff the said last-mentioned sum of money, when he the said defendant should be thereunto afterwards requested, and being so liable, &c. [*State premises, as ante, 151.*]

Payee or
indorsee
against
drawer or
indorser,
on refusal
of accept-
or to pay.

For that whereas the said E. F. heretofore, to wit, on, &c. in parts beyond the seas, to wit, at Jamaica, that is to say, at London, according to the usage and custom of merchants, from time immemorial used and approved of, made his certain bill of exchange in writing bearing date the day and year aforesaid, and then and there directed the said bill of exchange to G. H. (by the name and addition of Mr. G. H. merchant, London,) by which said bill of exchange he the said E. F. then and there requested the said G. H. two months after the date of that his second of exchange, first and third of the same tenor and date not paid, to pay to I. K. (by the name and addition of Mr. I. K. of Liverpool, merchant,) or order, the sum of —*l.* value received, and then and there delivered the said bill of exchange to the said I. K. which said bill of exchange the said G. H. afterwards, to wit, on, &c. at, &c. aforesaid, upon sight thereof, accepted, according to the said usage and custom of merchants ; and the said I. K. &c.—[*State indorsement, as ante, 152.*] And the said plaintiff in fact says, that afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. aforesaid, to wit, at London aforesaid, the said bill of exchange so accepted and indorsed as aforesaid, was presented and shown to the said G. H. for payment thereof, according to the said usage and custom of merchants,

and the said G. H. then and there had notice of the said indorsement so made thereon as aforesaid, and was then and there requested to pay the said sum of money therein specified, according to the tenor and effect of the said bill of exchange, and of his said acceptance thereof, and of the said indorsement so made thereon as aforesaid, but that the said *G. H. did not, nor would, at the said time when the said bill of exchange was so presented and shown to him for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money in the said bill of exchange specified, or any part thereof, but wholly neglected and refused so to do, nor did he pay the said first and third of exchange, in the said bill of exchange mentioned, or either of them, but therein wholly failed and made default; and thereupon afterwards, to wit, on, &c. (m) last aforesaid, at, &c. aforesaid, the said bill of exchange was duly protested for non-payment thereof, according to the usage and custom of merchants; of all which said several premises the said defendant afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, had notice; by means whereof, &c.—[*State liability, and promise of defendant, as ante, 151.*]

ON
FOREIGN
BILLS OF
EX-
CHANGE.
[*175]

[*State the drawing the bill to the order of the plaintiff, payee, as ante, 172, and then proceed as follows.*:]—And the said plaintiff further saith, that the said bill of exchange, being wholly unaccepted and unpaid, he the said plaintiff afterwards, to wit, on, &c. at Rouen aforesaid, to wit, at, &c. aforesaid, caused the said bill of exchange to be presented and shown to the said Messrs. E. F. and Co. for their acceptance thereof, according to the said usage and custom of merchants; and the said Messrs. E. F. and Co. were then and there requested to accept the same, but that the said Messrs. E. F. and Co. then and there wholly neglected and refused so to do, and thereupon afterwards, to wit, on &c. last aforesaid, at Rouen aforesaid, to wit, at, &c. aforesaid, the said bill of exchange was duly protested for non-acceptance thereof, according to the said usage and custom of merchants; whereof the said defendant, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, had notice; and the said plaintiff in fact further saith, that the said bill of exchange being still wholly unaccepted and unpaid, he the said plaintiff, afterwards, to wit, on, &c. to wit, at Rouen aforesaid, that is to say, at, &c. aforesaid, caused the said bill of exchange to be presented and shown to the said Messrs. E. F. and Co. for payment thereof, according to the said usage and custom of merchants; and the said Messrs. E. F. and Co. were then and there requested to pay the said sum of money *therein specified, according to the tenor and effect thereof, but the said Messrs. E. F. and Co. then and there wholly neglected and refused to pay the same; and thereupon the said bill of exchange was afterwards, to wit, on the day and year last aforesaid, at Rouen aforesaid, to wit, at, &c. aforesaid, duly protested for non-payment thereof, according to the said usage and custom of merchants, whereof the said defendant, afterwards, to wit, on the day and year last aforesaid, to wit, at, &c. aforesaid, had notice; by reason whereof, and also by the said usage and custom of merchants, the said defendant then and there became liable, &c.—[*State liability, and promise to pay on request, as ante, 151.*]

Payee
against
drawer,
on a bill
protested
abroad for
non-ac-
ceptance,
as well as
non-pay-
ment.

[*176]

(m) Date of protest, being same day as presentment for payment.

ON
FOREIGN
BILLS OF
EX-
CHANGE.
By indor-
see
against an
acceptor,
supra pro-
test (a).

[*After stating the drawing of the bill by A. B. on C. D. the indorsement of the payee to the plaintiff, and presentment and refusal of C. D. to accept, and protest for non-acceptance, as ante, 172, proceed as follows:*—Of all which said premises, the said defendant afterwards, to wit, on the day and year last aforesaid, at &c. had notice. And thereupon the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, in order to prevent the said bill of exchange from being sent back and returned to the said A. B. did, under the said protest so made as aforesaid, accept the said bill of exchange in writing, and subscribe the said acceptance on the said bill of exchange, according to the usage and custom of merchants; and the said plaintiff in fact says, that afterwards, when, &c. (*here state the presentment to the original drawee for payment, with averment of protest and notice, as in form, ante 174*); and by reason of the premises, and according to the said usage and custom, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, according to the tenor and effect of his said acceptance thereof; and being so liable, &c.—[*State promise accordingly, and a count may be added like the next precedent.*]

The like
by indor-
see in an-
other form
(o).

[*177]

[*After stating the drawing of the bill on E. F. delivery to payee, indorsement to plaintiff, the acceptance of the defendant *was stated as follows:*—which said bill of exchange, so indorsed as aforesaid, the said defendant afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, upon sight thereof, accepted, for the honor of the said A. B. (*the drawer*) according to the usage and custom of merchants (*here state the presentment for payment to the drawee, as directed in the last form*); by means whereof, and according to the said usage and custom of merchants, he the said defendant then and there became liable to pay the said sum of money, in the said bill of exchange specified, according to the tenor of his said acceptance thereof: and being so liable, &c.—[*State promise accordingly.*]

By draw-
ee, who
accepted
supra pro-
test for
non-ac-
ceptance
for honor
of second
indorser
against
first in-
dorser.

[*After stating that A. B. drew the bill on plaintiff, and the delivery to defendant as payee, and his indorsement to E. F. who indorsed to G. H. proceed as follows:*—And the said plaintiff in fact saith, that the said G. H. afterwards, and when the said sum of money, in the said bill of exchange specified, became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. aforesaid, according to the said usage and custom of merchants, caused and procured the said bill of exchange, so indorsed as aforesaid to be shown and presented to the said plaintiff, upon whom the said bill of exchange was so drawn as aforesaid,

(a) See form, 1 Wentw. 316. As to the rights and liabilities of an acceptor *supra* protest, see Chit. on Bills, 7th edit. 242. See a form, 7 B. & Cress. 468. 1 Moo. & Ry. 394, 403. S. C. And see a full form, 4 Car. & P. 35, *not* S. C. An averment of a presentment to the drawee for payment must be inserted, or the declaration will be bad in arrest of judgment. Id.

(o) An eminent Pleader suggested, that, before the statement of the acceptance, there should be a statement of the presentment for

acceptance to the drawee, and of the protest and that it should be shown that the defendant accepted *supra* protest; and this should be done in one count, as in the last precedent; but as an acceptance of a bill for the honor of the drawer will bind him, though there has been no protest, it is apprehended that this precedent may suffice; but see 2 Campb. 447. 7 B. & C. 468. 1 Moo. & Ry. 394, 403. S. C., and see fully, 4 Car. & P. 35.

for payment thereof, and the said plaintiff was then and there requested to pay the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of the said indorsements so made thereon as aforesaid, but which the said plaintiff then and there refused to do, whereupon the said G. H. afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, according to the said usage and custom of merchants, caused the said bill of exchange, so indorsed as aforesaid, to be shown and presented to the said I. K. to whom the said bill was also addressed, in case of need for payment thereof, and the said I. K. was then and there requested to pay the said sum of money therein mentioned, but the said I. K. did not then, nor hath he since paid the same, or any part thereof, but hath wholly neglected and refused so to do; and the said plaintiff further saith, that afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, the said G. H. caused the said bill of exchange to be duly protested for the non-payment thereof (*p*), according to the said usage and custom of merchants; and thereupon the said plaintiff afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, upon the said protest, and according to the usage and protest of merchants, and for the honor of the said E. F. the said second indorser of the said bill of exchange, paid to the said G. H. the said sum of money in the said bill of exchange specified, together with a large sum of money, to wit, the sum of—*l.* of lawful money of Great Britain, for the costs of the protest and charges attending the non-payment of the said bill of exchange, and noting the same. Nevertheless the said E. F. the preceding indorser of the said bill of exchange, the drawer, and all others whom it might or may concern, always obliged unto the said plaintiff for his reimbursement in due form of law according to the said usage and custom *of merchants in that particular, and of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, had notice; by means whereof, and according to the said usage and custom of merchants, he the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, and the costs of protest and charges so paid as aforesaid by the said plaintiff, for and upon the said bill, when he the said defendant should be thereunto afterwards requested; and being so liable, he the said defendant afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, together with the costs of protest and other charges so paid by the said plaintiff, for and upon the said bill of exchange as aforesaid, when he the said defendant should be thereunto afterwards requested.—[*Add money counts, account stated, and breach. It should seem that the plaintiff might recover on the count for money paid, 1 T. R. 269.*]

[*178]

(*p*) As to this, see 16 East, 391.—3 B. & A. 430.

ON SEA
POLICIES.

[*179]

On a sea
policy of
insurance
(*q*), on
goods lost
by cap-
ture.
The poli-
cy.

V. ON SEA POLICIES OF INSURANCE.

For that whereas the said plaintiff (*r*), heretofore, to wit, *on, &c. (*s*) at, &c. (*t*) according to the usage and custom of merchants (*u*), caused to be made a certain policy of insurance (*w*), purporting thereby and containing therein, that the said plaintiff (*or, if effected by an agent for the plaintiff, say, "that the said E. F."* (*x*)) as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part, or in all, did make insurance and cause, &c. [*Here set out the policy in the past tense to the words, "in witness," &c. which are to be omitted, and after observing the note, (y), infra, proceed as follows:*] And by a certain memorandum

(*q*) For the law on insurances, see Park. on Ins.—Marsh on Ins. Hughes on Ins.—3 Chit. Com. Law, 445. The remedy for a subscription on a policy is by action of assumpsit, when the policy is not under seal or of debt, 4 M. & S. 503—6 G. 1. c. 18. s. 4; or covenant when under seal. See forms in debt, post, 429; in covenant, post, 541, 536. The above precedent is given, with notes, as generally applicable to all declarations on policies, see a variety of forms, post, 183 to 208. See a form on a valued policy, Rickman v. Carstairs, 2 Nev. & Man. 562. Hughes, 523; on a time policy, effected on a ship by a member of a mutual insurance company, Id. 527.

(*r*) The action may be brought in the name of the person interested, or of the person in whose name the policy was effected. Park, 403.—Marsh. 589.—Hughes, 463.—Ante, vol. i. 10. n. (*q*). (Gardiner, v. Ruan, 1 Wash. C. C. Rep. 144.) Though the person whose name is used in the policy is interested in the property insured jointly with another, the action may be brought in his separate name, the joint interest being stated in the declaration. Ante, vol. i. 10. n. (*q*). If the policy be effected in the names of two persons, when only one of them is interested, the action may be brought in the name of that one. 4 Esp. 98. If brought in the name of the party interested, on a policy effected in the name of an agent, the declaration states that the plaintiff "*by one E. F., his agent in that behalf, made, &c.*" and sometimes shows that the requisites of the statute 28 Geo. 3 c. 56. have been complied with, as in 1 B. & P. 345. Marsh on Ins. 212; but *seem* that this is not necessary, see n. (*b*), post, 180. If the policy be effected in the name of a firm, it is usual to aver, that "the said plaintiffs, by the name, firm, and description of Messrs A. and B. and Co. &c." as in the policy, see 1 B. & P. 317. 345.

(*s*) The date of the policy in the margin, Park, 27.—Marsh. 241.

(*t*) The venue where the cause is to be tried; it is transitory. As to changing the venue, see Hughes, 472.

(*u*) When the policy is a form different

from that usually adopted, the words "according to the usage of merchants, &c." are to be omitted.

(*w*) The stat. 35 Geo. 3, c. 63. s. 11. directs, that the instrument shall be called a "policy of insurance." The instrument in common use has always been considered as ill-framed, 4 T. R. 210.—Burr. 348, 1555—3 East, 578.

(*x*) The word "agent" need not be inserted in the policy, 1 B. & P. 346. See observations on the Statutes, 15 East, 6.

(*y*) The legal effect or literal words of the policy must be stated. The qualifications introduced into the policy by means of warranties, or exceptive stipulations, should be stated. 3 Bing. 315.—11 East, 633—4 Campb. 20.—7 Taunt. 385. 2 B. & Cres. 20. In a late case, where the regulations of an association of ship-owners, combined for the mutual assurance of each other's ships, were indorsed on the back, and were declared to form part of a policy of insurance to which the ship-owners were subscribers, it was held, the declaration ought to set out the regulations as well as the policy. 3 Bing. 315. But clauses which do not in any way bear upon the cause of action, and are unnecessary to a just comprehension of it, need not be detailed; such as the enumeration of all the perils insured against, when the loss is plainly attributable to only one of them, see 4 Taunt. 285.

The policy is usually set forth with the blanks therein. 1 Wentw. 409.

In an action in a valued policy, where the goods had been estimated at too low a sum, and the mistake was corrected by the insertion of an increased sum in the margin, the declaration stated the policy according to its altered state, without noticing the original value, and was held sufficient; for at the time of the alteration all was in *feri*. 1 Stark. Rep. 336. But when an alteration has been made after the execution of the instrument, that fact should in general be stated, and it may sometimes be prudent to state both the original and altered forms in different counts. Hughes, 464, and see a form on an altered policy, post, 188.

thereunder written, corn, fish, salt, fruit, flour, and seed, were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins, were warranted free from average under 5*l.* per cent. and all other goods; also the ship and freight were warranted, free from average, under 3*l.* per cent. unless general, or the ship should be stranded (z). And by a certain other memorandum thereunder written, it was declared that the said insurance was on goods (a). As by the said policy of insurance and memoranda, reference being *thereunto had, will more fully and at large appear. And the said plaintiff in fact saith, that the said policy of insurance and memoranda were so made by the said plaintiff as aforesaid, as the agent of one E. F. and for his use and benefit, and that he the said plaintiff did receive the order for, and effect the said policy of insurance as such agent as aforesaid, to wit, at, &c. (*venue*) aforesaid (b). Of all which said premises he the said defendant afterwards, to wit, on, &c. (c) at, &c. (*venue*) aforesaid, had notice. And thereupon afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had [then and there paid to the said defendant a certain sum of money, to wit, the sum of (£5 5*s.*) of lawful money of Great Britain, as a premium or reward for the insurance of (£100) of and upon the said goods, in the said ship or vessel, in the said voyage (or "on the premises"), in the said policy of insurance mentioned (d), and had] then and there undertaken and faithfully promised the said defendant to perform and fulfill all things in the said policy of insurance contained, on the part and behalf of the insured, to be performed and fulfilled, he the said defendant undertook, and then and there faithfully promised the said plaintiff that he the said defendant would become and be an insurer to the said plaintiff of the said sum of (£100), upon the said goods (e), in the said ship or vessel, in the said voyage, in the said policy of insurance mentioned, and would perform and fulfill all things in the said policy of insurance mentioned, on his part and behalf,

ON SEA POLICIES.

Common memorandum.

Insurance on goods. Reference to policy.

[*180] Policy made by plaintiff as agent. Notice to defendant. Mutual promises.

(z) This is the common memorandum at the foot of the policy, see Park, 20, 21, 101. —Marsh. 240. As the memorandum is part of the policy, its contents may be so stated, without adopting the word "memorandum."

(e) The general terms of the insurance, in the printed part of the policy, are qualified by the insertion, either in the body or at the foot of the policy, of the words "on ship," or "on goods," or "on freight, &c." and when inserted at the foot, such memorandum is described as in the above precedent. In some policies on goods, &c. the particular goods insured are enumerated in the margin of the policy, in which case the averment of the insurance thereon may be as follows:—"And the said insurance was on divers, to wit, 20 bales and 20 tresses of goods and merchandizes, in the margin of the said policy enumerated, and separately valued, and the total value of the said goods, and merchandizes was thereby declared to be —"

(b) When the declaration is at the suit of

the principal, this averment is to be omitted. As to this averment, see 28 Geo. 3. c. 56 — 1 B. & P. 312, 317. If the policy be effected in the name of a firm, it may be expedient to aver, that it is the usual firm of the plaintiffs, as in 1 B. & P. 317, 345. As, however, at common law, these requisites did not exist, it should seem that they need not be averred in pleading, 1 Saund. 276 a. n. 2.—Sir T. Raym. 450.—1 M. & S. 204. 15 East, 1, 6, 7; but if the averment be inserted, care must be observed that it corresponds with the evidence, 1 M. & S. 201. See 1 Chit. R. 49.

(c) The date of the defendant's subscription at the foot of the policy.

(d) It should seem the words between brackets, are not necessary, when, as usual, the receipt of the premium is confessed in the policy.

(e) Or "freight of the said ship or vessel in the said voyage." It is sufficient to say, "upon the premises in the said policy of insurance mentioned" 4 Campb. 89.

ON SEA
POLICIES.

Defend-
ant's sub-
scription
of the pol-
icy.
Goods
shipped.

Interest of
insured.

as such insurer of the said sum of (100*l.*) to be performed and fulfilled. And the said defendant then and there became and was an insurer to the said plaintiff, and then and there duly subscribed (*or, if by *agent, "by one G. H. his agent, in that behalf duly subscribed,"*) the said policy of insurance, as such insurer of the said sum of (100*l.*) upon the said goods in the said ship or vessel, in the said voyage, (*or, upon the premises in the said policy in that behalf mentioned*), to wit, at, &c. aforesaid. And the said plaintiff further saith, that heretofore, to wit, on, &c. (*f*) aforesaid, divers goods (*g*) of great value, had been and were shipped and loaded at [London] aforesaid (*h*), in and on board of the said ship or vessel in the said policy of insurance mentioned (*i*), to be carried and conveyed there- in on the said voyage, to wit, at, &c. (*venue*) aforesaid. And that the said E. F. (*or if at the suit of the principal, that "he the said plain- tiff," (k)*) was then and there, and from thence continually afterwards, until and at the time of the loss, hereafter mentioned (*l*), interested in the said goods in the said policy of insurance and memoranda mentioned, and so shipped on board the said ship as aforesaid, to a large value and amount, to wit, to the value and amount of all the monies by him ever insured or caused to be insured thereon, to wit, at, &c. (*venue*) aforesaid (*m*). And

(*f*) The day of shipping the goods or about it. This averment is omitted, when the insurance is on ship. Sometimes it is stated that the goods were put on board after the making of the policy, which allegation need not be proved as laid, 5 T. R. 496; but the averment in the above precedent seems preferable.

(*g*) Where the insurance is on particular goods, it seems more proper to show that such goods were put on board. 2 New Rep. 77.—2 B. & P. 153. But if a declaration state that the policy was on indigo and bale goods, that divers goods were shipped of great value, that the insured was interested in them, and that the policy was made on the *said* goods, for the use and benefit and on the account of the insured, the above statement would be sufficient though specially demurred to, see *id.*

(*h*) Or any other port from which the insurance was to take effect. If by the terms of the policy the loading is to take place at a particular port, the declaration should state the loading at that port, or it would, it seems, be bad on special demurrer. 2 B. & P. 153.

(*i*) If the insurance were on freight, here say, "*to be carried and conveyed on freight in and on board the said ship or vessel in the said voyage.*"

(*k*) As to the mode of describing the parties interested, see note, *infra*.

(*l*) The only material averment is "*at the time of the risk insured against.*" 2 Taunt. 237, *infra*, n.

(*m*) This averment of interest is, in general, absolutely necessary, and being a material, averment must be proved as stated, Marsh. 587. Hughes, 466. The averment is necessary even in an action on a policy on a foreign ship, unless the policy contain a clause denoting the proof of interest to

be unnecessary, as the words "*interest or no interest,*" "*without further proof of interest than the policy,*" or other words of the like effect. 3 Taunt. 513.

An averment of interest at the time of effecting the policy is immaterial, and if alleged need not be proved; it suffices to aver and prove that the interest was vested during the period of the risk. 2 Taunt. 237.

The persons in whom the interest is vested must be described with great accuracy, so that the insurers may know from the declaration who are the precisely interested persons. Where two persons were jointly interested, a declaration, stating in one count that one of the parties was interested, and in another count that the other was interested, was held bad, on the ground of a variance, and that plaintiff could not recover on either count. 5 Taunt. 101.—16 East, 141.

(Sed vide *Graves and Barnwall v. Boston Marine Ins. Co.*, 2 Cranch. 419. Where the plaintiff avers the interest in himself generally, but it appears on the trial that A. was interested to one half, the plaintiff may notwithstanding recover for his moiety. *Murray and Ogden v. Columbian Ins. Co.* 11 Johns. Rep. 302. *Lawrence v. Van Horne*, 1 Caine's Rep. 276.) An averment, that A. B., C. D., and certain persons trading under the firm of E. and Co. were interested, is sufficient after verdict. 1 Chit. Rep. 49, and see 15 East, 4; and it would suffice, under such an averment, to prove that there is such a firm as E. & Co. without proving the component members thereof, *id.*

It does not seem necessary to aver the proportions of interest each party interested may have, though sometimes it might be as well to do so in one count. 6 Taunt. 14.—1 Marsh. 416. S. C. see form, post, 185.

The mode in which the interest was created need not be stated. But when the in-

the said *plaintiff in fact further saith, that heretofore, to wit, on, &c. (n) the said ship or vessel, with the said goods on board thereof, departed and set sail from — (o) aforesaid, on her said voyage, towards — aforesaid (p). And that afterwards, and whilst the said ship or vessel was proceeding on her said voyage (q), and before her arrival at — aforesaid, to wit, on, &c. (day of loss, or about it,) the said ship or vessel, with the said goods on board thereof, as aforesaid, were on the high seas, to wit, at, &c. (venue) aforesaid (r), with force and arms, and in an hostile manner, captured, seized, and taken by certain enemies of our lord the now king (s). And thereby the said goods then and there became and were wholly lost to the said E. F. (t) and never did arrive at, &c. aforesaid (u). Of all which said several premises the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, had notice, and was then and there requested by the said plaintiff to pay him the said sum of (100l.) so by him insured as aforesaid, and which said sum of (100l.) he the said defendant, then and there ought to have paid, according to the form and effect of the said policy of insurance, and his said promise and undertaking so by him made as aforesaid, to wit, at, &c. (venue) aforesaid.—[If there be any doubt as to the interest, or as to the nature of the loss, other counts may be added, varying the statement, 2 Burr. 1188; and in such case it seems unnecessary to set out the policy again in the second count which may refer to the first. See form, next precedent. An

ON SEA
POLICIES.
Ship sails.
Her capture.

The total
loss.

Notice to
defend-
ant.

terest, is alleged to be created by certain special circumstances, the averment, if not made out in proof, cannot be regarded as surplusage. 2 New R. 300. Prefatory matter, however unnecessarily introduced into the declaration, unconnected with the averment of interest, and not referred to by it, may be rejected as surplusage, id.

When it is uncertain as to who are the parties interested, different counts should be added to meet the doubts; see 2 New Rep. 290.

(n) The day of sailing, or about it. This seems preferable to the allegation, that after the making, &c. 5 T. R. 496. But whether the ship sailed before or after the making of the policy is immaterial—for every policy contains the words “lost or not lost,” and protects the insured against the perils that have or shall come, to the detriment of the property. An averment, therefore, that the ship sailed after the making of the policy is sustained, though it appears in evidence that the ship had sailed before the policy was made. 5 T. Rep. 496. 2 New Rep. 308; 6 Taunt. 465. 2 Marsh. Rep. 160. S. C.

(o) The place from which the voyage was to commence, 2 B. & P. 153; ante, 181, n.

(p) The place of final destination. If there were any warranty the compliance with it should here be shown, Marsh 588. If the policy were on freight, here insert, “and that the freight of the said goods, in case of her arrival there, would have amounted to a large sum of money, to wit, the sum of —£.” The amount of the value would, it seems, be unnecessary, even on a valued policy.

(q) If the voyage was not to any particu-

lar port, then say, “during the continuance of the risk in the said writing or policy of insurance mentioned, to wit, on, &c.” If the loss was while the ship was at her moorings, the allegation must be framed accordingly. 2 Marsh Rep. 157.

(r) 2 B. & P. 153.

(s) As to the loss, see Marsh. 588—Hughes, 215, 217, &c. In stating the loss, the protest should be consulted, and such loss should be stated precisely as it can be proved, and it must appear to be within the terms of the policy, see 2 Saund. 201 f. n. 18.—Park, 398 to 403.—Marsh. 591 to 596.—Hughes, 469.—3 B. & P. 23. The proximate and not the remote cause should be regarded, Hughes, 246. See the description of several losses, post, 189 to 207.

(t) The person interested.—A partial loss may be given in evidence under a count for a total loss, see Park, 399. Marsh. 629. Hughes, 471.—(Vide Watson and al. v. Ins. Co. of North America, 4 Dal. 283.) The damages are severable and a plaintiff may recover less though he cannot recover more than those alleged in the declaration, so the plaintiff may give in evidence any damage that is within the cause of action, as stated, without its being specially averred: Thus when some of the goods had been spoiled and some saved, and the declaration alleged that the ship sprang a leak and sunk in the river, evidence of the salvage was admissible. Hardwick, 304. Hughes, 471.

(u) If on freight, here insert, “and the said E. F. thereby lost and was deprived of the freight of the said goods and merchandise, so on board the said ship on freight as aforesaid, to wit, at, &c.”

ON SEA
POLICIES.

adjustment may be given in evidence as an admission under the above form, or under the account stated, Park, 118.—Marsh, 544, 588-9.—Hughes, 472, sed vide 1 J. B. Moore, 563.—7 Taunt. 306.—3 B. & Cress. 9. semb. contra. Add the counts for money paid, and for money had and received, and the account stated.]

[*183]
Com-
mence-
ment of a
second or
subse-
quent
count on a
policy of
insurance.

*And whereas also the said plaintiff, heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, according to the said usage and custom of merchants, caused to be made a certain other policy of insurance, upon a certain ship or vessel called — (or, “upon certain other goods and chattels, to wit, &c. in and on board of a certain ship or vessel called —”) for the same voyage, and upon the same subject-matter of insurance, and upon the same terms and stipulations, and containing therein to the same effect as in the said policy of insurance, in the said first count of this declaration is above mentioned, as by the said policy of insurance will more fully appear: of which, &c.—[*State notice to the defendant, and his subscription of the policy and other averments, according to the facts, as directed in the preceding precedent.*]

PROPERTY
INSURED
AND
INTEREST
Insurance
on freight,
and aver-
ment of
interest
and loss
thereon
(w).

[*184]

[*Set out the policy and memoranda, and proceed as directed in the precedent, ante, 178, and after stating defendant's description of the policy, state the shipment of the goods on freight, as follows:*]—And the said plaintiff further saith, that heretofore, to wit, on, &c. divers goods of great value had been and were shipped and loaded at — aforesaid, in and on board of the said ship or vessel, in the said policy of *insurance mentioned, to be carried and conveyed therein, on and for freight in and during the said voyage, to wit, at, &c. aforesaid, and that he, the said plaintiff, was then and there, from thence until and at the time of the loss hereafter mentioned, interested in the freight of the said goods, so shipped and loaded as aforesaid, to a large value and amount, to wit, to the value and amount of all the monies by him ever insured or caused to be insured thereon, to wit, at, &c. aforesaid.—[*State sailing of the ship and loss of the goods, as ante, 182. 1 Wentw. 395, 6. and then add*]—And the said plaintiff thereby and then and there lost, and was deprived of the freight of the said goods and merchandizes so on board of the said ship on freight, as aforesaid, to wit, at, &c. (*venue*) aforesaid.

On an in-
surance
on profits
expected
to arise on
sale of
goods,
with aver-
ment of
interest
(z).

[*Set out the policy and common memorandum, as directed ante, 178, and proceed as follows:*] —“And by a certain other memorandum thereunder written, the said insurance was declared to be on profit, valued at —.” [Then refer to the policy, and state notice, and defendant's subscription and shipment of goods, and sailing of vessel, as ante, 180, 2, and then aver the interest as follows:]—And that the said plaintiff was interested in the profits to arise and be made from the sale and disposal of the said cargo of goods and merchandize, to a large value and amount, to wit, to the value and amount of all the money by him insured, or caused to be insured thereon, to wit, at, &c. (*venue*) aforesaid.—[Then proceed as usual.]

(w) See notes to form, ante, 178; and see form, 1 Went. 393.

(z) 2 East, 544.—3 Chit. Com. Law, 459.

[Set out the policy and common memorandum, and proceed as directed in the precedent, ante, 178, to the statement of the mutual promises, and then describe the matter insured as follows :]—For the insurance of £100, of and upon one half or moiety of the said ship or vessel, in the said policy of insurance mentioned, and had, &c.—[Then state defendant's subscription and aver the interest as follows :]—And the said plaintiffs further say, that at the time of the making of the said policy of insurance, and from thenceforth until, and at the time of the loss hereinafter mentioned, one E. F., G. H., and I. K. were interested in the said moiety of the said ship or vessel to a large value and amount, to wit, to *the value and amount of all the money ever insured by or for them, thereupon, and that the said insurance was so made as aforesaid by the said plaintiffs, in trust for, and for the use and benefit of the said E. F., G. H., and I. K., to wit, at, &c. (venue) aforesaid.

PROPERTY
INSURED
AND
INTEREST.

Insurance
on moiety
of ship
and aver-
ment of
interest
thereon in
several
persons
for whom
plaintiff
insured
(y)

[*185]

[State policy and memoranda, and other allegation before the averment of interest, as ante, 178, and then proceed as follows :]—And the said plaintiff further saith, that he the said plaintiff, and one E. F. and one G. H. at the time of the making of the said policy of insurance, and from thence continually until and at the time of the loss hereinafter mentioned, were interested in the said ship or vessel to a great value and amount, that is to say, to the value and amount of the monies by them, or either of them, ever insured, or caused to be insured thereon, in the proportions, and in the manner hereafter mentioned ; and that the said policy of insurance was so made as aforesaid, for the use and benefit of the said plaintiff, and the said E. F. and the said G. H. that is to say, as two-third parts of the value of the ship or vessel, for and on the behalf of, and for the use and benefit of the said plaintiff ; and as to the remaining third part thereof, for and on behalf of, and for the use and benefit of the said E. F. and G. H. to wit, at, &c. (venue) aforesaid.

Plaintiff
interested
in two-
thirds, and
other per-
sons in re-
sidue (z).

For that whereas the said plaintiff, before and at the time of the making of the policy of insurance hereinafter mentioned, was interested, to wit, in two-third parts or shares, of and in a certain ship or vessel called the —, and remained so interested therein, until and at the time of the loss hereinafter mentioned ; and the said plaintiff, being so *interested as aforesaid, heretofore, to wit, on &c. at, &c. according to the usage and custom of merchants, caused, &c.

The like
in another
form, on a
policy,
where
plaintiff
interested
in two-
thirds of
the ship
(a).

And the said plaintiff further saith, that the said insurance was so made as aforesaid, to and for the use and on the account of, and in trust for one E. F. and one G. H. one I. K. one L. M. and one N. O. : and that before and until, and at the time of the loss hereafter next mentioned, the

[*186]

The like
where
some per-
sons were
interested
in the
ship, and
others in
the goods
(b).

(y) See other precedents, 1 Wentw. 403, 413, 439, 450, 451, and notes, ante, 181.

(z) See precedent, 1 Wentw. 402, 410, 450. It was till lately a disputed point whether the declaration must aver the interest, but it is now settled that it must be averred, and correctly so, according to the facts, see ante, 181, note. It does not seem however necessary to aver, though perhaps

sometimes advisable, to specify in what proportions several persons were interested. 6 Taunt. 14.—1 Marsh, 416, n. See ante, 181, n.

(a) See precedent, 1 Wentw. 445—This form is sometimes, though but rarely, adopted, see Id. ibid.

(b) See precedents, 1 Wentw. 392, 410, 439.

OF SEA
POLICIES.
PROPERTY
INSURED
AND
INTEREST.

said E. F. was interested in the said ship, and the said G. H., L. K., L. M. and N. O. were interested in the said goods and merchandize so on board thereof as aforesaid, to a large amount, to wit, to the amount of all the money ever insured, or caused to be insured thereon, to wit, at, &c. (*venue*) aforesaid.

Averment
that no
British
subject
was inter-
ested (c).

[*Set out the policy and memoranda, verbatim, the references thereto, and defendant's subscription, as ante, 178, and then proceed as follows:*]—And the said plaintiff in fact saith, that the said ship or vessel was not, at the time of the making, effecting or subscribing of the said policy of insurance, nor of the happening of the loss hereinafter mentioned, and property of, or belonging to our sovereign lord the king, or any of his subjects.

On an in-
surance of
money
lent on
responden-
tia on ship
and goods
(d).

For that whereas one E. F. heretofore, to wit, on, &c. at, &c. by his certain writing obligatory, sealed with his seal, and now shown to the court here, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiff in the sum of £1000, to be paid to the said plaintiff, or his certain attorney, executors, administrators, or assigns, whenever he the said E. F. should be thereunto afterwards requested, with and under a certain condition thereunder written.—[*Here set out the condition of the respondentia bond, with the recitals, verbatim, and then proceed.*]—And the said plaintiff further saith, that after the making of the said writing obligatory, and the said condition thereof, and after the lending of the said £1000, as aforesaid, to wit, on, &c. he the said plaintiff, according to the usage and custom of merchants, from time immemorial used and approved of, caused to be made a certain policy of insurance, purporting thereby, and containing therein, that, &c.—[*Here set out the policy, as in the usual form, ante, 178, the notice to the defendant, and his subscription, and the mutual promises, and then proceed as follows:*]—And the said plaintiff further says, that the said ship called the — in the said condition of the said writing obligatory mentioned, and the said ship called the — in the said policy of insurance mentioned, were one and the same ship, and not different ships; and that the voyage in the condition of the said writing obligatory mentioned, and the voyage in the said policy of insurance mentioned, were one and the same voyage, and not other or different voyages, and that the merchandize and effects in the said condition and writing obligatory mentioned, and the goods and merchandize in the said policy of insurance mentioned, were the same goods, wares, merchandize and effects; and that the said sum of £1000, in the said writing obligatory mentioned, was and is the money insured, and intended to be insured in and by the said policy of insurance, and not other or different money, to wit, at, &c. (*venue*). *And the said plaintiff further says (e) that the said ship, with all convenient speed after the making the said writing obligatory, did proceed and sail on her said voyage from and out of [the said river Thames] to a certain place called — [in the East Indies], in the said condition of the said writing obliga-

[*187]

(c) See precedents, 2 Saund. 202, n. 17. The declaration must aver an interest, ante, 181, n. and as how to aver it, id.

(d) See precedent, 1 Wentw. 431. See 19 Geo. 3 c. 37. s. 5.—2 Burr. 1394. Declarations on a policy of insurance on a Bot-

tomry bond, and law, Simonds v. Hodgson, 3 Barn. & Adolp. 50. See 19 Geo. 3. c. 37. s. 5

(e) These averments will depend on the condition of the bond.

tory mentioned, without deviation, and afterwards, in the said voyage, to wit, on, &c. did arrive in safety at the said place called — in the East Indies aforesaid, and that the said E. F. afterwards, to wit, on, &c. did load, and cause to be laden on board the said ship, at the said place called, &c. in the East Indies, divers merchandize and effects, to be brought from thence by the said ship in the said voyage, back to the river Thames aforesaid, and to London aforesaid; and that the said ship, afterwards, to wit, on, &c. did sail, proceed, and return with the said merchandize and effects so laden on board the said ship, without deviation in the said voyage, from the said place called — in the said East Indies, and towards the river Thames and London aforesaid, *and that afterwards, &c.—[Then state the loss of the ship and goods, according to the fact, and the defendant's consequent liability to pay, as usual. See ante, 178.]

OF SEA
POLICIES
PROPERTY
INSURED
AND
INTEREST.

[*188]

And the said plaintiff in fact saith, that the said policy of insurance was so made as aforesaid for the purpose of effecting an insurance on the said goods and merchandize so as aforesaid intended to be shipped and loaded in and on board of a certain ship or vessel called the (*George*) whereof the said E. F. was master, and that the said last-mentioned ship or vessel was and is called in and by the said policy of insurance, by the name of the (*Digby*) by mistake, and that there was not, at the time of making the said policy of insurance, any ship or vessel in the port of London aforesaid, whereof the said E. F. was master, other than and except the ship or vessel called the (*George*) on board whereof the said plaintiff so as aforesaid intended to ship and load the said goods and merchandize, to wit, at, &c. aforesaid.

AVERT-
MENTS.
Averment where the name of the ship had been mis-stated in the policy.

[After stating defendant's subscription, as usual, proceed as follows:] And the said plaintiff in fact saith, that after making of the said policy of insurance the said plaintiff was desirous to withdraw the mark of the hemp in the said policy of insurance mentioned, and the warranty of sailing, before or at the time in the said policy of insurance mentioned, whereof the said defendant then and there had notice; and thereupon, afterwards to wit, on &c. at, &c. aforesaid, by a certain memorandum indorsed on the said policy of insurance, and subscribed by the said defendant, by one E. F. his agent, then and there duly authorized in that behalf, it was agreed by and between the said plaintiff and the said defendant, for and in consideration of the sum of four guineas additional, and allowing 5 per cent. less return than was in the said policy of insurance mentioned, to withdraw the mark of the hemp in the said policy of insurance mentioned, and the said warranty of sailing, therein also mentioned.

On a policy varied after effected, but not as to subject-matter (f).

[After the statement of defendant's subscription of the policy, as usual, insert the following averment:]—And the said plaintiff further saith, that after the said policy of insurance was so underwritten on the behalf of the said defendant *as aforesaid, and before notice of the determination of the risks thereby insured, and whilst the things thereby insured were and re-

Statement of alteration of some of the terms of the policy after the

[*189]

(f) See 4 Taunt. 169.—8 East, 273, 273.—35 Geo. 3. c. 63. s. 13.—See another precedent, 1 Wentw. 444.

OF SEA
POLICIES,
AVER-
MENTS.

the com-
mence-
ment of
the risks
(g).

maintained the property of the said plaintiff as hereinafter next mentioned, to wit, on, &c. at, &c. he the said defendant, by a certain indorsement then and there made on the said policy, and signed for him by the said I. K. his agent in that behalf, agreed that the said vessel therein mentioned might sail from Martinique and Antigua or Antigua and Martinique, both of either, and from all or any of the West India Islands (Jamaica and St. Domingo excepted) to Liverpool, without being a deviation, and without prejudice to the said insurance, as by the said indorsement will also more fully appear.—[*Then state the sailing of the ship, and averment of interest, &c. as ante, 180, 2.*]

Averment
that ship
sailed
with con-
voy, &c.
(h).

And the said plaintiff further says, that afterwards, to wit, on, &c. the said ship, with the said goods and merchandize so laden on board her as aforesaid, departed and set sail with convoy from — aforesaid, on her said intended voyage towards — aforesaid, to wit, at, &c. aforesaid, and that afterwards, and whilst, &c.

LOSSES BY
PERILS OF
SEA.

Loss of
ship and
goods, by
stormy
weather,
and perils
of sea (i).

[*190]

[*After stating the sailing on the voyage, proceed as follows:*]—And the said plaintiff further saith, that the said ship in the said policy of insurance mentioned, with the said goods and merchandize so on board thereof as aforesaid, whilst she was proceeding on her said voyage, and before her arrival at any of her port or ports of destination, sale or final delivery, in the said writing or policy of insurance mentioned, to wit, on, &c. was, by the perils and dangers of the seas, *and by stormy and tempestuous weather, and the violence of the winds and waves, bulged, broken, damaged, spoiled, and destroyed, and the said ship, with the said goods and merchandize so on board thereof as aforesaid, thereby then and there became and were wholly lost to the said plaintiff (or, if he was agent for some other person, say "to the said E. F.") to wit, at, &c. aforesaid, of all which said premises, &c.—[*State the notice as ante, 182. Add another count, with a more general statement of loss, as in the next form.*]

More gen-
eral state-
ment of
loss by
perils of
sea.

Loss by
shipwreck
(k).

Was by the perils and dangers of the seas wholly lost to the said plaintiff, and never did arrive at — aforesaid, to wit, at, &c. (venue) aforesaid, of all which, &c.—[*State notice of loss, and conclude as ante, 182.*]

And before her arrival at — aforesaid, by the perils of the seas, was wrecked and totally lost, whereby the said ship and the said goods and merchandize so being on board thereof as aforesaid, and all other things in the same and thereto belonging, were wholly destroyed, perished, and

(g) See the last precedent and notes. 35 Geo. 3. c. 63. s. 13. 1 Wentw. 444. When not necessary to state alteration, ante, 179, note.

(h) See precedents, 1 Wentw. 399, 414, 444.—2 B. & P. 111.—Marsh. 269. Sailing sheathed with copper, 1 Wentw. 411.

(i) See precedent, 1 Wentw. 392, 448. The circumstances occasioning the loss are to be stated according to the facts, and usually in one count; the description is taken from the protest, when correct. It may suffice to describe the loss by the perils of

the sea more generally, as in the next precedent, when the facts will allow. As to what is a loss by perils of the sea, see 3 Taunt. 227.—4 Taunt. 126.—6 T. R. 676.—3 Chit. Com. Law, 490.—Hughes, 214, &c. and cases there collected. See precedent of loss by perils of sea, where ship was by the winds blown over on her side, in a graving dock, 5 B. & A. 161; see also id. 225.

(k) See another precedent in 1 Wentw. 438, 445, 460.

lost, and became of no use or value to the said plaintiff, to wit, at, &c. (venue) aforesaid, of all which, &c.—[*State notice of loss, and conclude as ante*, 182].

ON SEA
POLICIES.
LOSSES BY
PERILS OF
SEA.

By and through the force of certain hurricanes of winds, stormy and tempestuous weather, and by and through the perils and dangers of the seas, were on the high seas wrecked, sunk, and lost, to wit, at &c. (venue) aforesaid, of all which said premises, &c. [*State notice of loss, and conclude as ante*, 182.]

The like
in another
form (l).

That whilst the said ship, with the said goods and merchandizes so laden on board thereof as aforesaid, was sailing and proceeding on her said voyage, and before her arrival at, &c. aforesaid, to wit, on, &c. upon the high seas, by the perils and dangers of the seas, and the force and violence of storms and tempests there, was beat and broken to pieces, sunk, and totally lost in the sea, to wit, at, &c. (venue) aforesaid, of all which, &c.—[*State notice of loss, and conclude as ante*, 182.]

Loss by
the sink-
ing of the
ship (m).

And that afterwards, and whilst the said ship or vessel was sailing and proceeding on her said voyage, and before her arrival at, &c. aforesaid, to wit, on, &c. and on divers other days and times between that day and the — day of — the said ship or vessel, by stormy winds and tempestuous weather, became and was leaky, and greatly broken and damaged, inasmuch that by means thereof it then and there became and was expedient and necessary for the preservation of the said ship or vessel, to sail and proceed to the nearest port, and the said ship or vessel did then and there accordingly sail and proceed towards and for the nearest port, to wit, for — in America, to wit, at, &c. aforesaid; and that afterwards, and whilst the said ship or vessel was endeavoring to sail and proceed into a port of safety there, to wit, on, &c. to wit, at &c. the said ship or vessel, by the perils and dangers of the seas, and by the violence of the winds and waves became and was wholly lost to the said plaintiff, and never did arrive at, &c. aforesaid; of all which, &c.—[*State notice of loss, and conclude as ante*, 182.—*Add another count, with a *more general statement of loss by perils of the sea, as ante*, 190.]

Ship be-
ing leaky,
it became
necessary
to sail to-
wards the
nearest
port, in
doing
which
ship was
lost.

Upon the high seas, struck agianst certain rocks, and did thereby then and there founder, and the same ship, with her tackle, apparel, ordnance, munition, artillery, and other furniture, was then and there totally lost and destroyed, and sunk in the sea aforesaid; of all which, &c.—[*State notice of loss, and conclude as ante*, 182.—*Add another count, with a more general statement of loss, by perils of the sea, as ante*, 109.]

Loss by
the sink-
ing of the
ship
among
destructive
rocks.

Was by the perils and dangers of the seas, and by stormy and tempestuous weather, and the force and violence of the winds and waves, wrecked, foundered, and sunk, whereby the said ship or vessel, and the said goods and merchandize so on board the same ship as aforesaid, then became and were wholly lost to the said plaintiff, to wit, at, &c. aforesaid; of all

Loss by
ship found-
ering at
sea (n).

(l) See precedents, 1 Wentw. 434, 445, 446, 464.

(m) See precedents, 1 Wentw. 438, 458.
(n) 1 Wentw. 399, 438, 464.

OW SEA
POLICIES.
DAMAGES BY
PERILS OF
SEA.

Loss by
ship being
cast on a
rock and
the goods
damaged,
and after-
wards lost
in a river
by tem-
pest.

which, &c.—[*State notice of loss, and conclude as ante, 182.—Add another count, with a more general statement of loss by perils of the sea, as ante, 190.*]

And the said plaintiffs further say, that the said ship, after the making of the said policy of insurance, and within eighteen months after the day of her arrival in the said river Gambia, and during her stay and trade there, to wit, on, &c. was forced and cast upon a rock in the said river Gambia, and was then and there broke, shattered, and bulged, and said goods and merchandizes, so laden in and on board the said ship as aforesaid, were thereby then and there wetted, damaged, and wholly spoiled; and the said ship afterwards, and within the space of eighteen months from the day of her arrival in the said river Gambia, and during her stay and trade there, to wit, on, &c. by force of the winds and tempests, was wholly lost in the said river Gambia, to wit, at, &c. (*venue*) aforesaid, of all which, &c.—[*State notice of loss, and conclude as ante, 182.*—*Add another count, with a more general statement of loss by perils of the sea, ante, 190.*]

[*192]
Ship lost
by storms
and ice,
and found-
ered.

*Whilst the said ship was sailing and proceeding in the Greenland seas, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, by the force and violence of storms and tempests, and by and through misfortunes and accidents, arising and happening from the bodies of ice and snow floating and being in the same seas, and by and through the perils and dangers of the seas, the said ship or vessel, bulged, and went to pieces, sunk, and foundered, and all the body, stores, tackle, apparel, ordnance, artillery, boat, and other furniture of the said ship or vessel, were totally lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid, of all which, &c.—[*State notice of loss, and conclude as ante, 182.*—*Add another count, with a more general statement of loss by perils of the sea as ante, 190.*]

Loss of
ship and
freight by
stranding.

[*After stating the sailing of the ship, proceed as follows :*]—And the said plaintiff further saith, that afterwards, and whilst the said goods and merchandize remained and continued on board the said ship as aforesaid, and whilst she was proceeding on her said voyage, to wit, on, &c. at, &c. aforesaid, the said ship, by and through the perils and dangers of the seas, and by the force and violence of the winds and waves, was stranded, bilged, and wholly lost; and the said plaintiff thereby then lost and was deprived of the freight of the said goods and merchandize so on board the said ship, on freight, as aforesaid, to wit, at, &c. (*venue*) aforesaid; of all which, &c.—[*State notice of loss and conclude as ante, 182.*—*Add another count, with a more general statement of loss by perils of the sea, as ante, 190.* What is a stranding, see 3 Campb. 29; 5 B. & A. 225; 4 M. & S. 77; 1 Stark. 436; 4 B. & C. 736; *what not*, 4 Moo. 15; 1 Brod. & B. 388; 4 M. & S. 503.]

Goods
damaged
by a leak
sprung in
a storm
(e).

And that afterwards and during the said voyage, that is to say, on, &c. the said ship, so having the said goods and merchandizes on board thereof, whilst she was sailing and proceeding on her said voyage, and after her depar-

(e) See another precedent, 1 Wentw. 401, 450.

ture from, &c. aforesaid, and before her arrival at, &c. aforesaid, on the high seas, was, by and through the perils and dangers of the seas, and the force and violence of the winds and waves, and by means of stormy, tempestuous weather, greatly damaged and opened in her seams, and between her planks rendered leaky, and greatly filled with water, and the said goods and merchandizes thereby then and there in the said voyage, were wetted, damaged, and wholly spoiled, and rendered of no use or value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid; of all which, &c.—[*State notice of loss, and conclude as ante*, 182.—*Add another count, stating a loss by perils of the sea, more generally, as ante*, 190.]

OF SEA
POLICIES.
LOSSES BY
PERILS OF
SEA.

Was upon the high seas greatly eaten, damaged, and destroyed by worms and other insects, and thereby and by and through the force of certain hurricanes of wind and stormy *and tempestuous weather, and by and through the perils and dangers of the seas, the said ship or vessel was rendered of no use or value to the said plaintiff, and was thereby wholly lost to him, to wit, at, &c. (*venue*) aforesaid, of all which, &c.—[*State notice of loss, and conclude as ante*, 182.]

LOSS BY
WORMS.
Ship lost
by eating
of worms
and by
storms(p).
[*193]

And the said plaintiff further saith, that while the said ship or vessel, in the said policy of insurance mentioned, was proceeding on her said voyage, and before her arrival at any of her port or ports of destination in the said policy of insurance mentioned, to wit, on, &c. a certain other ship or vessel on the high seas, by and through the force and violence of the winds and waves, was carried and sailed against, and ran foul of the said ship or vessel in the said policy of insurance mentioned, without any default or neglect of any persons in and on board of the said ship or vessel in the said policy of insurance mentioned, and the same thereby then and there became and was lost and stranded by and through the perils and dangers of the sea, to wit, at, &c. (*venue*) aforesaid; of all which, &c.—[*State notice of loss, and conclude as ante*, 182.—*Add another count, with a more general statement of loss, as ante*, 190.]

LOSS BY
SHIPS RUN-
NING
FOUL.
Loss by
another
ship's run-
ning
down ship
insured.
(q).

Was on the high seas burnt and consumed with and by fire; and the said goods and merchandizes then being and remaining in and on board the said ship, were thereby then and there wholly burnt and consumed with and by fire, and wholly lost to the owners and proprietors thereof, to wit, at, &c. (*venue*) aforesaid; of all which, &c.—[*State notice of loss, and conclude as ante*, 182.]

LOSS BY
FIRE.
Ship and
goods
burnt at
sea (r).

Was on the high seas wholly consumed, destroyed, and burned by fire; and the said ship, and the said goods and merchandize so being on board thereof as aforesaid, were thereby then and there wholly destroyed and lost, to wit, at, &c. (*venue*) aforesaid; of all which said premises, &c.—[*State notice of loss, and conclude as ante*, 182.]

The like
in another
form (s).

And the said plaintiff further saith, that afterwards, and whilst the said

LOSSES BY
CAPTURE.

(p) 1 Wentw. 446.

(q) See the law, 4 Taunt. 126.

(r) See precedent, 1 Wentw. 402.—1 Rich. C. P. 465.

(s) See form, 1 Wentw. 396.

ON SEA
POLICIES.
LOSSES BY
CAPTURE.
Loss by
capture of
ship and
goods (t).

ship or vessel was proceeding on her said voyage, with the said goods and merchandize on board *thereof as aforesaid, and before her arrival at, &c. aforesaid, to wit, on, &c. the said ship or vessel, with the said goods and merchandize so on board thereof, were, on the high seas, at, &c. (*venue*) aforesaid, with force and arms, and in a hostile manner, attacked, conquered, seized, captured, taken, and carried away by certain then enemies of our lord the king, and his crown of Great Britain, to wit, by certain Frenchmen, and subjects of the king of France, then in open war with our said lord the king, and the said ship or vessel, and goods or merchandize so on board thereof as aforesaid, were thereby then and there wholly lost to the said plaintiff; of all which, &c.—[*State notice of loss, and conclude as ante*, 182.]

For a total
loss of
ship and
freight by
capture,
and de-
fendant's
proportion
of expenses
of endeavoring
to regain
the ship
(u).

And the said plaintiff further says, that afterwards, and whilst the said ship or vessel was proceeding on her said voyage with the said goods and merchandize so on board thereof, on freight as aforesaid, and before her arrival at, &c. aforesaid, to wit, on, &c. the said ship or vessel, with the said goods and merchandize, were on the high seas, to wit, at, &c. (*venue*) aforesaid, with force and arms, and in a hostile manner attacked, seized, captured, and carried away as prize, by certain persons unknown to the said plaintiff, to wit, by certain enemies of our said lord the king, whereby the said ship, and the freight thereof, then and there became and were wholly lost to the plaintiff, and a large sum of money, to wit, to the amount of —*l.* for each and every sum of 100*l.* assured by the said policy, was afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, expended by the said plaintiff in and about the claiming and endeavoring to recover the said ship, rateable proportion of which said sum so expended to be paid by the said defendant, then and there amounted to a large sum of money, to wit, the sum of 20*l.*, in addition to the said sum of 200*l.*, so insured by him as aforesaid, to wit, at, &c. (*venue*) aforesaid, of all which said premises, &c.—[*State notice of loss, and conclude as ante*, 182, with a promise to pay the said sums.]

Total loss
of goods
in conse-
quence of
capture
and recap-
ture.

[*195]
Vessel
and goods
were so
damaged
that they
did not
produce
enough to
pay sal-
vage and
incidental
expenses.

Was, with force and arms, and in a hostile manner, attacked, conquered, seized, captured, and taken a prize by certain enemies of our lord the now king, and his crown of *Great Britain, to wit, by certain Frenchmen, and subjects of the king of France, then in open war with our said lord the king; and the said goods and merchandizes were by those enemies then and there taken and carried away in the said ship, and afterwards, and before that the said ship, goods, and chattels, were by those enemies carried into any port, to wit, on, &c. the said ship, with the said goods and merchandizes so being and remaining on board her as aforesaid, was, upon the high seas, to wit, at, &c. aforesaid, retaken and recovered out of the hands and possession of the said enemies by one of his present majesty's ships of war, and afterwards, to wit, on, &c. brought into the port of Plymouth, in the county of Devon, by the said ship of war, and there

(t) See precedent, ante, 178, and 1 Wentw. 401, 406, 411, 412.—15 East, 525. And as to the statement of losses by capture in general, see, 2 Saund. 203 a, note 18.—1 B. & P. 163, 155.—3 Chit. Com. Law, 493.

(u) See the precedent, ante, 178. As to the statement of this loss, see 2 Saund 203 a, note 18.—15 East, 525.—1 Wentw. 401, 406, 411, 412.

kept and detained for a long time, to wit, for the space of three months and more, then next following, to wit, at, &c. aforesaid; and the said first-mentioned ship or vessel, at the end of that time, to wit, on, &c. proceeded on her said voyage to the said island of Antigua aforesaid, to wit, &c. aforesaid; but by reason of such capture, recapture, and detainer of the said ship, goods, and merchandizes, as aforesaid, and the said goods being a perishable commodity, the said goods and merchandizes, before the said ship arrived at Antigua aforesaid, to wit, on, &c. at, &c. aforesaid, were so lessened in value, spoiled and damaged, that the same were not, at the time of their arrival at Antigua aforesaid, or at any time afterwards, of value sufficient to pay the average due to the crew of the said king's ship for the recaption of the said goods and merchandizes, and other the necessary expenses relating thereto, and were afterwards, to wit, on, &c. sold and disposed of towards payment and satisfaction thereof, and never came to the hands or possession of the said plaintiff, but have been and are wholly lost to him, to wit, at, &c. (*venue*) aforesaid.

ON SEA
POLICIES.
LOSSES BY
CAPTURE.

And the said plaintiff further saith, that afterwards, and whilst the said ship, with the said goods and merchandizes so laden on her as aforesaid, was proceeding on her said voyage, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, the said ship was, with force and arms, and in a hostile manner, attacked and fired upon by certain men of war, to *the said plaintiff unknown, and was thereby then and there so greatly shattered and damaged in her hull, masts, yards, and rigging, that by reason thereof the said ship, with all her tackle, apparel, ordnance, munition, boat and furniture, together with the said goods and merchandizes so laden, and being on board thereof as aforesaid, were afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, sunk in the sea and destroyed, and became and were wholly lost to the said plaintiff, to wit, at, &c. aforesaid.—[*Add a second count stating the loss to have occurred through shipwreck, and the perils of the seas, as ante, 150. 1 Wentw. 445.*]

Losses by
being fired
upon and
sunk by
the ene-
my (*w*).
[*196]

And the said plaintiff further saith, that the said ship, with the said goods and merchandizes so being on board thereof, afterwards, and whilst she was proceeding on her said voyage, and before her arrival at, &c. aforesaid, to wit, on, &c. upon the high seas, near Cadiz, in the kingdom of Spain, to wit, at, &c. aforesaid, was so broken and shattered, and suffered so much by and from storms and tempests, and the violence and perils of the seas, that she was thereby then and there wholly disabled and rendered incapable of performing, nor could nor did the said ship perform the residue of the said voyage, to wit, at, &c. aforesaid. And the said plaintiff further saith, that the said ship being so disabled as aforesaid, the said E. F. her master, and the mariners belonging to and sailing in her, thereupon afterwards, to wit, on, &c. last aforesaid, to wit, for the preservation of their lives, were obliged to put into Cadiz aforesaid, to wit, at, &c. aforesaid, and that the said ship, with the said goods and merchandizes so laden on board her as aforesaid, together with the master and mariners belonging to the said

Total loss
of goods,
ship being
compelled
by storms
and shat-
tered con-
dition to
go into
Cadiz, and
there was
taken by
the king
of Spain
and she
and all
her cargo
forfeited
(*z*).

(w) See a precedent, 1 Wentw. 445. Where ship fired upon by another English ship, mistaking her for an enemy, it was held not a loss by perils of sea, but that plaintiff might recover under a special count, sta-

ting particular circumstances, for it was within the general words, "all other perils, losses, and misfortunes," 5 M. & S. 451.

(z) 1 Wentw. 423.—3 B. & P. 23.

ON SEA
POLICIES.
LOSSES BY
CAPTURE.

ship, afterwards, to wit, on, &c. at the said port of Cadiz, to wit, at, &c. aforesaid, by force of arms and against the will of the said E. F. the master, and mariners then belonging to and sailing in the said ship, in a hostile manner was seized, taken, and detained in the said port of Cadiz, by divers soldiers and mariners belonging to a ship of war in the service of the king of Spain, and the said goods and merchandizes were there confiscated, and thereby then and there became wholly lost to the said plaintiff, to wit, at, &c. aforesaid.—[*Add a second count, for loss by peril of sea, as ante, 190, and a third by capture, as ante, 193.*]

[*197]
LOSS BY
ARREST
OR DE-
TAINMENT.

Ship ar-
rested and
detained,
by per-
sons un-
known to
plaintiff,
on the
coast of
America
(y).
Loss by
the ship
being seiz-
ed by sav-
ages (a).

*And the said plaintiff further saith, that afterwards, and whilst the said ship or vessel was proceeding on her said voyage, to wit, on, &c. the said ship or vessel was, by force and violence, upon the high seas, arrested, restrained, and detained by certain *people* (z), unknown to the said plaintiff, on the coast of America, whereby the said ship and freight, in the said policy of insurance mentioned, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid; of all which, &c.—[*State notice of loss, and conclude as ante, 182. See a second count, 1 Wentw. 419.*]

And the said plaintiffs further say, that long after the expiration of twenty-four hours from the arrival of the said ship at Gambia aforesaid, and during her abode there, that is to say, on, &c. certain inhabitants of Africa, to the said plaintiffs unknown, and without the default of the said plaintiffs, or any of them, by force and violence seized the said ship, and broke in pieces, shattered, and spoiled the said ship and the tackle, apparel, and furniture, thereof, to wit, at, &c.; of all which, &c.—[*State notice of loss, and conclude as ante, 182.*]

LOSS BY
PIRATES.

Loss by
capture of
Ameri-
cans, then
regarded
as rebels
(b).
Second
count, as
if taken by
pirates (c).

And the said plaintiff further saith, that the said ship, with the said sugars, and rum on board, afterwards, and before her arrival at, &c. aforesaid, to wit, on, &c. whilst she was proceeding on her said voyage on the high seas, was, with force and arms, and in a hostile manner, attacked, conquered, and taken by certain rebellious subjects of our lord the king, and by means whereof the said sugars and rum then became and were wholly lost to the said W. to wit, at, &c. aforesaid; of all which, &c.—[*State notice of loss, and conclude as ante, 182.—Add a second count, stating a loss, thus:—*On the high seas, was, with force and arms, and in a hostile manner, attacked, conquered, and taken by pirates, and, by means thereof, the said last-mentioned sugars and rum then and there became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.

[*198] *And the said plaintiff further saith, that after the departure of the

(y) See precedent, 1 Wentw. 419.—421.

(z) The word "people" in the policy, means the governing power of the country, and this breach will not be supported by evidence of rioters having seized upon the ship, see 4 T. R. 783, 784.—2 Saund. 202 c. note 12.—3 Chit. Com. Law. 495. But in 4 T. R. 787, it was said, that if averment

had been, that ship was taken by *pirates*, the evidence would have been sufficient to support it. *Per Lord Kenyon.*

(a) See precedent, 1 Wentw. 402.

(b) See precedents, 1 Wentw. 415, 416, and 418.—2 Saund. 203 b. note 18.

(c) See similar loss, 4 T. R. 783.—2 Saund. 263 b. note 18.—1 Wentw. 416, 17.

said ship from Cork aforesaid, and before the said ship had finished her said intended voyage, to wit, on, &c. certain persons, to the said plaintiffs as yet unknown, and without the default of the said plaintiffs or either of them, broke, damaged, and spoiled the body of the said ship, and broke, spoiled, took and carried away the tackle, apparel, ordnance, munition, artillery, boat, and furniture, of the said ship in the said writing or policy of assurance mentioned, to a great value and amount, to wit, to the value and amount of —l. whereby the said last-mentioned ship was disabled from performing her said voyage, and did not perform the same, and was and is of no use or value to the proprietors thereof, to wit, at, &c. aforesaid, of all which, &c.

ON SEA
POLICIES.
LOSS BY
THIEVING.
Ship dam-
aged on
her voy-
age by un-
known
persons
and rob-
bed (d).

And the said plaintiff further says that afterwards, and whilst the said ship was proceeding on her said voyage, and before the arrival of the said last-mentioned ship, with the said goods and merchandizes so laden on board her as last aforesaid, at Rotterdam aforesaid, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, the master and mariners in and on board the said last-mentioned ship, in a barratrous and fraudulent manner, without the knowledge and against the will of the said plaintiff, took and carried away the said last-mentioned ship, with the said goods and merchandizes so on board her as aforesaid, to places unknown to the said plaintiff, and converted and disposed thereof to their own use; and the said plaintiff thereby then and there lost and was deprived of the said last-mentioned ship and the goods and merchandize so on board thereof as aforesaid, and the profits thereof, to wit, at, &c. aforesaid.

LOSS BY
BARRA-
TRY.

Loss of
ship and
goods by
barratry
of master
and mari-
ners (e).

And that afterwards, and before the arrival of the said ship or vessel, with the said goods and merchandizes so on board thereof as aforesaid, at Guernsey aforesaid, to wit, on, &c. the said E. A. then being such master and commander of the said ship or vessel as aforesaid, and the said goods and merchandizes so being on board her as aforesaid, by and through the fraud and barratry of the said E. A. the said master of the said ship or vessel became and were wholly lost to the said plaintiffs, and the said plaintiffs thereby then and there lost all benefit and profit arising from the same, and the whole freight so insured as aforesaid, to wit, at, &c. (*venue*) aforesaid, of all which, &c.—[*State notice of loss and conclude as ante*, 182.—*Add another count, averring a loss, thus.*]

The like
in a more
general
form (f).
[*199]

And the said plaintiffs further say, that whilst the said ship or vessel, with the said goods and merchandizes on board thereof as aforesaid, remained and continued in the port of Plymouth aforesaid, to wit, on, &c. and on divers other days and times between that day and the time of seizure

Second
count, that
master
put smug-
gled goods
on board,
whereby
the ship
became
forfeited
(g).

(d) See precedent, 1 Wentw 402.

(e) See precedent, 2 Saund 202 e. n. 13 —1 Wentw. 401, 423, 435 —24 Mr. Justice Ashhurst's Paper Books, 318: as to what constitutes barratry, see 2 Saund. 202 e. note 13.—8 East, 126, 134.—2 Campb. 150, and 1 B. & P. 181, 201, 313.—3 B. & P. 23.—5 East, 314.—3 Chit Com Law 407. It is not necessary to use the word "barratrous" in the statement of this loss. It will

be sufficient if the breach assigned be "that the ship was lost through the fraud and negligence of the master."—2 Lord Raym. 1340.—5 Mod 231 —1 Stra. 561 —See Park on Ins. 94 —Hughes, 471.

(f) 1 Wentw. 435 —24 Mr. Justice Ashhurst's MS. Paper Books, 318.

(g) See precedent, 2 Saund. 203 b. note 18.—4 T. R. 33.—1 Wentw. 446.

ON SEA
POLICIES.LOSS BY
BARRA-
TRY.

and condemnation of the said ship or vessel as hereinafter mentioned, he the said E. A. in a barratrous and fraudulent manner, and contrary to the form of the Statute in that case made and provided (*h*), and without the knowledge, privity, or consent, and against the will of the said plaintiffs, or either of them, did unship from and on board the said ship or vessel, to be laid on land in the said port of Plymouth aforesaid, divers large quantities of brandy and coffee, of and belonging to him the said E. A. and being in and on board the said ship or vessel last-mentioned, on the account and adventure of himself the said E. A. and not the property of or on account or adventure of the said plaintiffs, brought and imported from parts beyond the seas, into Great Britain, in the said ship or vessel, the customs, subsidies, and other duties due and payable to our sovereign lord the now king, not being first paid or lawfully tendered to the collectors of the said customs at Plymouth aforesaid, or to any other person whatsoever there or elsewhere lawfully entitled to receive the same, or to the said collector's deputy, with the consent or agreement of the said comptroller or surveyor there, or one of them at least, nor agreed with him for the same at the custom-house according to the form of the Statute in such case made and provided, whereby, and according to the said Statute in such case made and provided, the said ship then and there became and was forfeited to our lord the king for the cause last aforesaid, to wit, at, &c. aforesaid, and thereupon the said ship or vessel was afterwards, to wit, on, &c. seized there and arrested on the behalf and account, and to and for the use of our said lord the king, to wit, at, &c. aforesaid, and afterwards, to wit, on, &c. was in due form of law condemned as forfeited, according to the form of the Statute in such case made and provided, to wit, at, &c. aforesaid: and by reason of the premises the said ship or vessel, by and through the said fraud and barratry of the said master, became and was wholly lost to the said plaintiffs, and the said plaintiffs thereby then and there lost all benefit and profit arising from the same, and the whole freight so insured as aforesaid, to wit, at, &c. aforesaid; of all which said premises, &c.—[*State notice of loss, and conclude as ante*, 182.]

[*200]
BY BARRATRY.

Ship confiscated through barratry of master, in taking her into an hostile port (i).

*And the said plaintiff further saith, that afterwards, and whilst the said ship was proceeding on her said voyage, to wit, on, &c. to wit, at, &c. the master of the said ship, in a barratrous and fraudulent manner, took and carried the said ship or vessel, with the said goods and merchandize so on board her as aforesaid, to certain places to the said plaintiff unknown, to wit, at, &c. aforesaid, by means whereof the said goods and merchandize then became and were subject to capture, seizure, and confiscation, and wholly lost to the said plaintiff and the other persons interested therein as aforesaid, to wit, at, &c. aforesaid, of all which, &c.—[*State notice of loss, and conclude as ante*, 182.]

AVERAGE
LOSSES.

For an average on goods, damaged by sea-water rushing into ship.

And the said plaintiff further saith, that the said ship, with the said goods and merchandize so laden and remaning on board thereof as aforesaid, afterwards, to wit, on, &c. departed and set sail with convoy from —aforesaid, on her said voyage towards, and for, &c. aforesaid, and

(*h*) "Contrary to the statute, &c." is not in the precedent in 24 Mr. Justice Ash-hurst's MS. Paper Books, 318.—4 T. R. 33—2 Saund. 203 b. note 18.

(*i*) See 2 Taunt. 509.

that afterwards, and after her departure from, &c. aforesaid, and before her arrival at &c. aforesaid, and whilst the said ship was so proceeding on her said voyage as aforesaid, with the said goods and merchandize so on board thereof as aforesaid, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, by the violence of the winds and waves, storms, and tempests, and by the rolling and laboring of the said ship and the sea water which came into the said ship, and other perils of the seas, and the said goods and merchandize were greatly wasted, destroyed, damaged, and spoiled; whereby the said plaintiff sustained an average damage or loss on the said goods and merchandize to a larger amount than 5*l*. per cent. on all the money insured thereon, to wit, to the amount of 70*l*. by the hundred for each and every 100*l*. insured thereon, by the said plaintiff, to wit, at, &c. aforesaid, whereby the said defendant then and there became liable to pay to the said plaintiff a large sum of money, to wit, the sum of 70*l*., being his, the said defendant's proportion of the said average loss, for and in respect of the said sum of 100*l*. so by him insured as aforesaid, of all which said premises, he the said defendant afterwards, to wit, on the day and year last aforesaid, to wit, at, &c. (*venue*) aforesaid, had notice.

ON SEA
POLICIES.
AVERAGE
LOSSES.

*And the said plaintiff further saith, that during the said voyage, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, the ship, with the said goods and merchandize on board the same, was, by storms and tempest perils, and dangers of the seas, brought into great distress, and in danger of perishing, and being lost and destroyed in the sea; wherefore the said master of the said ship, and the mariners thereof, for the general safety and preservation of the said ship and the said goods and merchandize on board the same, during such voyage, were necessarily obliged to cut away, and did then and there cut away divers masts, yards, sails, cables, anchors, ropes, and buoys, of and belonging to the said ship, and to cast and leaves them in the sea, whereby they were lost; by reason whereof the said plaintiff, in respect of his interest in the said goods and merchandize, then and there became liable to bear and pay a proportionable part of the value of the said masts, yards, sails, cables, anchors, ropes, and buoys, so lost as aforesaid, *and thereby sustained a general average loss, amounting to a large sum of money, to wit, the sum of 70*l*. by the hundred, for each and every hundred pounds, so by him insured as aforesaid, whereby the said defendant then and there became liable to pay the said plaintiff the sum of 70*l*., for and in respect of the said sum of 100*l*. so by him insured as aforesaid, of all which said premises the said defendant afterwards, to wit, on, &c. had notice, to wit, at, &c. aforesaid.—[*Add money paid, had and received, account stated, and breach.*]

[*201]
Second
count for
general
average,
which
plaintiff
was oblig-
ed to pay,
as owner
of the
goods in-
sured
where it
was ne-
cessary to
cut away
the masts,
&c. in a
storm (*k*).
[*202]

And the said plaintiff further saith, that the said ship or vessel, in the said policy of insurance mentioned, afterwards, to wit, on, &c. departed and set sail from the said port of — on her said intended voyage in the said policy of insurance mentioned, with certain goods and merchandize

Ship
stranded,
and disab-
led from
prosecut-
ing her

(*k*) An eniment Pleader at the bar was of opinion that the general average might be recovered under the court for money paid, if the plaintiff had paid the same to the owners of the ship. The liability of the underwriter is not restricted to the single amount of his subscription, but he may be

subject either to several average losses, or to an average loss and total loss, or to money expended, and labor bestowed about the defense, safeguard, and recovery of the ship, to a much greater amount than the subscription, and it shall be recoverable as an average loss. See 4 Taunt. 267.

ON SEA
POLICIES.
AVERAGE
LOSSES.

—
voyage
without
being un-
loaded
and re-
paired,
and for
safety was
piloted,
and plain-
tiff incur-
red trou-
ble and ex-
pense,
whereby
defendant
liable to
pay ave-
rage loss
(l).

[*203]

in and on board thereof, but that, after her departure, and before the completion of the said voyage, and in the course thereof, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid the said ship or vessel was, by and through the force and violence of the winds and waves, and by the perils and dangers of the seas, forced, driven, and cast upon and against certain shoals and sands, and sand banks, and thereby then and there became and was strained, bulged, and disjointed, broke and otherwise damaged in her body, rudder, irons, and other parts, insomuch, that by means thereof the said ship or vessel was wholly disabled from proceeding on her said voyage without being repaired as to the said damage so by her sustained as aforesaid; and in consequence thereof, and for the purpose of such repair, and the safeguard, safety, and preservation of the said ship or vessel, the said ship or vessel was forced and obliged to be, and then and there was piloted, and attended by a pilot and a certain ship or vessel during her distress, and to be conducted, conveyed, and carried into port, and there unloaded and repaired; and on that occasion, and by reason and means of the said several premises, the said plaintiff, by himself and his servants and agents, did labor for, in, and about the safeguard, safety, and preservation, of the said ship or vessel, and in so doing, and in and about the repair of the same ship or vessel, as to the said damage so by her *sustained as aforesaid, and of the premises aforesaid, did necessarily lay out and expend a large sum of money, to wit, &c. to wit, on, &c. in, &c.; whereby the said defendant, according to the tenor and effect of the said policy of insurance, and his promise and undertaking, thereupon then and there became and was liable to pay the rateable part or proportion of the charges aforesaid, which he, the said defendant, then and there ought to have paid and contributed in respect of his said insurance, amounting to a large sum of money, to wit, the sum of—*l.* to wit, at, &c. aforesaid; of all which, &c.—[*State notice of loss, and conclude as ante, 182.*]

For a rate-
able part
of ex-
pense in-
curred in
endeavor-
ing to re-
cover ship
according
to terms
of policy
(m).

And the said plaintiff further saith, that after the said capture of the said ship, and by reason and in consequence thereof, the said E. F. and G. H. for whose benefit the said insurance was so made as aforesaid, afterwards, to wit, on, &c. did sue, endeavor, and labor to recover the aforesaid ship, to wit, at, &c. aforesaid, and in so doing did then and there necessarily expend a large sum of money, that is to say, 600*l.* of lawful money of Great Britain, whereby the said defendant, according to the terms of the said policy of insurance, and of his said promise and undertaking, then and there became liable to pay, and ought to have paid to the said plaintiff, for the use of the said E. F. and G. H. the further sum of 100*l.*, being the rateable part or proportion of the expense aforesaid, which the said defendant ought to have paid and contributed in respect of the insurance aforesaid; whereof the said defendant afterwards, to wit, on the day and year last aforesaid, to wit, at, &c. (*venue*) aforesaid, had notice.

The ship
damaged

And the said plaintiff further saith, that afterwards, and during the said

(l) See precedent, 1 Wentw. 450.—4 (m) See precedents, 1 Wentw. 463.—4
Taunt. 367.—2 Burr. 1167, 1172, and ante, Taunt. 367.
200.

voyage, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, the said ship or vessel, and the tackle, apparel, and furniture thereof, by and through the mere force and violence of certain hurricanes of wind and stormy weather, and by the perils and dangers of the seas, became and was greatly strained, broken, shattered, damaged, and spoiled, and thereby the quarter-boards and starboard cable of the said ship or vessel, together with the companion-wheel and stern-sail thereof, were carried away, and wholly lost to the said plaintiff; and also thereby, and for the preservation of the said ship and cargo, the master and crew of the said ship or vessel were then and there forced and obliged to, and did necessarily cut away the larboard anchor of the said ship or vessel and a certain other cable of and belonging to the same, and likewise the stay-sail mast, with the boom-sail and rigging thereof, and all the wreck occasioned as aforesaid, and divers, to wit, two four-pound guns and one gun-carriage, were then and there, by the means aforesaid, washed overboard and wholly lost to the said plaintiff, whereby, in order to repair the damage done to the said ship or vessel, and the tackle, apparel, and furniture thereof as aforesaid, the said ship or vessel was then and there necessarily forced and obliged to proceed, and did proceed, to the port of Kingston-upon-Hull, in the county of York, and there to unload the said cargo; and that, before her arrival at the said last-mentioned port, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, the said ship or vessel was necessarily obliged to and did slip and let go a certain cable and anchor belonging to the same by means, and in consequence of which said several premises, and of the charges and expenses occasioned thereby, and by the salvage of the said last-mentioned cable and anchor, the said plaintiff necessarily suffered and sustained an average loss, to wit, an average loss of —*l.* per cent. upon the said ship or vessel, so assured as aforesaid; and in consequence thereof, the said defendant then and there became liable to pay to the said plaintiff, a certain sum of money, to wit, the sum of —*l.* of like lawful money, being his proportion of the said average loss, for and in respect of the said sum of —*l.* so by him assured as aforesaid, of all which said premises the said defendant, afterwards, to wit, on the day and year last aforesaid, to wit, at, &c. (*venue*) aforesaid, had notice.

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POLICIES.
AVERAGE
LOSSES.

by bad weather, her cables, masts, &c. cut away, and she was forced to put into a port, whereby another cable was destroyed, expense of salvage incurred, and consequent average loss.

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And the said plaintiff further says, that afterwards, and whilst the said ship was proceeding on her said voyage, and before her arrival at the port of London aforesaid, to wit, on, &c. in parts beyond the seas, to wit, at, &c. aforesaid, the said ship or vessel, by the perils and dangers of the seas, sprung a leak, and became and was broken and damaged, insomuch, that by means thereof, the said ship or vessel was forced and obliged to, and did put into the harbor of Lisbon, in the kingdom of Portugal; and that afterwards, and while she continued in the same harbor, to wit, on, &c. the said ship or vessel, with the said cotton on board thereof, was, by the violence of the winds and waves, driven ashore, and stranded in the said harbor of Lisbon, and thereby the said ship or vessel then and there became and was incapable of further proceeding on her said voyage, and also thereby the said cotton then and there became and was greatly soiled, wetted, damaged, and spoiled, insomuch, that it was then and there expe-

Average loss where the ship sprung a leak and was forced to put into the port of Lisbon, where she was stranded, and goods sold at a loss.

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LOSSES.

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dient and necessary to sell the said cotton, and the same was accordingly then sold at Lisbon aforesaid, and by means of the premises aforesaid, the said plaintiff sustained an average loss, to wit, an average of £60 0s. 9d. per cent. upon and in respect of the said cotton, to wit, at, &c. aforesaid, and thereby and according to the form and effect of said policy of insurance, and his said promise and undertaking, the said defendant then and there became liable to pay, and ought to have paid the said plaintiff, a certain sum of money, to wit, the sum of 120*l.* 18*s.* of like lawful money, being his the said defendant's proportion of the said average loss, for and in respect of the said sum of 200*l.* so by him insured as aforesaid, of all which said several premises the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had *notice.—*[Add a second count for a total loss, stating that the ship was stranded and lost in the said harbor of Lisbon, and also thereby the said last-mentioned cotton became and was wholly lost to the said A. B. and never did arrive at London aforesaid.]*—Of all which said several premises, &c. *[Notice to defendant, and thereby, &c. liability of defendant to pay to plaintiff the said last-mentioned sum of 200*l.* when, &c.]*

Average
loss on su-
gars, by
the ship's
becoming
leaky, and
the sugar
thereby
wetted
and deter-
iorated in
value.

And the said plaintiff further says, that afterwards, and whilst the said ship or vessel with the said sugar on board thereof, was proceeding on her said voyage, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, the said ship or vessel was, by and through the perils and dangers of the seas, struck and run aground, and became and was leaky, and thereby the said sugar then and thereby became and was wetted and greatly damaged, lessened in value, and spoiled, insomuch, that by means thereof, the said sugar was then obliged to be forthwith unloaded and sold, to wit, at, &c. aforesaid, and by means of the several premises aforesaid, he the said plaintiff suffered and sustained an average loss, to wit, an average loss of 10*l.* per cent. upon the said share of the said sugar, to wit, at, &c. aforesaid. —*[State liability to pay defendant's proportion, and notice, as in precedent, ante, 203, and add count for total loss.]*

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For an av-
erage loss,
the an-
chor being
entangled
with the
shore, it
became
necessary
to cut it
away, to
proceed
on the
voyage,
and the
sails, &c.
were torn
away.

*And during the said voyage, to wit, on, &c. it became and was necessary to cast anchor in the port of — and the best bower anchor was then and there accordingly cast, and thereupon the same then and there became and was accidentally entangled in certain mooring-chains there, called Land Borringdon's moorings, insomuch, that it then and there became and was found impracticable and impossible to weigh and raise the same; and the said plaintiff in fact saith, that afterwards, to wit, on, &c. at, &c. it became and was necessary for the said ship or vessel to proceed on her said voyage immediately, in order to join the first convoy to sail to the port of her destination; and it being then and there impossible to weigh or raise the said anchor, it then and there became and was necessary to cut the cable thereof, for the purpose of enabling the said ship or vessel to proceed on her said voyage, and the same was then and there accordingly cut, and a part thereof, together with the said anchor, being then and there of great value, to wit, of the value of —*l.* of, &c. were then and there necessarily left at the moorings aforesaid, to wit, at, &c. aforesaid; and the said plaintiff in fact further saith, that afterwards, and during the said voyage, to wit, on, &c. on the high seas, to wit, at, &c.

aforesaid, by the force and violence of the winds and waves, divers, to wit, twenty sails of the said ship or vessel were torn in pieces and destroyed, and divers, to wit, twenty ropes and twenty cables thereof torn away from the said ship, were then and there washed away, and wholly lost, to wit, at &c. aforesaid; by means of which said several premises, &c.—[*State the average loss, and defendant's liability to pay his proportion, and notice as ante, 202, 3.*]

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LOSSES.

And the said plaintiff further saith, that afterwards, and whilst the said ship was proceeding on her said voyage, to wit, on, &c. on the high seas, to wit, at, &c. aforesaid, the said ship caught fire, whereby a great part of the tackle, apparel, ordnance, munition, artillery, boats, and other furniture of the said ship, in the said policy of insurance, mentioned, then and there became and was wholly burnt and consumed by fire, and the residue thereof thereby then and there became, and was greatly damage, lessened in value, and spoiled, to wit, at, &c. aforesaid, by means of which said several premises, he the said plaintiff then and there sustained an average loss on the said tackle, apparel, ordnance, *artillery, boats, and other furniture, so burnt and consumed with fire, and so damaged, lessened in value, and spoiled as aforesaid, above the amount of 3*l.* per cent. that is to say, to the amount of 10*l.* per cent. by means whereof, &c.—[*State defendant's liability to pay proportion of average, and notice, as ante, 203.*]

For average loss by tackle of ship being burnt and damaged by fire.

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And that afterwards. and whilst the said ship or vessel remained and continued at, &c. aforesaid, waiting for convoy for the said voyage, to wit, on, &c. the said ship or vessel, and the said two bales of woolen cloth, so shipped and loaded on board thereof, were respectively arrested and detained by the authority of our said lord the now king, whereby the said ship or vessel was restrained and hindered from further prosecuting her said voyage; and that afterwards, and whilst the said ship or vessel was under such restraint, and so detained, as aforesaid, to wit, on, &c. one of the said bales of woolen cloth, that is to say, the said bale of woolen cloth, No. 229, being of great value, to wit, &c. was taken and carried away by certain thieves, to the said plaintiff as yet unknown, and wholly lost to the said plaintiff, to wit, at, &c. aforesaid, and by means of the said several premises aforesaid, he the said plaintiff then and there sustained an average loss, to wit, an average loss, of —*l.* per cent. on the value of the said two bales of woolen cloth, that is to say, for and in respect of the said bale of woolen cloth so lost as aforesaid.—[*State defendant's liability to pay proportion of average, and notice as ante, 203.*]

For an average loss, ship was detained by embargo in this country, and during that time part of the goods were stolen.

[*After stating the loss, and notice to defendant, proceed as follows:*]
—And whereupon, afterwards, to wit, on, &c. the said plaintiff gave notice thereof to the said defendant, to wit, at, &c. aforesaid, and then and there, according to the usage and custom of merchants, *abandoned* and *renounced* to the said defendant, and the other assurer who had subscribed

STATE-
MENT OF
ABANDON-
MENT.

Averinert that plaintiff abandoned all his claim to the ship (n).

(n) See the precedents, 2 Saund. 202, 3, and note 19.—1 Mod. Ent. 225. It is not now usual to state the abandonment.

ON SEA
POLICIES.
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LOSSES.
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the said policy, all his interest in the said ship, and the other premises so insured as aforesaid, and then and there requested the said defendant to pay to him the said plaintiff the said sum of money so by him insured as aforesaid, and which he, the said defendant, by reason of *the premises, and according to the custom of merchants, then and there ought to have paid to the plaintiff.

STATE-
MENT OF
ADJUST-
MENT.

Statement
of adjust-
ment of
loss in an
action on
a policy of
insurance
(o).

[*After stating the loss, notice thereof to defendant, and his liability, as ante, 182, proceed as follows:*]—And thereupon the said defendant, and the said plaintiff, afterwards, to wit, on, &c. at, &c. aforesaid, ascertained and adjusted the said loss to amount to a large sum of money, to wit, the sum of 100*l.* per cent.; and the said defendant, in consideration of the premises, then and there, by a certain memorandum of agreement, signed and subscribed by him the said defendant, on the back of the said writing or policy of insurance, undertook, and then and there faithfully promised the said plaintiff to pay to him, the said plaintiff, the said sum of 200*l.*, so by him insured as aforesaid, in one month then next following. [*As to what are instruments of Bottomry, and as to what are insurances thereon see Simons v. Hodgson, 3 Barn. & Adolph. 50. And as to insurances against Canal navigation Risks, see Crowley v. Cohen, 3 Barn. & Adolph. 478.*]

ON LIFE
POLICIES.

VI. ON LIFE POLICIES.

On a poli-
cy on life
against an
assurer
who un-
derwrote
by agent
(p)
[*209]

For that whereas the said plaintiff, heretofore, to wit, on, &c. (*date of policy*), at, &c. (*venue*) caused to be made a certain writing or policy of assurance, purporting thereby, and containing therein, that in consideration of three *guineas per cent. the receipt of which the several persons

(o) See other precedents, 1 Wentw. 412, 458-9. It is not necessary to state the adjustment specially, as above, and it will suffice to declare on the policy generally, and the adjustment may be given in evidence under a general count, see Marshall on Insurance, 544 and 588. 1 Wentw. 412; but in some cases it is necessary to declare specially on the defendant's adjustment.—1 J. B. Moore, 563—7 Taunt. 306—3 B. & Cres. 9—An adjustment is not binding, if it in any degree proceeds on mistake, 2 Taunt. 286—3 Chit. Com. Law, 531, as to the effect of adjustment.

(p) See other precedents, 1 Wentw. 465 to 470, and the next precedent. For forms in Covenant, see post, 541. See on this subject, Park on Ins. 429 to 440—Marsh. on Ins. 664 to 670.—Hughes on Ins. 456 to 504.—Selwyn's N. P. tit. Insurance, 1034 to 1038. Most of the principles which govern marine insurances are also applicable to contracts of this nature; see ante, 178. And see the cases collected in Harrison's Index, 2d edit. tit. Insurance; and Chitty's Med. Jurisprudence, vol. ii.

Insurance on lives, wherein the insured have no interest, are prohibited by the stat-

ute 14 Geo. 3. c. 48. s. 1. which statute also directs that the name of the person interested, or on whose account the insurance is effected, shall be inserted in the policy. A creditor has, in general, an insurable interest in the life of his debtor, 9 East, 72.—Park, 432—Marsh. 673 to 676. Vandindenau v. Desborough, 8 Barn. & C. 566. But if the executor of the debtor pay the creditor, the latter cannot sue the insurer, 9 East, 72. A trustee may insure, Marsh. 676.—8 T. R. 12. And a mere expectancy, as a father's expectation that his son, on his coming of age, will make a will in his favor, is not insurable, Halford v. Keymer, 10 Bar. & C. 724.

It is usually one of the conditions of the policy that the insured shall subscribe a declaration of warranty, containing a statement of the age, state of health, and other circumstances relating to the life insured. Upon the truth of this declaration the validity of the contract depends. A warranty that the party is in good health will not, however, be falsified, by proving that he labored under a particular infirmity which had no tendency to shorten life. 1 Bla. Rep. 312.—Park, 438.—Marsh. 667—Hughes, 500.

ON LIFE
POLICIES.

whose names were thereto subscribed, thereby acknowledged, and according to that rate, for every greater or lesser sum received of Messrs. B. & Co. of London, merchants, on behalf of the said plaintiff, (by the name and description of Mr. A. B.) they whose names are thereto subscribed, did for themselves severally, and for their several heirs, executors, administrators, and assigns, and not one for the other, or others of them, or for the heirs, executors, administrators, and assigns of the other, or others of them assume, promise, and agree that they respectively, or their respective heirs, executors, administrators, and assigns should and would, well and truly pay or cause to be paid, without any dispute, abatement, or contention whatever, unto the said plaintiff, his executors, administrators, and assigns, by his or their indorsement thereon, the full sum and sums of money which they had thereunto respectively subscribed, on the following conditions, (that is to say) in case [John Earl of Glencairn] should die or decease out of his natural life, by any ways or means whatsoever, suicide and the hands of justice excepted, at any time between the [10th day of January, 1796, and the 10th day of January, 1797, both days included,] and during the life-time of [the Dowager Countess of Glencairn,] his mother; but in case the said Dowager Countess of Glencairn, his mother, should depart this life before the above-named John Earl of Glencairn, that policy or obligation to be null and void, and otherwise to be and remain in full force until the [10th day of January, 1797;] and by

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Nor is it to be concluded, that a disorder with which a person is afflicted, before he effects an insurance on his life, is a disorder tending to shorten life, within the meaning of the declaration of Insurance Offices, from the mere circumstance that he afterwards dies of it, if it be not a disorder necessarily having that tendency. 4 Taunt. 763. But if particular questions be asked, which are not fairly answered, as if the name of a physician who last attended be withheld, this avoids the policy, if material, though the death happened from another disorder, and the creditor for whose benefit the policy was made was in no ways privy to the fraud, 5 D. & R. 266.—1 Car. & Pay. S. C. and see 3 Bing. 60.—6 Taunt. 186. See exception, *Swete v. Fairlee*, 6 Car. & P. 1. If no such warranty be required, the insurer takes the risk upon himself; though even in this case fraud or misrepresentation will prevent the insured from claiming the benefit of the policy. *Id. ibid.* Interest is not recoverable on a policy, 3 D. & R. 613. But see 3 & 4 W. 4. c. 42.

The declaration.—As to the mode of stating a policy in general, see ante, 179, note. It is usual to recite the policy *verbatim*, together with all the proposals and conditions to which it refers, and any material variance or omission will be fatal, unless allowed to be amended under the 9 Geo. 4. c. 15.—Marsh. 587; though it is not necessary in this or in any other case of special *assumpsit* on an agreement, not under seal, to state any more than is relevant to the plaintiff's cause of action. 6 East, 567.—4 Taunt. 287. The plaintiff must also state his compliance with the conditions of the policy, his inter-

est in the life insured, and the truth of his warranty or declaration, if any such were made. It is usual to add counts for money had and received, and on an account stated, to enable the plaintiff to recover the premium, if he should appear to be entitled to it, or to avail himself of any balance which the defendant may have admitted to be due. If the policy be under seal the declaration must be in debt or covenant. The 6 Geo. 1. c. 18. s. 4. prescribes the form of declaring against the two Incorporated Insurance Companies. This form, which was not absolutely enforced by the statute, has not, however, been usually adopted, see 2 Marsh. on Ins. 601.

Plea.—The most usual plea is the general issue non-assumpsit, which puts in issue every material fact alleged in the declaration. In actions of debt and covenant against the two Insurance Companies they are allowed to plead *nil debet* or, *non-infregrit conventionem*, see 11 Geo. 1. c. 30. s. 43.—2 Marsh. 601.

Evidence.—In an action by a husband, on a policy of insurance on the life of his wife, her declarations are admissible to show her own opinion of her state of health at the time of effecting the policy, see 6 East, 188.—2 Smith's Rep. 646, S. C. Unwritten evidence will not be admitted to vary or contradict the terms of the policy. *Skin. 54.*—3 Campb. 58.—4 Taunt. 846. Where the defendant underwrites by agent it will be sufficient proof of his agency that the defendant usually recognizes policies so subscribed, without producing the agent's authority in writing, 4 Campb. 88.

**on writ
return.** the said writing or policy of assurance, the interest of the said plaintiff, in the life of the said John Earl of G. was valued at the sum insured ; and by a certain memorandum, thereunder written, the said John Earl of Glencairn was "*warranted in health.*" As by the said writing, or policy of assurance, and memorandum more fully appears. Of which said writing or policy of assurance and memorandum the said defendant afterwards, to wit, on the day and year first aforesaid, at &c. (*venue*) aforesaid, had notice ; and thereupon afterwards, to wit, on (*venue*) the day and year last aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there paid to the said defendant, a certain sum of money, to wit, the sum of three guineas, (that is to say, the sum of 8*l.* 3*s.* of lawful, &c.) as a premium and reward for the assurance of 100*l.* of like lawful money, upon the premises mentioned in the said writing or policy of assurance, and had then and there undertaken, and faithfully promised the said defendant, to perform and fulfill all things in the said writing or policy of assurance contained, on the part and behalf of the assured to be performed and fulfilled, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would become and be an assurer to the said plaintiff of the said sum of 100*l.* upon the premises aforesaid, and would perform and fulfill all things in the said writing or policy of assurance contained, on his part and behalf as such assurer to be performed *and fulfilled ; and the said defendant then and there became and was an assurer to the said plaintiff, and then and there, by one E. F. his agent in that behalf, subscribed the said writing or policy of assurance as such assurer of the said sum of 100*l.* as aforesaid ; and the said plaintiff in fact saith, that at the time of making the said writing or policy of assurance, and of the said promise and undertaking of the said defendant, the said J. E. of G. was in health, and that the said plaintiff was then, and from thence until the time of the death of the said J. E. of G. interested in the life of the said J. E. of G. to a large amount to wit, to the amount of all the monies by him ever insured, or caused to be insured thereon, to wit, at, &c. (*venue*) aforesaid ; and the said plaintiff in fact further saith, that after the making of the said writing or policy of assurance, and between the [said 10th day of January 1796, and the said 10th day of January, 1797,] in the said writing or policy of assurance mentioned, during the life-time of the said [D. C. of G. the mother of the said John Earl of Glencairn,] to wit, on, &c. (*q*) aforesaid, at, &c. (*venue*) aforesaid, the said John Earl of G. died and deceased out of his natural life, by other ways and means than by suicide, or by the hands of justice, of all which said several premises the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice ; and was then and there requested by the said plaintiff to pay him the said sum of 100*l.*, so by him assured as aforesaid, and which said sum of 100*l.*, he the said defendant, then and there ought to have paid the said plaintiff, according to the form and effect of his said promise and undertaking so made as aforesaid.—[*Add count for money had and received, and the common conclusion.*]

(*q*) Day of the death, or about it.

For that whereas the said plaintiff heretofore, to wit, on, &c. (*date of policy*) at, &c. (*venue*) caused to be made a certain policy of insurance, whereby, after reciting that the said plaintiff, therein described by the name and addition of plaintiff, of, &c. esquire, being interested in the life of E. F. wife of the said plaintiff, of — aforesaid, was desirous to effect an insurance with the Atlas Company on the life of the said E. F. for the term of one year, commencing from, &c. and ending, &c. and renewable from time to time, at his *option at the end of every year during the term of one year, and that the said plaintiff accordingly paid, at the said Company's office in Dublin, the sum of 82*l.* Irish currency, as a premium of such insurance for one year, the said defendants, three directors of the said Company, whose hands were thereto subscribed and affixed, relying upon the truth of a certain declaration, bearing date on, &c. and made by the said plaintiff, in compliance with the conditions on the said policy indorsed, did agree with the said assured that they, the said three directors, would, in case the said E. F. should happen to die at any time within the term of one year commencing from and ending at the respective times therein and hereinbefore mentioned, pay, out of the stock and funds of the said Company, to the said assured, his executors, administrators, and assigns, within three months after the decease of the said E. F. should have been certified to the said directors of the said Company, at their principal office, the sum of 5000*l.* Irish currency; [and that if the said E. F. should survive the said term of one year, and the said A. B. his executors, administrators, and assigns, should, on, &c. in every subsequent year during so many years of the said term of seven years as the said E. F. should happen to live, pay, at the office of the said company, the like premium of, &c. Irish currency, and if the said E. F. should actually depart this life during the said term of years, then that the said three directors would, within three months after the decease of the said E. F. should have been duly certified as aforesaid, pay out of the stock and funds of the said Company, to the said assured, his executors, administrators, and assigns, the sum of 5000*l.* Irish currency:] provided always, and it was declared by the said policy, that the funds and property of the said Company, for the time being, should be answerable to the demands thereupon under the said policy; and that neither the persons who were subscribed thereto, nor any other member of the said Company, should, upon any account, be subject or liable to any demand beyond his or her share or interest in the capital stock or funds of the said Company, and which share was set opposite to his or her signature to the deeds of settlements establishing the said Company, or mentioned in some other deed referring thereto, and declaring him or her to be a member thereof, (any thing contained in the said policy to the contrary notwithstanding :) provided also, that the said policy, and the assurance thereby effected, should, at all *times, and under all circumstances, be subject to such conditions and stipulations as were contained in the printed proposals indorsed thereon, in the same manner as if the same were there wholly and actually repeated and adapted to that present case; as by the

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(r) See notes to the last precedent. It will be observed, that the policies of some of the Companies are so framed as to contain no personal contract to pass so as to sustain an action at law; but almost a charge on the funds of the Company; and on especial case

from equity, it was held, that in such a case no action is sustainable; but the companies rarely venture to take that legal obligation. See *Anscomb v. Shore*, in K. B., A. D. 1818, argued by Fuller and Chitty.

ON LIFE
POLICIES.
Payment
of premi-
um and
mutual
promises.

Averment
of con-
tents of
declara-
tion.

Averment
of con-
tents of
printed
proposals.

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said policy, reference being thereunto had, will fully appear and thereupon afterwards, to wit, on, &c. at, &c. aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendants, had heretofore, to wit, on the day and year last aforesaid, there paid to the said Company a certain sum of money, to wit, the sum of 82*l.* Irish currency, as a premium or reward for the insurance of the said sum of 5000*l.* Irish currency, upon the life of the said E. F. as in the said policy is mentioned, for one year, to wit, from, &c. to, &c. aforesaid, in the said policy of insurance mentioned, and had then and there undertaken and faithfully promised the said defendants to perform and fulfill, &c.—[*State mutual promises to perform policy, same as ante*, 210.] And the said plaintiff further saith, that the said declaration, in the said policy mentioned, was and is a certain declaration as follows, (that is to say) I, A. B. of Merion-street, in the city of Dublin, being desirous to make an assurance with the directors of the Atlas Assurance Company, in the sum of 5000*l.*, upon the life of E. F. born in the parish of, &c. on, &c. but now residing at Merion-street, in the city of Dublin, do hereby declare, to the best of my belief, that the said E. F. is not, nor has she been, afflicted with gout, asthma, fits, or any other disorder which tends to shorten life; that she has had the small-pox (or cow-pox), and that the age of the said E. F. does not exceed twenty-seven years, and that I have an interest in the life of the said E. F. to the full amount of the said sum of 5000*l.*; and I do hereby agree that this declaration shall be the basis of the contract between me and the said Company, or any of the members thereof, and that if any untrue averment is contained in this declaration, in the setting forth the age, state of health, profession, occupation, or other circumstances relative to the said E. F. all monies which shall have been paid to the said Company, or to any member thereof, upon account of the insurance so made by me shall be forfeited. Dated, &c. And the said plaintiff further saith, that, in the printed proposals mentioned and referred to by the said policy of insurance, it was expressed and declared, that persons proposing to effect life assurances would be required to state * the following particulars, namely.—[*Here state the proposals, which may be, perhaps, as follows:*]—name, and residence of the party by whom the proposal was made; name, residence, and profession of the party whose life is to be insured, and in case of an assurance upon survivorship, the name, residence, and profession of each party, place, and date of birth, and age next birth-day; sum to be insured, and the name and residence of the medical gentleman to be referred to for the state of the person's health; whether afflicted with the gout, asthma, or any other disorder which tends to shorten life; whether the party had had the small-pox or cow-pox; whether the party would attend personally at the office; whether employed in the military or naval service: a declaration as to all the above points would be considered as the basis of the contract between the insured and the Company: if any such declaration should not be in all respects true, then the policy would become void, and the premium that might have been paid would be forfeited; the lives of persons in the military or naval service might be assured at the office on moderate terms; that no assurance should be in force until the premium should have been paid, nor would any policy be considered valid for more than fifteen days after the expiration of the period limited therein, unless the premium conditioned for the renewal of

ON LIFE
POLICIES.

such policies should have been paid within that period; that assurances might be revived at any period not exceeding three months, on sufficient proof of the unimpaired state of health of the party, and on payment of the premium, with the addition of 5s. for every 100*l.* so assured; that such policies would become void, if the parties whose lives had been assured should go beyond the limits of the United Kingdom, or should die on the high seas, (except in his majesty's packets passing between Great Britain and Ireland) unless permission should have been granted to leave the United Kingdom, which might be obtained on such parties attending personally to give every requisite explanation, and paying a premium adequate to such risk; that when parties whose lives have been assured should not appear personally at the office, an additional charge of 10*l.* per cent. would be made on the sum assured; that assurances made by persons on their own lives would be void if they should die by the hand of justice, by duelling, or suicide; but should the family of such persons be left in distress and poverty, the directors, in their own discretion would make such allowance, in respect of the policies *of the deceased, as they might deem just and reasonable; that if any person should become desirous of discontinuing an insurance effected in that office, the Company would purchase the interest in such policy at an equitable valuation; that transfers might also be made by any person without giving notice to the Company; that persons effecting assurances on other lives than their own would be required to state the nature of the interest they possessed in such lives; that all claims upon the Company would be paid within three months after satisfactory proof should be produced of the death of the persons on whose lives assurances had been effected. And the said plaintiff in fact says, that the said last-mentioned declaration, so referred to in the said policy as aforesaid, so by him made as aforesaid, was in all respects true, to wit, at, &c. (*venue*) aforesaid. And the said plaintiff further saith, that at the time of the making of the said last-mentioned declaration, and also at the time of making the said last-mentioned policy of insurance, and of the said last-mentioned promise and undertaking of the said defendants, as last aforesaid, and also at the time of the death of the said E. F. as hereinafter mentioned, he, the said plaintiff, was interested in the life of the said E. F. to a large amount, to wit, to the amount of all the monies by him insured thereon, to wit, at, &c. (*venue*) aforesaid. And that he, the said plaintiff, did, before the making of the said policy of insurance, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, state to the said Company the nature of the said interest which he the said plaintiff possessed in the life of the said E. F.; and the said plaintiff further saith, that afterwards, to wit, on, &c. (*day of death, or about it,*) aforesaid, at, &c. (*venue*) aforesaid, the said E. F. died; and the said plaintiff further saith, that the decease of the said E. F. as aforesaid, was afterwards, to wit, on, &c. in, &c. duly certified to the said directors of the said Company, at their principal office, to wit, at, &c. (*venue*) aforesaid, and that afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, satisfactory proof was produced to the said Company by the said plaintiff, of the death of the said E. F. as aforesaid; and although the said plaintiff hath in all things conformed himself to, observed, performed, fulfilled, and kept all things in the said policy of insur-

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E. F.'s
death cer-
tified.
Proof of
death ad-
duced.
Plaintiff's
general per-
form-
ance of
condi-
tions.

OF LIFE
POLICIES.
[*216]
Stock and
funds suf-
ficient.
Three
months
elapsed.

ance, and the said conditions, and the said stipulations contained, on his part and behalf to be observed and performed, according to the form and effect of the said policy of assurance, and of the said proposals and *conditions; and although the said stock and funds of the said Company always, from the time of the making of the said policy of insurance, have been, and yet are, sufficient to pay to the said plaintiff the said sum of 5000*l.*; and although three months after the decease of the said E. F. was duly certified to the directors of the said Company, at their principal office as aforesaid, and after satisfactory proof was so produced of the death of the said E. F. as aforesaid, have long since elapsed; of all which said several premises the said defendants, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice, and were then and there requested by the said plaintiff to pay him the said sum of 5000*l.*, so by them insured as aforesaid; yet the said defendants, not regarding their said promise and undertaking so by them made as aforesaid, did not, nor would, when they were so requested as aforesaid, or at any time before or since, pay the said sum of 5000*l.*, or any part thereof, but have hitherto wholly neglected and refused so to do, and still neglect and refuse so to do, to wit, at, &c. (*venue*) aforesaid.

Second
count.

[And whereas also the said plaintiff heretofore, to wit, on, &c. at, &c. aforesaid, caused to be made a certain other policy of insurance, whereby, after reciting, &c. *same as first count, omitting the words in brackets, and declaration of interest, and then add counts for money had and received, account stated and breach.*]

FOR GEN-
ERAL
AVERAGE.

By the
owner of
a ship,
against
the person
who had
goods on
board, for
his pro-
portion of
[*217]
general
average
loss, ac-
cruing
from dam-
age done
by the loss
of an an-
chor cut
away to
preserve
the ship
and cargo,
as also for
loss of
boats, and
for repairs
of such
ship in
part (s).

VII. FOR GENERAL AVERAGE.

For that whereas the said plaintiff, before and at the time of happening of the damages and losses in this count mentioned, was owner or proprietor of a certain ship or vessel called the — and of her tackle, anchors, masts, boats, and appurtenances, the same being of great value, to wit, of the value of —*l.* of lawful, &c.; and which said ship or vessel was then proceeding on a certain voyage, to wit, from, &c. towards, &c. with certain goods and merchandizes of the *said defendant, of great value, to wit, of the value of —*l.* on board thereof, to be carried and conveyed therein on freight during the said voyage, to wit, at, &c.* And whereas also, whilst the said ship or vessel was sailing and proceeding on her said voyage with the said goods and merchandize on board thereof, to wit, on, &c. at, &c. (*venue*) aforesaid, by storms, winds, and tempestuous weather, one of the anchors of and belonging to the said ship or vessel, and then and there being the property of the said plaintiff, and of great value, to wit, of the value of —*l.* was washed, forced, and driven overboard from and out of the said ship or vessel, and became and was suspended on the side of the said ship

(s) See precedents, 1 East, 220.—4 Taunt. 124. Damage done to ship by tempests, falls alone on the owners. 6 Abbott on Shipping, 4th ed. And for law as to average in general, see Abbott on Shipping.—

Holt on Shipping.—Marshall on Insurance. —Park on Insurance.—Hughes on Insurance, 234, &c. 3 Chit. Com. Law, 432. See also 3 Campb. 430.—2 Marsh. 309.—2 M. & S. 482.

or vessel, and entangled in the rigging thereof; and thereupon, in order to preserve the said ship or vessel, and the goods and merchandizes on board thereof, it then and there became and was expedient and necessary to cut away the jibs and forestay-sail, and the downhall and bury rope, and other parts of the rigging of and belonging to the said ship or vessel, and being the property of the said plaintiff, of great value, to wit, of the value of —£., and the same were then and there accordingly cut away, and thereby then and there became and were wholly lost to the said plaintiff; and the said plaintiff further saith, that by means of the said damage and loss, and other damage to the said ship or vessel occasioned by the said storms, winds, and tempestuous weather, the said ship or vessel became and was so greatly damaged that it then and there became and was expedient and necessary, in order to preserve the said ship or vessel, and her cargo on board thereof, for the said ship or vessel to put back again to —aforesaid, and there to repair the said damage so occasioned as aforesaid; and the said ship or vessel, with the said goods and merchandizes of the said defendant on board thereof, did thereupon then and there put back and sail back again to —aforesaid, and the said damage was then and there repaired; and the necessary expenses incurred by the said plaintiff in the premises, then and there amounted to a large sum of money, to wit, the sum of —£. and the said plaintiff further saith, that whilst the said ship or vessel was so repairing as aforesaid, to wit, on, &c. at —to wit, at, &c. (*venue*) aforesaid, the said plaintiff was forced and obliged to pay the wages and maintenance of divers, to wit, 50 seamen, and 50 persons, in and on board the said ship or vessel, in the whole amounting to, &c.: and the said goods and merchandizes were then *and there saved and preserved, and arrived safely into the hands and possession of the said defendant; of all which said several premises the said defendant afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, had notice; and by reason of the premises, and of the said defendant so being such owner of the said goods and merchandizes so on board the said ship or vessel, on freight as aforesaid, and so saved and preserved by the means aforesaid, he the said defendant, as such owner, became, and was liable to contribute to the said losses, damages, and expenses, in a general average, and thereupon, in consideration of the premises, the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) undertook, and then and there faithfully promised the said plaintiff to pay him so much money as he the said defendant, as owner of the said goods and merchandizes, was liable to contribute to the said losses, damages, and expenses, in a general average, when he the said defendant should be thereunto requested: and the said plaintiff avers, that the said defendant, as such owner of the said goods and merchandizes as aforesaid, was liable to pay and contribute to the said losses, damages, and expenses, in a general average, a large sum of money to wit, the sum of —£.; whereof the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, there had notice.

And whereas also the said plaintiff, at the time of the accruing of the damages and losses in this count hereinafter mentioned, was owner and proprietor of a certain ship or vessel, and her tackle, anchors, masts, boats,

FOR THE
SPECIAL
COUNTESS.

[*218]

Second
count.

FOR GEN-
ERAL
AVERAGE.

[*219]

and appurtenances, the same being of great value, to wit, of the value of —*l.* of lawful, &c. which said last-mentioned ship or vessel was then proceeding on a certain voyage from, &c. to — with certain goods and merchandizes of the said defendant, of great value, to wit, of the value of —*l.* on board thereof, that is to say, at, &c. (*venue*); and whereas also, whilst the said last-mentioned ship or vessel was sailing and proceeding on her said last-mentioned voyage, with the said last-mentioned goods and merchandizes on board thereof, to wit, on, &c. at, &c. aforesaid, one of the anchors of and belonging to the said ship or vessel, and then and there being the property of the said plaintiff, and of great value, to wit, of the value of —*l.* was forced overboard from and out of the said ship or vessel, and became and was suspended on the side of the said ship or vessel, and entangled in the rigging *thereof, and thereupon, in order to preserve the said last-mentioned ship or vessel, and goods and merchandizes on board thereof, it then became expedient and necessary to cut away the jib and forestay-sail, and the downhall and bury rope, and other parts of the rigging of and belonging to the said ship or vessel, and being the property of the said plaintiff, of great value, to wit, of the value of —*l.* and the same were then and there accordingly cut away, and were wholly lost to the said plaintiff; of all which said premises the said plaintiff, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) had notice; and by reason of the premises, and of the said defendant so being such owner of the said last-mentioned goods and merchandizes, so on board of the said ship or vessel as aforesaid, on freight as aforesaid, he the said defendant, as such owner, became liable to contribute to the said losses and damages, in a general average; and thereupon, in consideration of the premises, he the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) undertook, and then and there faithfully promised the said plaintiff to pay him so much money as he the said defendant, as owner of the said last-mentioned goods and merchandizes, was liable to contribute to the said losses and damages, in a general average, when he the said defendant should be thereunto requested; and the said plaintiff avers, that the said defendant, as such owner of such last-mentioned goods and merchandizes as aforesaid, was liable to pay and contribute to the said losses and damages, in a general average, a large sum of money, to wit, the sum of —*l.*; whereof the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, had notice.—[*Add indebitatus counts for general average, as ante, 62; also counts for money paid, account stated, and usual breach.*]

For an average loss, anchor being cut away, it being entangled with the shore, and the ship sailing after convoy, sails, &c.

[*220]

[*As in the last precedent to the asterisk*, in page 217.*] And whereas also, during the said voyage, to wit, on, &c. it became necessary to cast anchor in the port of E. in the country of, &c. and the best bower anchor was then and there accordingly cast, and thereupon the same then and there became, and was entangled in certain mooring-chains there called —, insomuch that it then and there became, and was found impracticable and impossible to weigh and raise the same; and the plaintiff, in fact saith, that afterwards, to wit, on, &c. at, &c. it became and was necessary for the said ship or vessel to proceed in her said voyage, and immediately to sail, in order to join the first convoy to the *port of her destination;

and it being then and there impossible to weigh or raise the said anchor, it then and there became necessary to cut the cable thereof, for the purpose of enabling the said ship or vessel to proceed on her said voyage, and the same was then and there accordingly cut, and a part thereof, together with the said anchor, being then and there of great value, to wit, &c. was then and there necessarily left at the moorings aforesaid, to wit, at, &c. aforesaid; and the said plaintiff in fact further saith, that afterwards, and during the said voyage, to wit, on, &c. at, &c. (*venue*) by the force and violence of the winds and waves, divers, to wit, twenty sails of the said ship or vessel were torn to pieces and destroyed; and divers, to wit, twenty ropes and twenty cables thereof torn away from the said ship, the same then being the property of the said plaintiff, of great value, to wit, of the value of —*l.* and the same were then and there wholly lost to the said plaintiff; of all which said premises the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. had notice; and by reason of the premises.—[*Conclude as ante*, 217.]

FOR GENERAL AVERAGE.

being blown away from the ship.

[*Same as the precedent, ante*, 216, to the statement of the damage, and then proceed as follows:—The said ship or vessel having the said goods and merchandize on board her as aforesaid, was, by and through the perils and dangers of the seas, and the force and violence of the winds and waves, and by means of stormy and tempestuous weather in the course of such voyage, greatly damaged, strained, and rendered leaky, insomuch that divers large quantities of water entered the same; and the said ship or vessel, with the said goods and merchandize on board thereof, being thereby in great and imminent danger of sinking and foundering, it afterwards, to wit, on, &c. last aforesaid, became, and was necessary and expedient, for the preservation and safety of the said ship or vessel, and the said goods and merchandizes, to put into a certain harbor, to wit, the harbor of Cork, and then and there to lay the said ship or vessel, with the said goods and merchandizes on board her, on a certain beach there, and the same was accordingly laid on such beach; and thereby, and by means of the said several premises, the said ship or vessel, her tackle, and appurtenances, respectively became, and were unavoidably greatly bilged, broken, injured, and deteriorated, and rendered of little or no value to the said plaintiff; but the said goods and merchandizes of the said defendant were thereby then and there saved and *preserved from loss and damage, with great trouble and expense to wit, an expense of —*l.*; and the same were afterwards, to wit, on, &c. to wit, at, &c. aforesaid, safely and securely delivered to the said defendant; of all which premises the said defendant, afterwards, to wit, on the day and year last aforesaid, there had notice; and by reason of the premises, and of the said defendant being owner of the said goods and merchandizes during the said voyage, and at the time when the said brig or vessel was so strained, laid upon the beach, broken, injured, and deteriorated as aforesaid, and being thereby benefited as aforesaid, he the said defendant then and there became liable to contribute to the said loss or damage, and injury, so occasioned to the said ship or vessel as aforesaid, in a general average; and thereupon, &c.—[*State promise, and averment, and notice, as in the precedent, ante*, 217, and vary the statement in different counts, as in that precedent.]

For general average, where ship, damaged by storms, and obliged to put into port, and be laid on beach, where she, by weight of cargo, became bilged, and defendant's goods being saved, he became liable to pay proportion of injury and expense, incurred in saving goods.

[*221]

ON CHARTER-PARTIES.

VIII. ON CHARTER PARTIES.

On charter-party, by owner of ship against freighter, for not dispatching ship, and not loading her, and for non-payment of freight and demurrage (1).
Statement of the charter-party.

[*222]

For that whereas, heretofore, to wit, on, &c. (*date of charter-party*) at, &c. (*venue*) by a certain charter-party of affreightment, then and there made between the said plaintiff, therein described to be part owner of the good ship or vessel called the [Neptune] of the burden of [one hundred and forty-two tons] or thereabouts, whereof G. H. was master, then lying in the river Thames (*u*), of the one part, and the said defendants, therein described of the city of London, merchants, freighters of the said ship, of the other part (*u*), it was witnessed, [*here set forth the charter-party in its legal effect or literal words in the past tense*] amongst other things, that the said owner, for the considerations thereafter mentioned did, thereby promise and agree, to and with the said freighters, his executors, administrators, and assigns, that the said ship being tight, staunch, and strong, and every way properly fitted, victualled, and manned with all things needful and necessary, as is usual for vessels in merchants' service, and for the voyage thereafter named, the said master should and would receive on board the said ship, from alongside in the river Thames, a full and complete cargo of such lawful goods, wares, and merchandizes, *as should be

(1) See precedents and notes in covenant, post, 528. And see a form, *Irving v. Clegg*, 1 Bing. N. C. 53. As to charter-parties in general, see Abbott on Shipping, 5th edit. 163 to 211.—Holt on Shipping, 3 Chit. Com. Law, 387, 426. The action must be brought in the name of the contracting party. See 2 Taunt. 407, 414.—10 East, 279.—Abbott, 165.—Ante, vol. i. p. 5.—2 M. & S. 426.—4 Taunt. 4, 52.—1 Campb. 532

As to the declaration.—The charter-party is sometimes under seal, in that case the plaintiff must frame his declaration specially upon the deed. 1 New Rep. 104; *sed quæritur* whether in an action brought by and against the parties to the deed, the declaration may not be framed in debt generally, and the deed given in evidence. See *per Bayley*, J. 4 B. & C. 968. If the owner execute a deed to the freighter containing a covenant for the right delivery of the cargo, he cannot afterwards be sued by the merchant, in an action of *assumpsit*, grounded on the bill of lading, signed by the master. 10 East, 378.—Abbott, 186. So where the master of a ship entered into a charter-party under seal, on behalf of the owners with one partner of a firm, the owners cannot maintain *assumpsit* for the freight against the whole firm; for though the parties are different, the interest is the same. 1 M. & S. 573. An action may however be maintained on a parol contract, notwithstanding a sealed charter-party, if such contract be distinct in its provisions, and not inconsistent with the deed. 12 East, 578. Where the owner and freighter covenant by deed, that forty days shall be allowed for loading and unloading, the freighter impliedly covenants not to detain the ship longer than

that time, and if he do, the owner's remedy is upon the deed, and not in *assumpsit*, as upon an implied contract. 12 East, 179. 4 Campb. 131.—2 Chit. Rep. 570. And where a charter-party under seal was made by the master, in that character, with merchants who did not know that he was also a part-owner, in the ship, as in fact he was; it was held, they might sue him and the other owners in an action upon the case, for a breach of such general duties as were not inconsistent with the stipulations of the charter-party, such as the not providing necessaries for the voyage, and employing a negligent and unskilful master. 3 B. & B. 171.—6 J. B. Moore, 415, S. C. 8 Barn. & Cres. 166; 2 Moo. & Ry. 47, S. C. See a form in *Case*, post, 666; also the form in *Case*, in 6 J. B. Moore, 415.

If the freighter covenant to provide a full cargo, consisting of copper, tallow, and hides, or other goods, he is not bound to provide a properly assorted cargo, and he is not obliged to furnish any copper, though without it the ship would be kept in ballast, and the freight would be materially diminished. 4 Campb. 103.

It is usual for the parties to these contracts to bind themselves to each other in a penal sum, for the performance of their respective stipulations, but this does not preclude the party from bringing his action on any of the other clauses, and he may recover damages beyond the amount of the penalty. 13 East, 343.—1 Bla. Rep. 395.—Abbott, 5th edit. 170: but see 1 Campb. 78.

(u) Let this description of the parties agree with their description in the charter-party.

ON SHIP-
THE
PARTIES.

tendered for the said vessel, by the said freighter or his agents, and from no other person or persons in the port of London, that is to say, in the whole as much as could be laden and stowed in the said ship or vessel over and above her provisions, tackle and furniture, (the master's cabin, and sufficient room for his crew excepted) and being so fully laden and dispatched, he the said master should and would (wind and weather permitting) set sail in and with the said ship, and proceed for the port of Gibraltar, or so near thereto as she might safely get, and being arrived there, should and would address himself with the said ship to the freighter's correspondent, and make a right and true delivery of the cargo unto them the said freighters' agents, correspondents, or assigns, or their order, according to bills of lading which might have been signed for the same, and having discharged such part of the cargo as might be required to be unladen at the port of Gibraltar, should, if required, immediately proceed to a port on the coast of Spain, not higher than Valencia, and address himself as aforesaid, and make a right and true delivery of the remainder of the cargo, and thus end and complete the said intended voyage (the act of God, the king's enemies, restraints of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever excepted): and it was thereby further declared and agreed, that the said freighters, for and in consideration of the payment of the freight thereinafter agreed on, should effect an insurance to the amount thereof, holding the policy as a security for the same, deducting the premium of insurance; in consideration whereof, and of every thing above mentioned, the said defendants for themselves, their executors and administrators, did thereby promise and agree to and with the said plaintiff, his executors, administrators, or assigns, that they should and would load the said vessel with a cargo of merchandize, and dispatch her from Gibraltar, and one other port on the coast of Spain, and on the arrival of the said vessel there, received the said cargo out of her, according to the custom of their ports of loading and unloading respectively, and within the days thereinafter agreed on; and further, that the said freighters should and would well and truly pay, or cause to be paid, unto the said owner, or his order, freight for the said voyage 850*l.*, provided the said vessel was required to proceed from Gibraltar to a port on the coast of Spain, no higher up than Valencia, but if the cargo was wholly discharged at Gibraltar, then 756*l.* was to be paid in full, for freight for the said voyage, of lawful money of Great Britain, with 5 per cent. like money, for primage, and taking the measurement of the cargo, and in lieu of all port charges and pilotage whatsoever, during the said intended voyage; but should a ship discharge at a port on the coast of Spain, then all port charges at such port to be paid by the freighters' agent, the said freight to be paid as follows, 250*l.*, and with five pounds per cent. primage by the acceptance of the freighters, at three months date; and 300*l.*, with five pounds per cent. primage, by the said acceptance, at four months date from the day the ship should clear outwards at the custom-house in London; and 100*l.* more, with five pounds per cent. primage thereon, by the said acceptance, at sixty days sight, upon receipts being received of a right and true delivery of the cargo, or such part thereof, as might be discharged at Gibraltar, and one 100*l.* more, with five pounds per cent. thereon, by the said acceptance, at sixty days sight, on a right delivery at a port on the coast of Spain as aforesaid, if so required,

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ON CHARTER
PARTIES.

Mutual
promises.
[*224]

Averment
that vessel
was tight,
staunch,
&c. (w).

And the
master
was ready
to receive
the cargo
on board,
and did re-
ceive the
same on
board, and
other per-
formance.

And it was mutually agreed by and between the said parties, that thirty running days should be allowed for loading at London, and ten days for unloading the said ship at the port or ports of discharge, to commence in London from the day the said master should be ready to load, to re-commence in Gibraltar from the day the said master should be ready to begin to unload; and notice thereof having been given to the agents of the said freighters, the vessel having free practice and being current at the custom-house, cease when discharged, and re-commence from the day the said master should be ready to begin to discharge, at the ordered port on the coast of Spain; and it was thereby further agreed between the said parties, that it should and might be lawful for the said freighters or their agents, to retain and keep the said vessel at the port of discharge ten days on demurrage, over and above the lay days before limited, at and after the rate of six pounds six shillings per day, to be paid, day by day, as the same should become due, and the said vessel should be dispatched, so as to enable the master to join and sail with the first regular convoy that might be appointed to sail in July, from Portsmouth, for the Mediterranean, wind and weather permitting, any thing contained therein, to the contrary in anywise notwithstanding; and the said charter-party of affreightment being so made as aforesaid, afterwards, to *wit, on the day and year first aforesaid, to wit, &c. at, (*venue*) in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to perform and fulfill the said charter-party of affreightment, in all things on his part and behalf to be performed and fulfilled, they the said defendants undertook, and then and there faithfully promised the said plaintiff to perform and fulfill the said charter-party of affreightment, in all things on their part and behalf to be performed and fulfilled, and the said plaintiff in fact saith, that the said ship, within a reasonable time after the making of the said charter-party, to wit, on the day and year first aforesaid, at, &c. (*venue*) was tight, staunch, and strong, and every way properly fitted, victualled, and manned, with all things needful and necessary, as was usual for vessels in merchants' service, and for the voyage in the said charter-party mentioned; and thereupon the said master was then and there ready and willing to receive, and did, afterwards, to wit, on, &c. receive on board the said ship in the river Thames, aforesaid, a cargo of such lawful goods, wares, and merchandizes, as they the said defendants tendered for the said vessel, and from no other person or persons, to wit, at, &c. aforesaid, afterwards, to wit, on, &c. and being fully laden and dispatched, did then and there so set sail in and with the said ship and cargo, and proceed for the port of Gibraltar aforesaid, and being afterwards, to wit, on, &c. arrived there, made a right and true delivery to the agents, correspondents, and assigns there, of the said defendants, according to bills of lading of such parts of the said cargo as the said agents and correspondents and assigns required to be there delivered, to wit, at, &c. aforesaid, and afterwards, being thereunto required, to wit, on, &c. proceeded to a port on the coast of Spain, not higher than Valencia, to wit, the port of Malaga, and there, to wit, on, &c. at, &c. made a right and true delivery of the remainder of

(w) The plaintiff must aver the performance of every act which constituted a condition precedent, and the following averments must therefore be adopted, according as those conditions are in the charter-party.

the said cargo, to the agents of the said defendants, according to the terms of the said charter-party, to wit, at, &c. aforesaid; and the said plaintiff saith, that although he hath always performed and fulfilled all things in the said charter-party *mentioned, on his part and behalf to be performed and fulfilled, to wit, at, &c. aforesaid, yet, protesting that the said defendants have not performed, fulfilled, or kept any thing in the said charter-party contained, on their part and behalf to be performed and fulfilled, and kept, according to the tenor and effect of the said charter-party, and their said promise and undertaking, the said plaintiff in fact saith, that the said defendants, not regarding their said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not dispatch the said vessel upon the voyage aforesaid, so as to enable the master to join and sail with the first regular convoy that was appointed to sail in July, from Portsmouth, for the Mediterranean, but, on the contrary thereof, kept and detained the said vessel a long space of time, to wit, for the space of two months after the sailing of the first convoy that was appointed to sail, in July, aforesaid, from Portsmouth, for the Mediterranean, before she was dispatched from the Thames aforesaid, upon the said voyage, whereby the said plaintiff was put to much cost and charge, and expended a large sum of money, to wit, the sum of 300*l.*, in and about the maintenance of the master and mariners of the said vessel during the time aforesaid, and lost and was deprived of great gains and profits which he would have had and acquired by the use of the said vessel, during the said time, to wit, at, &c. aforesaid; and the said plaintiff further says, that the said defendants, further contriving and intending as aforesaid, did not nor would, within the number of days in the said charter-party mentioned, on their behalf respectively, load the said vessel with a cargo of merchandize, at, &c. and dispatch her from thence on the said voyage, and receive the said cargo at the said ports of discharge, according to the tenor and effect of the said charter-party, and the said promise and undertaking; but, on the contrary thereof, kept and detained the said vessel after she was ready to receive her cargo aforesaid, at, &c. and they had notice thereof, and after she was ready to deliver the same at the ports of discharge aforesaid, and they had notice thereof in and about the loading and unloading of the said vessel at the said places respectively, a long space of time, to wit, the space of one hundred days, over and above the said lay days, and ten days of demurrage in the said charter-party mentioned, whereby the said plaintiff was put to great costs, charge and expense, to wit, the further expense of 500*l.*, in and about maintaining the master *and mariners of the said vessel, for the said time last-mentioned, and lost and was deprived of the use of the said ship or vessel, and of all the profits thereof, during the time last aforesaid, to wit, at, &c.; and the said plaintiff further says, that although by reason of the premises, a large sum of money, to wit, the sum of 89*l.* 10*s.* became due and payable to the said plaintiff, as for the freight of the said vessel for the voyage aforesaid, and primeage thereon, according to the terms of the said charter-party, to be paid as in the said charter-party is mentioned and agreed, and a further sum of (63*l.*) as and for the demurrage, for the detention of the said vessel at Gibraltar and Malaga aforesaid, for the days of demurrage in the said charter-party mentioned, to be paid as therein mentioned, to wit, at,

ON CHARTER PARTIES.

[*225]

Defendant's breach not dispatching the vessel, and plaintiff's consequent expense.

Second breach, not loading and dispatching within specified lay days.

[*226]

Third breach, non-payment of freight and demurrage.

OF CHARTER-
TER
PARTIES.

&c. yet the said defendants further contriving and intending as aforesaid, have not, nor hath either of them, paid to the said plaintiff the said two several sums of money, or either of them, or any part thereof; but to pay the same or any part thereof to the said plaintiff according to the terms of the said charter-party, or in any other manner, the said defendants have hitherto wholly refused and still do refuse so to do, contrary to their said promise and undertaking, to wit, &c. — [*Add other counts, varying the statements, as circumstances may require, and counts for freight and demurrage, use of ship, work and labor, and common counts.*]

By the
owners of
ship
against
the as-
signee of
the
freighter,
for dama-
ges, in de-
taining
the ship
beyond
the days
of demur-
rage, and
for
freight,
primage,
and de-
murrage.

For that whereas heretofore, and before the making of the promise and undertaking of the said defendant, as hereafter mentioned, to wit, on, &c. (*date of charter-party*), in parts beyond the seas, to wit, at Hamburg, to wit, at, &c. (*venue*) by a certain charter-party of affreightment then and there made, it was mutually agreed between the said plaintiff, by one D. C. their agent in that behalf, therein described as Captain D. D. master of the good ship or vessel called the Gough, of B. measuring her register 126 tons or thereabouts, then laying at Hamburg, and certain persons therein described as Messrs. G. & H. of Hamburg merchants; that the said ship being tight, staunch, and strong, and every way fitted for the voyage should, with all convenient speed, sail and proceed to Wells, (Norfolk) after having taken on board about one hundred tons of oil cakes, or more if the said freighters should think proper to put a larger quantity of cakes on board the said vessel the Gough, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture; and being so loaded, should therewith proceed to the port of War, before or so near thereunto as she could safely get, and there deliver the same to the said freighters or their assigns, they paying freight for the same, at the rate of 10s. sterling, and 10 per cent. primage for each English ton of oil cakes delivered, with no charges for pilotage and port charges during the said voyage, (the act of God, the king's enemies, fire, and all and every other damages and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage always excepted.) The freight to be paid in cash after the delivery of the cargo, fourteen running days being allowed for loading and discharging the oil cakes, — days were to be allowed the said merchant, (if the ship was not sooner dispatched); and the said freighters to have the option of keeping the ship eight days on demurrage, over and above the said laying days, at 5l. sterling per day. And whereas also within a reasonable time after the making of the said charter-party, and before the making of the promise and undertaking of the said defendant hereafter next mentioned, to wit, on the day and year aforesaid, at Hamburg aforesaid, to wit, at Lynn aforesaid, in the county aforesaid, the said ship being tight, staunch, and strong, and every way fitted for the said voyage, did, with all convenient speed, sail and proceed to W. Norfolk aforesaid, after having loaded and taken on board the said oil cakes and cargo, as agreed on by the said charter-party; and did afterwards, to wit, on the 16th day of November, in the year aforesaid, arrive at the port of W. aforesaid, to wit, at, (*venue*) aforesaid, with the said oil cakes and cargo on board, whereof the said freighters and their assigns then and there had notice;

Sailing of
ship.

Arrival of
ship with
cargo, &c.

and the said plaintiffs were then and there ready and willing to deliver the same to the said freighters or their assigns, according to, and upon the terms of the said charter party. And the said plaintiffs in fact say, that afterwards, to wit, on the day and year last aforesaid, to wit, at, (*venue*) aforesaid, the said freighters assigned to the said defendant, and the said defendant then and there became and was the assignee of the said oil cakes and cargo, and entitled to receive the same, and thereupon, heretofore, to wit, on the day and year last aforesaid, at Lynn aforesaid, in the county aforesaid, in consideration of the premises, and that the said plaintiffs, at the special instance and request of the said defendant, would deliver unto the said defendant, as such assignee, and suffer and permit him to take the said oil cakes and cargo, according to the said charter-party, and perform and fulfill all things in the said charter-party contained on the said plaintiffs' parts to be performed and fulfilled towards the assignee of the said oil cakes and cargo, he the said defendant undertook, and then and there faithfully promised the said plaintiffs to perform and fulfill all things in the said charter-party contained, on the part and in behalf of the freighters and their assigns, to be performed and fulfilled. And the said plaintiffs aver, that they, confiding in the said promise and undertaking of the said defendants aforesaid, afterwards to wit, on the day and year last aforesaid, at (*venue*) aforesaid, did deliver to and suffer and permit the said defendant, as such assignee as aforesaid, to take the said oil cakes and cargo, according to the said charter-party, and the said plaintiffs have performed and fulfilled all things in the said charter-party contained, on the said plaintiffs' part and behalf to be performed and fulfilled. Yet the said plaintiffs in fact say, that the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure the said plaintiffs in this behalf, did not nor would, within the number of days allowed by the said charter-party as aforesaid in that behalf, load and discharge the said oil cakes and cargo: and on the contrary thereof the said plaintiffs in fact say, that the said freighters and the said defendant, kept and detained the said ship and vessel over and above the said fourteen running days, and the said eight demurrage days, at W. aforesaid, for a long time to wit, for the space of two days, whereby the said plaintiffs were put to great costs, charges, and expenses, amounting, to wit, to the sum of 20*l.* in and about the maintaining and keeping the master and mariners of the said ship or vessel, and during that time lost and were deprived of the use and profits of the said ship or vessel, to wit, at, &c. (*venue*) aforesaid. And the said plaintiffs in fact further say, that by reason of the premises, a large sum of money, to wit, the sum of 74*l.* 18*s.* became due and payable to the said plaintiffs, as and for the freight of the said ship or vessel for the voyage aforesaid, and primage thereon, according to the terms of the said charter-party, to be paid as in the said charter-party is mentioned and agreed; and a further sum of 50*l.*, as and for demurrage for the detention of the said ship or vessel, for the days of demurrage, in the said charter-party mentioned to be paid, as therein mentioned, to wit, at Lynn aforesaid, in the county aforesaid, whereof the said defendant hath always there had notice; yet the said defendant not regarding his said promises and undertaking, hath not yet paid the said last-mentioned two several sums of money, or either of them, or any part thereof, but to pay the same, or any part thereof to the said plaintiffs hath

ON CHARTER PARTIES. Defendant becomes assignee. Mutual promises.

Delivery of cargo to defendant.

Breach in detaining ship above the time allowed.

Non-payment of freight, primage, and demurrage.

ON CHARTER PARTIES. wholly neglected and refused, and still doth neglect and refuse, contrary to his said promise and undertaking, to wit, at, (*venue*) aforesaid. [*Add common counts for freight and demurrage, as ante, 61, 64; and a count for the use and hire of the ship, as ante, 60, work and labor, money counts, account stated, and breach.*]

IX. ON WAGERS.

On a wager on a horse-race for a hunter's sweepstakes (x).
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[*228]

For that whereas, before and at the time of the making of the agreement and the promise and undertaking of the *said defendant hereinafter next mentioned, a certain race for hunters' sweepstakes, amounting to a large sum of *money, to wit, the sum of —*l.* was about to be run over the Nottingham course, to wit, at — and it was then and there expected

(x) See other precedents, post.—*Herne*, 76, 176.—*Bro. Red.* 29.—*Plead. A.* 97, 143, 216.—*Morg. Prec.* 192.—1 *Wentw.* 100 to 119.—2 *Wentw.* 541, 3, 4. 10 *East*, 22.—3 *T. R.* 693.—16 *East*, 150.

Horse-racing, how far legal.—A wager on a horse-race is legal, if the sum bet do not exceed 10*l.* and provided the race, which is the subject of the bet, is run for the sum of 50*l.* or upwards, or 25*l.* deposited by each party, 2 *Campb.* 438.—3 *T. R.* 705.—2 *Str.* 1159.—2 *Wils.* 309.—2 *Bla. Rep.* 706. 4 *Burr.* 2433.—5 *T. R.* 1.—2 *B. & P.* 51.—9 *Ann. c.* 14.—13 *Geo. c.* 19. But horse-races against time on a highway, or for a stake of less value than 50*l.* are illegal. 4 *N. R.* 1.—2 *B. & P.* 51, 54.

When the game itself is illegal, then no action can be maintained for a wager respecting it, however small the bet. See *infra*.

How far a Judge may refuse to try a wager.—A Judge has, it seems, a right to exercise his discretion, whether he will try a cause between the parties relative to an *idle* or *frivolous* wager, as a dog-fight, or the like, though, if he suffer it to be tried, and the wager was not illegal, the verdict will not be disturbed. *Per Abbott, C. J.* in 6 *D. & R.* 27.—1 *Ry. & Moo.* 213.—1 *Car. & P.* 613. *S. C.* 2 *H. Bla.* 43.—And see *Chit. Col. Stat.* vol. i. 419, notes.—7 *D. & R.* 130. But it should seem, that if one of the parties to an illegal or frivolous wager, demands his deposit from the stakeholder before the event has been determined, or before the money has been paid over, he has a right to insist on the trial of the cause in order to recover back his money. *Id. ibid.*—7 *Price*, 540.—8 *B. & C.* 221.—6 *D. & R.* 28.—3 *Campb.* 140. 2 *Younge & Jerv.* 156. *Chit. jun. on Contracts*, 2d ed. 394, 395.

What wagers legal, or not.—A wager upon an indifferent matter, which has no tendency to produce any public mischief or individual inconvenience, is legal; but to make the wager legal, the subject-matter of it must be perfectly innocent, and have no tendency to

impolicy or immorality. 3 *Chit. Com. Law*, 82.—*Cowp.* 37.—3 *T. R.* 693.—1 *Salk.* 356, n.—5 *Burr.* 2802.—1 *Ld. Raym.* 69.—3 *Salk.* 14, 176.—16 *East*, 161.—A wager between voters on the event of an election (1 *T. R.* 56.—2 *D. & R.* 450.) (*Vide Bunn v. Riker*, 4 *Johns. Rep.* 426. *Lansing v. Lansing*, 8 *Johns. Rep.* 454. *Vischer v. Yates*, 11 *Johns. Rep.* 23. *Yates v. Foot*, 12 *Johns. Rep.* 1 (or in the event of a war (7 *T. R.* 535.—1 *T. B.* 57.—3 *B. & P.* 194), or concerning the produce of the revenue, as of the hop-duties (2 *T. R.* 610.—2 *B. & P.* 130,) or tending to inconvenience or degrade the courts of justice (2 *Hen. Bla.* 43.—12 *East*, 247.—3 *Campb.* 140.—1 *Car. & P.* 163.—1 *Ry. & Moo.* 213.—7 *Price*, 540. 8 *B. & Cres.* 221.—6 *D. & R.* 28.—*Supra*), or concerning an abstract question of law or legal practice, in which the parties have no interest (12 *East*, 247), is illegal and void. A cock-match, or a wager upon it, is illegal. 3 *Campb.* 140. So is a wager on the result of a sparring exhibition. 1 *Bing.* 1.—7 *J. B. Moore*, 212.

A wager, prejudicial to the interest or feelings of a third person, as on the sex of a person, is illegal. *Cowp.* 729.—2 *Lev.* 161.—1 *B. & A.* 683. A wager, whether an unmarried woman has had a child was held void. 4 *Campb.* 152. A wager tending to restrain marriage is void. 10 *East*, 22. A wager on the life of Bonaparte was held void. 16 *East*, 150. (See *Phillips v. Ives*, 1 *Rawle*, 36.) A person may lay a wager upon his own age. 3 *Campb.* 168. There is no illegality in betting a rump and dozen. *Id. ibid.*

By the 9 *Ann. c.* 14. s. 15. all written securities given to secure the payment of money won at any game are void. See 3 *Stark.* 1.—1 *Wils.* 220.—2 *Wils.* 36.—*Chitty on Bills*, 78, 7th edit. But an action of assumpsit will lie to recover money won at play at a legal game not amounting to 10*l.* 1 *Esp. Rep.* 235.

Supposing the subject-matter of the wager to be legal, the point must not be certain

that a certain horse called —, and also certain other horses, would run the said race over the said course, for the said stakes, to wit, at, &c. (*venue*) and thereupon, heretofore, to wit, on, &c. (*y*) at, &c. (*venue*) aforesaid, it was agreed by and between the said plaintiff and the said defendant, that if the said horse called —, in running the said race, should beat the said other horses which should run the said race over the said course, for the said stake, he the said defendant should pay to the said plaintiff the sum of —*l.* of lawful money of Great Britain; but that if the said horse called —, should be beaten by any or either of the said other horses which should run as aforesaid, he the said plaintiff should pay to the said defendant the sum *of —*l.* of like lawful money. And the said agreement being so made as aforesaid, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration thereof, and that the said plaintiff, at the special instance and request of the defendant, had then and there undertaken, and faithfully promised the said defendant to perform and fulfill the said agreement in all things, on the said plaintiff's part and behalf to be performed and fulfilled; he the said defendant undertook, and then and there faithfully promised the said plaintiff to perform and fulfill the said agreement in all things, on the said defendant's part and behalf to be performed and fulfilled. And the said plaintiff in fact saith, that after the making of

ON
WAGERS.

[*229]
Mutual
promises
(2).

Aver-
ments.

as to one part, and contingent as to the other. 5 Burr. 2802. But a person who lays a wager cannot set it aside on the ground, that at the time when it was laid the opposite party had received information that he was mistaken: and it is too late for him, on his discovering his mistake, to countermand the authority of the stakeholder to pay over the money betted. 4 Campb. 157—See 5 Burr 2639.

Action to recover deposit money.—It has been decided, that a stakeholder is bound to retain the money till one of the parties be clearly entitled to receive it; and if he unduly pay it over to either party not entitled to it, he will be liable to repay the stake.—5 Burr. 2639. But whilst the stake remains in the hands of the stakeholder, either party may sue him for the stake he deposited. 7 Price, 540.—8 B. & Cres. 221. And money deposited on an illegal wager may be recovered by either party from the stakeholder, before it has been paid over, whether the wager has been determined or not. 3 Taunt. 282.—4 Taunt. 474.—5 T. R. 405. *acc.*—3 Esp. 253, *semble contra.* But an action cannot be maintained by the loser of an illegal wager after the sum has been paid to the winner; for when both parties are *particeps criminis*, the rule is, that in *pari delicto potior est conditio possidentis*. 6 T. R. 575.—1 East, 96.—8 East, 381, in note, *acc.*—7 T. R. 535, *contra.*

An agent who is authorized only to contract illegal bets, cannot, if he loses, pay the winner without an express direction so to do. 4 Taunt. 165. Where a dinner is ordered at a tavern by the authority of two persons who have laid a wager of a rump and dozen, if the winner pays the bill, he may

maintain an action against the loser for money paid, to recover the amount. 3 Campb. 168.

Declaration.—It is necessary, in an action against the loser of a wager, to state the special circumstances, and the wager cannot be recovered from him under an *indebitatus* count. 6 Mod 129.—12 Mod 81—3 Lev. 118.—Carth. 338.—Ld. Ray. 69.—Salk. 23. 3 T. R. 700. But the stake may be recovered from the stakeholder upon a common count for money had and received. 6 Mod. 128.—12 Mod. 81.—In the declaration against the loser, mutual promises should in general be stated: and though it has been usual to allege that a discourse was had, &c. as in the case of feigned issues (3 T. R. 693), that form is unnecessary, and it is sufficient to state as inducement the expectation of the event upon which the parties betted, and then show the agreement, &c. of the parties, with other proper averments of the events on which the right of the action depends. If a man agrees to ride without a whip or stick, or other arms, an allegation that he rode without whip and stick, or other arms, is a sufficient averment of performance; at least, it is good after verdict. 2 Ld. Raym. 1366.

Plea.—See a plea of special denial that plaintiff won the wager, 1 Wentw. 101; but the general issue is the most usual plea.

(*y*) The day of the wager, or about it.

(*z*) Where an agreement has been stated, there seems to be no occasion for the statement of mutual promises, 2 New Rep. 62.—3 Bingh. 470, and see, in general, as to the statement of mutual promises, *supra*, ante, vol. i. 265.

ON
WAGER.

the said agreement, to wit, on the day and year aforesaid, at the Nottingham course aforesaid, to wit, at, &c. (*venue*) aforesaid, the said race for the said stakes was run between the said horse called —, and divers, to wit, — other horses; and that in running the said race, the said horse called — did beat the said other horses so running as aforesaid, whereof the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, had notice; yet the said defendant not regarding the said agreement, nor his said promise and undertaking so by him made as aforesaid, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet paid the said sum of —*l.* or any part thereof to the said plaintiff, although often requested so to do; but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit at, &c. (*venue*) aforesaid.—*[If the precise terms of the race, or the bet be doubtful, insert another special count, and add the counts for money had and received, and the account stated; the first on the supposition of the defendant's having received the deposit money, and the latter to meet any admission of the debt.]*

[*230]
On a
horse-race
agree-
ment for
a sum of
money
forfeited
by the de-
fendant's
making
default in
running
his horse
(a).

For that whereas, before and at the time of the making of the agreement, and the promise and undertaking of the *said defendant hereafter next mentioned, the said plaintiff was the owner and proprietor of a certain filly, and the said defendant was the owner, and possessed of a certain other filly, to wit, at, &c. (*venue*). And thereupon, heretofore, to wit, on, &c. (b) at, &c. (*venue*) it was agreed by and between the said plaintiff and the said defendant, that a race, to wit, a race of — miles should be run by and between the said fillies of them the said plaintiff and defendant at Chester, to wit, at the Chester races, to be holden in the year of our Lord — when the said fillies respectively would be two years old, for —*l.* each, and that one half of that sum should be forfeited by the party making default, in causing his filly to run the said race; each of the said fillies to carry eight stone. And the said agreement being so made as aforesaid, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration thereof, and that the said plaintiff, at the special instance and request, &c. [*Here state mutual promises, as ante, 228.*] And the said plaintiff in fact saith, that although the Chester races, in the year of our Lord — aforesaid, were had afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, and the said filly of the said plaintiff was then and there ready and prepared to run the said race, and for that purpose was then and there, on the day and year aforesaid, duly started with the said weight of eight stone, so agreed upon as aforesaid, and did then and there proceed on the said race: yet the said defendant not regarding the said agreement, nor his said promise and undertaking so by him made as aforesaid, then and there wholly neglected and omitted to cause the said filly of the said defendant to run the said race, and therein wholly failed and made default, and thereby the said defendant then and there forfeited and became liable to pay to the said plaintiff the sum of —*l.* so agreed to be forfeited, as half of the said sum of —*l.* as aforesaid.

(a) See preceding form and notes. The above form, after several objections taken to it was held sufficient, and the plaintiff recovered, A. D. 1815.

(b) The day of the wager, or about it.

Yet the said defendant, although often requested so to do, hath not yet paid the same, or any part thereof, to the said plaintiff, but hath hitherto altogether neglected and wholly refused, and still neglects and refuses so to do, to wit, at, &c. (*venue*) aforesaid.

OF
WAGERS.

And whereas also heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, it was agreed between the *said plaintiff and the said defendant, that a certain other filly of the said plaintiff, and a certain other filly of the said defendant, should, at the Chester races, in the year of our Lord — aforesaid, run a race against each other, to wit, a race of — miles, for the sum of —*l.* each, and that in case of default by either the said plaintiff or the said defendant in causing the said race to be run, the sum of —*l.* half of the said sum of —*l.* should be paid by the party making such default to the other of them. And the said last-mentioned agreement being so made as aforesaid, thereupon, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration thereof, and that the said plaintiff had then and there undertaken, &c.—[*Here state mutual promises, as ante, 228.*] And the said plaintiff in fact saith, that although the Chester races, in the year of our Lord — aforesaid, were had afterwards, to wit, on, &c. the day and year aforesaid, at, &c. (*venue*) aforesaid, and although he, the said plaintiff, was then and there ready and willing to perform and fulfill the said last-mentioned agreement on his part, and for that purpose did cause the said last-mentioned filly of the said plaintiff, to attend the said races on the day and year last aforesaid, in order to run the said last-mentioned race, and to proceed upon the same, and to go the distance so agreed upon as last aforesaid, to wit, — miles to wit, at, &c. (*venue*) aforesaid; yet the said defendant not regarding the said last-mentioned agreement, nor his said last-mentioned promise and undertaking, but contriving and intending craftily and subtly to deceive and defraud the said plaintiff in this respect, wholly neglected and omitted to perform and fulfill his part of the said last-mentioned agreement, and neglected to cause or procure his said filly to be present, and run the said race as aforesaid; whereby, and by means of the premises, he the said defendant became liable and ought to have paid to the said plaintiff the sum of —*l.* as a forfeit for such last-mentioned default, according to the tenor and effect of the said agreement so made as last aforesaid. But to pay the same, or any part thereof, he the said defendant hath from thence hitherto wholly refused and neglected, although he was afterwards, to wit, on the day and year aforesaid, and oftentimes afterwards requested by the said plaintiff to pay the same, to wit, at, &c. (*venue*) aforesaid.

Second
count, stating the
contract
more generally.
[*231]

And whereas also heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the *said plaintiff, at the like special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant, that the said plaintiff would, at the Chester races, then expected to be holden in the year of our Lord — aforesaid, cause and procure a certain filly of the said plaintiff, to run a race with and against a certain filly of the said defendant, for —*l.* each, or would forfeit to the said defendant the sum of —*l.* he the said

Third
count, on
a mutual
promise to
forfeit a
sum of
money by
the party
not running.
[*232]

ON
WAGERS.

defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant, would, at the said Chester races, in the year of our Lord — aforesaid, cause and procure a certain filly of the said defendant, to run a race with and against the said filly of the said plaintiff, for —*l.* each, or would forfeit to the said plaintiff the like sum of —*l.* And the said plaintiff in fact saith, that although he, the said plaintiff, confiding in the said last-mentioned promise and undertaking of the said defendant afterwards, to wit, on, &c. the said Chester races being then holden in that year, did produce and have ready the said last-mentioned filly of the said plaintiff, to run the said race with and against such filly of the said defendant as aforesaid, for the said sum of —*l.* each, and was then and there, to wit, at, &c. (*venue*) aforesaid, ready and willing to cause such filly to run the same race; whereof the said defendant, then and there, to wit, on the day and year aforesaid at, &c. (*venue*) aforesaid, had notice; yet the said defendant, not regarding his said last-mentioned promise and undertaking, did not, nor would produce, or cause or procure the said last-mentioned filly of the said defendant, to run the said race with or against the filly of the said plaintiff, at the said Chester races, but wholly neglected and omitted so to do: by means whereof he, the said defendant, then and there forfeited to the said plaintiff the said last-mentioned sum of —*l.* according to the tenor and effect of the said last-mentioned promise and undertaking, and became liable to pay, and ought to have paid the same to the said plaintiff; yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this respect, hath not, (although often requested so to do), as yet paid the said sum of —*l.* so forfeited as last aforesaid, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse, to wit, at, &c. (*venue*) aforesaid.—[*Add a count on an account stated, and breach.*]

For money won
by betting
at a horse-
race (c).

[*233]

For that whereas, before and at the time of the making of the promise and undertaking of the said defendant hereafter next mentioned, a certain race was intended, and then shortly about to be run, at a certain place called —, in the county of —, by and between a certain horse called —, and a certain horse called —, for a certain piece of plate of great value, to wit, of the value of 100*l.* (*d*), to wit, at, &c. (*venue*) and thereupon, heretofore, to wit, on, &c. at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant *to pay him the sum of —*l.* of lawful money of Great Britain, in case the said horse called —, in the event of the said race, should win the said piece of plate, so intended and about to be run for as aforesaid, he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him the sum of —*l.* in case the said horse called — should not, in the event of the said race, win the said piece of plate so intended and about to be run for as aforesaid; and the said plaintiff in fact says, that the said race, so about to be run as aforesaid, was after-

(c) See form, 2 Wentw. 545. See note to form, ante, 226.

(d) See form and note, ante, 226. The race must have been for a prize of 50*l.* or upwards, 4 T. R. 1; but 25*l.* on each side will suffice, 4 Burr. 2433. Ante, 226, note.

wards, to wit, on the day and year aforesaid, accordingly run at the said place called, &c. by and between the said horse called —, and the said horse called —, for the said piece of plate so intended and about to be run for as aforesaid, to wit, at, &c. (*venue*) aforesaid; and that, in the event of the said race, the said horse called — did not win the said piece of plate, for that the same was then and there won by the said horse called —, whereof the said defendant, on the day and year aforesaid, at, &c. (*venue*) had notice; and by means thereof, and according to the tenor and effect of the said promise and undertaking, he the said defendant then and there became liable to pay to the said plaintiff the said sum of —l. when he the said defendant should be thereunto afterwards requested.—[*Add counts for money had and received, account stated and breach.*]

ON
WAGERS.

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) a certain discourse was had by and between the said plaintiff and the said defendant, of and concerning the weight of — hogs of the said plaintiff, and upon that discourse, the said defendant then and there affirmed that the said hogs did not weigh seven stone a-piece, one with the other, which the said plaintiff then and there denied, and affirmed that the said hogs did weigh seven stone a-piece, one with the other; and thereupon, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant then and there undertook, and faithfully promised the said defendant to pay him —l. of lawful money of Great Britain, if the said — hogs did not weigh seven stone a-piece, one with the other, upon weighing the same the then next day; he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him —l. of like lawful money, if the said — hogs did *weigh seven stone a-piece, one with the other, upon weighing the same the next day; and the said plaintiff in fact saith, that the said — hogs, upon the next day, to wit, upon, &c. at, &c. (*venue*) aforesaid, were weighed, and that the said — hogs then and there, upon weighing the same as aforesaid, weighed seven stone a-piece, one with the other, whereof the said defendant afterwards, to wit, upon the same day and year last aforesaid, had notice, to wit, at, &c. (*venue*) aforesaid.—[*Add counts for money had and received, and on an account stated and breach.*]

On a wager concerning the weight of hogs (c).

[*234]

For that whereas heretofore, to wit, on &c. (g) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there agreed with, and undertaken, and faithfully promised the said defendant to play at a certain game, that is say, at a certain game called cribbage, with the said defendant, and to pay him all such sum and sums of money as he, the said plaintiff, should lose to the said defendant, by means of his said playing with the said defendant, he, the said defendant, then and there agreed with, and undertook, and faithfully promised the said plaintiff to play at the said game, with

For recovery of money lost at the game of cribbage (f).

(e) See Plead. A. 97. See note, ante, 226. recoverable in an action of assumpsit, see 1 Esp. R. 235, and stat. 9 Ann. c. 14. 2 Bla.

(f) See precedents for money lost at whist, 2 Wentw. 543, 544.—2 Sid. 425.—Money won fairly at play, if under 10l. is Rep. 1226, ante, 226, note.

(g) The day of the gaming, or about it.

ON
WAGERS.

the said plaintiff, and to pay the said plaintiff all such sum and sums of money, as he, the said defendant, should lose to the said plaintiff, by means of his so playing with the said plaintiff, when he the said defendant should be thereunto afterwards requested; and the said plaintiff avers, that he, confiding in the said promise and undertaking, and agreement of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, play at the said game with the said defendant, who did also then and there play at the said game with the said plaintiff; and also the said defendant by means of his so playing with the said plaintiff as aforesaid, did then and there lose to the said plaintiff, who did then and there win of the said defendant divers sums of money, amounting to a large sum of money, to wit, the sum of 10*l.*; yet the said defendant, although he was then and there, and oftentimes afterwards requested by the said plaintiff to pay him the said sum of money, so by him lost to the said plaintiff in manner aforesaid, did not nor would, when he was so requested as aforesaid, pay, nor hath he, at any time before or since, hitherto paid or caused to be paid the said sum of money so by him lost to the said plaintiff as aforesaid, or any part thereof, to *the said plaintiff, but hath hitherto wholly refused, and still refuses so to do, to wit, at, &c. aforesaid.—[*Add the money counts, account stated, and breach.*]

[*235]

ON FEIGN-
ED ISSUES.

X. ON FEIGNED ISSUES.

*Michaelmas Term, 1 William 4.*Feigned
issue, with
two
Ellenborough.

— (to wit.) Be it remmembered (*h*), that on — next after — in this same Term, before our lord the *king at Westminster, comes A. B. by — his attorney, and brings into the court of our said lord the king, before the king himself, now here, his certain bill against C. D. being in the cutsody of the marshal of the Marshalsea of our said lord the king, before the king himself, of a plea of trespass on the case upon pro-

(*h*) When the issue is in the Common Pleas, there is no memorandum, but the issue begins with the declaration. 2 Rich. C. P. 120.—1 Wentw. 136.

first count
to try peti-
tioning
creditor's
debt, and
second
count to
try act of
bankruptcy
(*i*).
[*236]

(*i*) See forms of different feigned issues, post, 237, &c. 1 Wentw. 120, to 140, and Index, vol. ii.—Plead. A. 100, 150.—Lil. Ent. 45, 65, 66.—2 Rich. C. P. 120.—1 Mod. Ent. 139, and Feigned Issues in general, Vin. Ab. Feigned Action: Com. Dig. tit. Chancery. Formerly, the feigned issue was more prolix than at present, see 2 Saund. 261. 2 Chit. Gen. Pract. 352.

Nature of feigned issue.—A feigned issue is in the nature of a wager (see the notes to form, ante, 226,) between two or more parties, invented to ascertain a matter in dispute between them, and is either authorized by act of parliament, or directed by the Court of Chancery, to try the existence of a *modus* as above, or of a petitioning credi-

tor's debt, or an act of bankruptcy, or the validity of a will, right of common, or any other fact; for the Court of Chancery ought to be very cautious of deciding upon facts, without first directing an issue, 9 Ves. 168.

Venue.—When the venue is local, and a fair trial cannot be had in the proper county, the question may, by feigned issue, be tried in any other county, Skin. 44.

Who to be the plaintiff in, 2 Rose, 97.

Declaration.—The declaration usually commences with an allegation that a certain discourse was had, &c. but in some cases, as when a petitioning creditor's debt is to be tried, it is usual to begin with an inducement, as follows, 1 Wentw. 188:—"For that whereas before and at the time of the making the promise and undertaking of the said defendant hereinafter next mentioned, a certain commission of bankruptcy had been and was issued against the said defend-

mises; and there are pledges for the prosecution, to wit, John Doe and Richard Roe, which said bill follows in these words, that is to say, — ON FEIGNED
ISSUES.

(venue) to wit, A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the king, before the king himself. —

*For that whereas, before and at the time of the making of the promise and undertaking of the said defendants hereinafter next mentioned, a certain joint commission of bankrupt had been and was issued against the said defendants, to wit, at, &c. (venue) and thereupon afterwards, and before the making of the said promise and undertaking, to wit, on, &c. at, &c. (venue) aforesaid, a certain discourse was had and moved by and between the said plaintiffs and the said defendants, wherein a certain question then and there arose; that is to say, [*whether the said defendants were, at the issuing of the said joint commission, jointly indebted to the said plaintiffs, as surviving partners of E. F. late of, &c. iron master, deceased, in the sum of —l. or upwards;*] and in that discourse the said plaintiffs then and there asserted and affirmed that the said defendants were, &c. [*same as the words in italics to the end*] which said assertion and affirmation the said defendants then and there contradicted and denied, and then and there asserted and affirmed the contrary thereof; and thereupon, afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendants, had then and there paid to the said defendants the sum of 5l. of lawful money of Great Britain, they the said defendants undertook, and then and there faithfully promised the said plaintiffs to pay them the sum of 10l. of like lawful money, if they the said defendants were at the issuing, &c. [*same as the words in italics*]. [*237]

And the said plaintiffs in fact say, that the said defendants were at the issuing of the said, &c. [*same as the words in italics*] to wit, at, &c. (venue) aforesaid, whereof the said defendants, on the day and year aforesaid, at, &c. (venue) aforesaid, had notice, whereby they the said defendants, then and there became liable to pay and ought to have paid to the said plaintiffs the sum of 10l.: And whereas also after the issuing of the said commission against the said defendants as aforesaid, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, a certain other discourse

Second
count to
try act of
bankruptcy.

ent, and thereupon afterwards and before the making of the said promise and undertaking, to wit, on, &c. at, &c. a certain discourse, &c." stating the wager to have been "whether at the time of the issuing of such commission the said defendant was indebted to the said plaintiff in the sum of 100l., &c." See 3 Younge & Jerv. 305. "(On a motion to vacate a judgment entered on a bond and a warrant of attorney, on an allegation of usury: if the fact be put in doubt, a court of common law may, in its discretion, award a feigned issue to try the fact. Cook v. Jones, Cowp. 727. 1 Taunt. 413. —Wardel v. Eden, 2 Johns. Cas. 258. —Hewit v. Fitch, 3 Johns. Rep. 250. 2 Johns. Cas. 280. 3 Johns. Rep. 139. So a feigned issue has been awarded to try whether a bond and warrant of attorney, on which judgment had been entered, were forged. King v. Shaw, 3 Johns. Rep. 142. So, an issue will be directed to try whether

the plaintiff in ejectment, had taken possession of more land than he had recovered or not. Jackson and Ostrander v. Hasbrouck, 5 Johns. Rep. 366.—5 Burr. 2673. Vide Saunders v. Wright, 1 Taunt. 369.)

Leave of Court to try.—The attempt to try a feigned issue without leave of the court, or the direction of an act of parliament is a contempt of court, 4 T. R. 402; and trying a feigned issue without such consent is a contempt, and after such trial the proceedings will be stayed. 4 T. R. 402.—9 East, 381.—15 East, 309.

Other Points.—As to consolidation of issues, see 5 Taunt. 167.

As to costs, Tidd, 9th edit. 966, 7.—2 Marsh. 355.

When the whole issue need not be proved, see 3 Gwill. on Tithes, 1229.

It is said to be proper to move the Court of Chancery for a special jury, Pre. Ch. 264.—2 P. W. 68.—4 M. & S. 195, 6.

OF FEIGN-
ED ISSUES.

was had and moved by and between the said plaintiffs and the said defendants, wherein a certain other question then and there arose, that is to say, [*whether each of them the said defendants had, at any time, and when, at and before the date and suing forth of the said commission of bankrupt issued against the said defendants by the said plaintiffs as aforesaid, committed any and what act of bankruptcy;*] and in that discourse the said plaintiffs then and there asserted and affirmed, that each of them the said defendants, &c. [*same as the last words in italics*] which said last mentioned assertion and affirmation the said defendants then and there denied, and asserted and affirmed to the contrary thereof; and thereupon afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said defendants, had then and there paid, &c. [*As in the first count from the asterisk, stating the plaintiff's payment of 5l., and defendant's undertaking, and averring the affirmative of the last question; notice to defendants, and their liability, as in first count, and then conclude as directed in note, ante, 236.*]

[*239]

Plea to the
first
count.

**The pleader framing the declaration, also frames the plea and the award of venire, as follows.*—And the said C. D. by E. F. his attorney, comes and defends the wrong and injury, when, &c. and says, that the said A. B. ought not to have and maintain his aforesaid action thereof against him, because, he says, that though true it is that the said discourse was had and moved by and between the said A. B. and the said C. D. wherein the said question did arise as aforesaid, and that he, the said C. D. did undertake and promise, in manner and form as the said A. B. hath above in that behalf alleged. Nevertheless, for plea in this behalf, the said C. D. saith, that for every, &c. [*negating the first assertion in italics,*] in manner and form as the said A. B. hath above in that behalf alleged, and of this the said C. D. puts himself upon the country, and the said A. B. doth the like; therefore, &c. (*award of venire, as in common cases.*)

Plea to
second
count.

And as to the said second count, the said C. D. says, though true it is, &c.—[*Same as first plea, negating the question in a second count, and conclude as above.*]

[*240]

The like
to try
trading of
a supposed
bank-
rupt (k).

*[*Commencement as ante, 235.*]—For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) a certain discourse was had and moved by and between the said plaintiff and the said defendant, of and concerning a commission of bankruptcy which had heretofore, to wit, on, &c. (*date of commission*)—been issued under the great seal of Great Britain, and bearing date the same day and year last aforesaid, against the said defendant, on the petition of the said plaintiff, and in that discourse a certain question then and there arose, that is to say, [*whether the said defendant was a trader within the meaning of the statutes in force concerning bankrupts, or any of them, at or before the said date and suing forth of the said commission against him or not:*] and in that discourse the said plaintiff affirmed, &c. —[*Proceed as directed in the last precedent, to end of plea, and award venire mutatis mutandis.*]

(k) See a form, Plead. A. 100. See the form directed ante, 235, as to try a petitioning creditor's debt.

[*Commencement as ante*, 235.]—For that whereas heretofore, to wit, on &c. at, &c. (*venue*) a certain discourse was had and moved of and concerning divers freehold estates, to wit, &c. and of and concerning a certain leasehold estate, situate at, &c. late the estates of one E. F. deceased, and of which said freehold estates the said E. F. deceased, *on, &c. (*the date of the will*) was seized in his demesne as of fee, and afterwards died seized thereof; and of which said leasehold estates the said E. F. deceased, on the day and year last-mentioned, was possessed, and afterwards died so possessed thereof; and also of and concerning a certain paper-writing, bearing date, &c. (*the date of the will*) purporting to be a last will and testament, and which the said defendant then and there asserted and affirmed was the last will and testament of the said E. F. deceased, and in that discourse a certain question then and there arose, that is to say, [*whether the said E. F. deceased, did by his said will devise the said freehold and leasehold estates or not*:] and upon that discourse the said plaintiff then and there asserted and affirmed, &c. [*as ante*, 236, to the end.]

ON FEIGNED
ISSUES.Feigned
issue out
of Chan-
cery devi-
savit vel
non of
freehold
and lease-
hold es-
tates (l).

[*241]

[*Commencement as ante*, 235.]—For that whereas, heretofore, to wit, on, &c. at, &c. a certain discourse was had and moved by and between the said plaintiff and the said defendant, of and concerning him the said plaintiff, and in that discourse a certain question then and there arose, that is to say, [*whether he the said plaintiff was heir at law of one E. F.*]; and thereupon the said plaintiff then and there asserted, &c. [*as ante*, 236 to the end.]

The like
to try
whether
plaintiff
was heir
at law or
not.

XI. ON AWARDS.

ON
AWARDS.

For that whereas, before the making of the promise and undertaking of the said defendant hereinafter next mentioned, *certain differences had arisen and were then depending between the said plaintiff and the said de-

On a parol
submis-
sion to an
award (m).
[*242]

(l) See a form, 1 Wentw. 135.

(m) See precedents, 1 Wentw. 90 to 100 and vol. ii. Index.—2 Rich. Prac. C. P.—Mod. Ent. 165—1 Saund. 28.—8 T. R. 571. For the law relating to awards, see Tidd's Prac. 9th edit. 819 to 845—Watson on Awards.—Caldw. on Awards.—Kyd. on Awards—3 Chit. Com. Law, 637. As to other remedies, see Tidd, 9th edit. 833.—Com. Dig. Arbitrament, I. 1.—3 Chit. Com. Law, 660 to 665.

There are early instances of the action of *assumpsit* on a parol submission. 1 Saund. 28. 8 T. R. 571. It lies on an award in pursuance of an order of nisi prius, 5 East, 130; or of a judge, or by a rule of court, 4 Campb. 17.—11 Mod. 170; and this, though a collateral act be awarded to be done. 2 Ld. Raym. 1040.

Assumpsit will lie for revoking a parol submission.—2 Keb 10, 20, 24.—1 Sid. 281.

When the submission is by deed, the remedy is by debt or covenant, unless the award be made after the limited time.—3

T. R. 592. (Vide *Adams v. Freeman*, 9 Johns. Rep. 115.)

Debt on a parol submission is frequently most advisable when the award is merely for the payment of money, and the whole sum is due. Watson on Awards, 200, 1. See a precedent in debt, 2 Saund. 61, 127, 128. Also forms, post, 395, 8. But if there be any other demand, more properly the subject of an action of *assumpsit*, which may be joined with the demand on the award; or if the award were not merely for the payment of money, or for the payment of money by instalments, not all due, or for any collateral act, then the plaintiff should declare in *assumpsit*. 2 Saund. 62, b. 1. n. 5.—5 Hen. Bla. 547.—Ld. Raym. 1040. An action of debt on an award will not lie against executors or administrators on an arbitrament made in the life-time of their testator or intestate, when the submission was not under seal, because the testator or intestate might have waged his law in such action. Cro. Eliz. 567, 600.

ON AWARDS. defendant, touching and concerning (n) *certain books before then sold by the said defendant as the agent of and for the said plaintiff, to wit, at, &c. (venue).* And thereupon for the putting an end to the said differences the said plaintiff and the said defendant, heretofore, to wit, on, &c. (date of submission or about it) at, &c. (venue) respectively (o) submitted themselves to the award of one E. F. to be made between them, of and concerning the said differences; and in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant had then and there undertaken and faithfully promised (p) the said defendant to perform and fulfill the award of the said E. F. to be so made between the said plaintiff and defendant of and concerning the said differences in all things therein contained, on the said plaintiff's part and behalf, to be performed and fulfilled, he the said defendant undertook, and *then and there faithfully promised the said plaintiff to perform and fulfill the said award in all things therein contained, on the said defendant's part and behalf to be performed and fulfilled. And the said plaintiff in fact saith, that the said E. F. having taken upon himself the burthen of the said arbitrament, afterwards, to wit, on, &c. (date of award or about it) at, &c. (venue) aforesaid, made his certain award (q) between the said plaintiff and the said defendant, of and concerning the said differences (r), and did thereby award (s) that the said defendant should, on, &c. pay to the said plaintiff the sum of 100*l.* in full satisfaction and discharge of the said matter in difference. Of which said award the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, had notice (t). And although he the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) was requested (u) by the

Mutual promises.

The award.

Breach.

[*243]

The assent of a party to submit a matter to arbitration is a sufficient consideration, even though he had no cause of action. 1 Leon. 103.—4 Leon. 31.—(Vide *Shephard v. Watrous*, 3 Caines' Rep. 166 (1).)

As to how far the irregularity of the proceedings on the reference may be set up as a defense, see *Watson on Awards*, 222, denying the correctness of the law laid down in 2 Phil. Evid. 107. See also 1 R. & M. N. P. C. 17.

(n) Or, "*divers sums of money due and owing from the said defendant to the said plaintiff.*" But it seems the declaration may either state or omit the subject-matter of the dispute, though it is more usual to state it. 2 Saund. 61 h. n. 1.

(o) Declarations on awards must state a mutual submission. If the action were brought on an arbitration bond, it is otherwise, for the defendant, by praying oyer, shows that there was a mutual submission. 2 Saund. 61 h. n. 2.—2 Stra. 923.

(p) The mutual submission implies mutual promises to observe the award. 11 Mod. 170.

(q) The award in pleading must be stated to have been made agreeably to the submission—as if the submission were, "*so that*

the award be made in writing," &c. it must be stated to have been so made. 2 Saund. 62, n. 3.—2 Marsh. 304.

(r) What is a sufficient allegation that it was so made, see 2 Vent. 242.—Kyd on Awards, 291.

(s) Here set forth the award in its legal effect or literal words. The plaintiff need not, in a declaration, state more of the award than is relative to his case. Where there is a condition precedent, which qualifies the terms of the award and the performance of it, it must be averred. 2 Saund. 62 b. n. 5.—1 Burr. 278.—1 Salk. 72. (Vide *McKinstry v. Solomons*, 2 Johns. Rep. 57.)

(t) This averment is in general unnecessary; for one party is as much bound to take notice of the award as the other, unless the stipulation be, that the award shall be notified to the parties, in which case notice must be averred. 2 Saund. 62 a, n. 4. (See vide 9 Mass. Rep. 198, 200.)

(u) Sometimes a request to perform the award is necessary; and in a late case, where an award directed that one of the parties to the submission should pay the expenses of the reference, and that the other should repay them on demand, and the party directed having paid them made an affidavit on debt

(1) *Mitchell v. Bush*, 7 Cow. 137, and the cases there cited.

ON
AWARDS.

said plaintiff to pay him the said sum of 100*l.*, according to the tenor and effect of the said award, and his said promise and undertaking; yet the said defendant not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this behalf, did not, nor would on the day and year last aforesaid, or when he was so requested as aforesaid, or at any time afterwards (*w*), pay the said sum of (100*l.*), or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at &c. (*venue*) aforesaid.—[*Add indebitatus count, as ante*, 89, and counts on the plaintiff's original demand referred to arbitration—the account stated—and breach (*x*).]

XII. ON JUDGMENTS.

ON JUDGE-
MENTS.

For that whereas the said plaintiff, heretofore, to wit, at a supreme court of judicature of our sovereign lord the king, *holden at [the town of

On a Ja-
maica
judgment
(y).
[*244]

against the other party, alleging such payment, but not stating any demand of repayment, it was held this was not sufficient. 7 B. & Cres. 494. 1 M. & R. 324. S. C.

(*w*) Let this breach deny the performance of the award in the words thereof.

(*z*) It has been decided, that the award, when there is a parol submission, may in most cases be given in evidence under the common count founded on the original debt, or on the account stated. And it is no bar to such action, that it only settles the amount of claim, *Allen v. Milner*, 2 Crompt. & Jerv. 47. 3 Tyr. 113; 1 Price, P. C. 142; *Peake C. N. P.* 227.—1 Esp. Rep. 194. 377.—5 T. R. 6.—Tidd's Prac. 9th edit. 834.

(*y*) See other precedents, Doug. 4, note 2. An action will lie in one court on a judgment obtained in another; for a judgment pronounced by a court of competent jurisdiction, creates a debt all over the kingdom, *Gilb. Debt*, 392, 393. According to *Martin v. Nicholls*, 3 Simons, 458, and *Becquet v. McCarthy*, 2 B. & Adolp. 954, a foreign judgment is conclusive, unless on the face of it, the proceeding has been against law and reason. But see *Frankland, v. McGusle*, Knapp's Rep. in privy Council, 274 to 310.

Form of remedy, &c.—Assumpsit or debt will lie here on a judgment of a court not of record, or on a foreign judgment. Doug. 1.—4 T. R. 493. 3 Taunt. 85, n. or on an Irish judgment, whether before or since the Union, 6 B. & Cres. 411.—5 East, 473; or on a Scotch decree, obtained in absence against a native of Scotland, for a debt contracted in Scotland, 1 Moo. & Pay. 663. 4 Bingh. 686. S. C. ante, vol. i. 89, 95. An action is not maintainable on a decree of a court of equity. 3 B. & A. 52 (1); and see ante, vol. i. 100. Debt is the usual and preferable form of action, unless there be another

demand recoverable, only in assumpsit, Doug. 5 Post.

In action on a judgment, pronounced by an English court of record, the decision cannot be impeached. Doug. 5. And it should seem that the judgment of an inferior court in England, whether of record or not, is conclusive and incontrovertible between the same parties, upon the same subject-matter, provided, upon the face of the proceedings, it appears to have been fairly and justly obtained. 2 Burr. 1009. 2 Bingh. 216.—1 Stark. Evid. 208; but see Doug. 5. But the judgment of an inferior court may be controverted, where it appears the proceedings have been bad in law, as where a summons and attachment was issued against defendant at the same time, returnable at the same time, and to which the defendant never appeared. 3 B. & Cres. 772. 5 D. & R. 719, S. C.; and it seems that the judgment of an inferior court, though it cannot be controverted, may yet be avoided by proof that the cause of action did not arise within the jurisdiction of the court. Willes, 36, n.—Bingh. 213. *sed query*.

As to the conclusive qualities of a foreign judgment, it seems, that if it be given in a court of competent jurisdiction on a question cognizable by the law of the country, and appear on the face of it to be consonant to the justice of the case, and be also conclusive by the law of the foreign country, it will be conclusive here also, upon the same question between the same parties. 1 Ves. 159.—2 Stra. 733.—2 Bing. 380.—4 B. & Cres. 637.—4 M. & S. 20; and unless the contrary be shown, the court will presume that the decision in a foreign court is consonant to the justice of the case. 3 Bing. 353. If it appears on the face of the proceedings that the judgment is founded in injustice,

(1) An action at law is maintainable in Pennsylvania upon a decree of a Court of Equity of a sister state for the payment of money. *Evans, adm. v. Evans*, 9 Serg. & Rawle, 262.

ON JUDGE-
MENT.

St. Jago and La Veza,] in and for the island of Jamaica, and within the jurisdiction of the said court, to wit, at, &c. (*venue*) in this action, heretofore, to wit, on, &c. (*day of judgment, or about it*) before the honorable —, chief judge of the said court, and his associates, then sitting judges of the same court, by the consideration and judgment of the same court, recovered against the said defendant, (by the name and addition of, &c.) [*245] [as in **the judgment, and then set out the judgment, which may be as follows* :]— As well a certain sum of money, to wit, (1024*l.* 14*s.* 7 1-2*d.*) current money of the said island of Jamaica, with interest on 829*l.* 9*s.* 5*d.* current money of the said island, from the 10th day of April then next ensuing, for their damages which they had sustained by and on occasion of the non-performance of certain promises and undertakings before that time made by the said defendant to the said plaintiff as also the sum of 14*l.* 14*s.* current money of the said island, for his costs and charges by him about his suit in that behalf expended, to the said plaintiff, by the said court there, of their own assent adjudged, whereof the said defendant was convicted, which said judgment still remains in that behalf in full force and effect not in any wise satisfied, reversed, or annulled, to wit, at, &c. (*venue*) aforesaid; and the said plaintiff in fact says, that no execution hath as yet been obtained of or upon the said judgment, and that the damages, cost and charges aforesaid, in form aforesaid recovered, are of great value, to wit, of the value of —*l.* of lawful money of Great Britain, to wit, at (*venue*) aforesaid; by means of which said several premises the said defendant then and there became liable to pay to the said plaintiff the said last-mentioned sum of money, when he the said defendant should be thereunto afterwards requested; and being so liable, and the said last-mentioned sum of money being and remaining wholly due and unpaid, he the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money, when he the said defendant should be thereunto afterwards requested.—[*Add counts for the original debt for which the judgment was recovered, account stated, and usual breach.*]

On a
Scotch de-
cree at
suit of as-
signees of
a bank-
rupt (z).

For that whereas heretofore, to wit, on, &c. (*date of decree, or about it*)

as where defendant was not summoned and did not appear, such judgment would not be conclusive. 9 East, 192.—1 Campb. 63. —1 Stark. 125.

Declaration—It is necessary to set forth with certainty the parties to the judgment, and the Term in which it was recovered. Com. Dig. Pleader, 2 W. 12 And if the judgment was given in the Common Pleas, or an inferior court, it is advisable to state the names of the judges and suitors, *id.* *ibid.* Carth 86.—2 East, 362. The omission of this will be aided by verdict, *id.* *ibid.* The plaintiff need not show the ground of the judgment, and any matter which affects its validity must be insisted upon by the defendant, Doug. 1. It is unnecessary to allege that the judgment remained unsatisfied, 1 Saund. 330, note 4. It is expedient to add counts for the debt upon which the judgment was founded, that the plaintiff may be

enabled to recover upon these, if the judgment should be impeached with success.

Plea—Though the plaintiff should erroneously or unnecessarily conclude the statement of a judgment which is not matter of record or a foreign judgment with a *prout patet per recordum*, the defendant cannot plead *nul tiel record*, and the erroneous conclusion must be rejected as surplusage. Doug. 1. And although since the Union, the plea of *nul tiel record*, concluding to the country, has been adopted to an action of assumpsit, on an Irish judgment, 5 East, 473, 9 Price, 1, yet since the decision in 4 B. & Cres. 411, the correctness of such a plea seems more than questionable, for an Irish judgment is no record here (1).

(z) That assumpsit lies, see 1 M. & P. 663.—4 Bingh. 686. S. C. and see the notes, ante, 243 a.

(1) As to the plea of the statute of limitations in actions upon foreign judgments, see *Richards v. Bickley*, 13 Serg. & Rawle, 495, and the *New York* cases there cited.

a certain decree was made and pronounced in and by the court of our lord the then king before the Lords of Council and Session at *Edinburgh*, in that part of the United Kingdom of *Great Britain and Ireland*, called *Scotland*, to wit, at, &c. (*venue in this action*) in and concerning a certain action then depending in the same Court, at the instance of J. S. and R. S. before they became bankrupts, against the said defendant, whereby the Lords of Council and Session aforesaid, did then and there decree and ordain the said defendant, to make payment to the said J. S. and R. S. before they became bankrupts as aforesaid, of a certain sum of money, to wit, the sum of (447*l.* 6*s.* 3*d.*) sterling money of *Great Britain*, and annual rent, that is to say, legal interest thereof, from a certain day, to wit, the (18*th* day of November, 1801,) and until payment, together with the sum of (50*l.*) of like sterling money, as the expense of process, besides the sum of (1*l.* 0*s.* 01-2*d.*) sterling money of *Great Britain*, being the full dues of extracting that decree, as by the said decree remaining in the Court of Session at *Edinburgh* aforesaid, more fully appears, which said decree remains in full force and wholly unsatisfied, whereby the said defendant became liable to pay to the said J. S. and R. S. before they became bankrupt as aforesaid, the said sums of money, so decreed to be paid as aforesaid, together with such interest as aforesaid, on the said sum of (447*l.* 6*s.* 3*d.*) according to the said decree, when he the said defendant should be thereunto afterwards requested. And being so liable, the said defendant, in consideration thereof, to wit, on, &c. (*any day before the bankruptcy*) to wit, at (*venue*) aforesaid, undertook, and then and there faithfully promised the said J. S. and R. S. before they became bankrupts as aforesaid, to pay them the said sums of money, so decreed to be paid as aforesaid, together with such interest as aforesaid, when he the said defendant should be thereunto afterwards requested.—[*Add counts for the original debt, for which the decree was given, account stated, and breach.*]

ON JUDG-
MENTS.

XIII. FOR LEGACIES.

FOR
LEGACIES.

For that whereas one E. F. heretofore, to wit, on, &c. (*date of will, or about it*) at, &c. (*venue*) by his last will and testament, in writing, did (amongst other things) give and bequeath unto plaintiff the sum of —*l.*

Against
an execu-
tor on a
promise to
pay a lega-
cy in con-
sideration
of forbear-
ance (a).

(a) No action at law lies against an executor to enforce the payment of a pecuniary legacy, he acting as such, and retaining the sum in his hands as a trustee for the party entitled to receive it, 5 T. R. 690.—Peake, 73.—1 Sid. 45, 6.—1 Lord Raym. 23, 4 (1). The remedy of the legatee in such a case is in a court of equity. But the legatee of a *specific chattel* may recover it after the executor has assented to the bequest, 3 East, 120. And if the executor expressly promise (by writing, according to the Statute of Frauds,) to pay in respect of any new consideration, such as forbearance,

or the like, the executor may, in that case, be sued, 5 T. R. 693.—2 Lev. 3.—1 Saund. 210, n. 1.—7 T. R. 350, note.—2 Saund. 136.—Toller, 465. See 1 Chit. Gen. Pract. 552. And when the pecuniary legacy can no longer be considered as retained by the executors, in their character of executors, it may be recovered from them by action at law, as where the plaintiff, and three others, being residuary legatees under the will of one T. P. the defendants, as the executors named in the will, accounted with them, and having paid to the latter the respective sums due to them thereon, took from them and the

(1) *Aliter* in *New York* and *Pennsylvania*, where the action is given by statute. Dewit v. Schoonmaker, 2 Johns. 263. Wilson v. Wilson, 3 Binn. 559.

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LEGACIES.

[*247]

if he the said plaintiff *should be living at the time of the said E. F.'s death, and of his said last will and testament [*let this averment agree with the bequest*] and made the said defendant one of the executors thereof, and the said E. F. afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) died without altering or revoking his said will, as to the said bequest; and the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, took upon himself the burden of the execution of the said will: and the said plaintiff further says, that divers goods and chattels of the said E. F. of great value, to wit, of —*l.* afterwards, to wit, on the day and year aforesaid, at &c. (*venue*) came to the hands and possession of the said defendant to be administered, which said goods and chattels were more than sufficient to pay the just debts and legacies, and funeral expenses of the said E. F. and the charges of proving the said will, to wit, at, &c. (*venue*) aforesaid, of all which said several premises the said defendant then and there had notice; by reason of which said premises the said defendant then and there became liable to pay to the said plaintiff the said sum of —*l.* so bequeathed by the said E. F. as aforesaid; and being so liable, he the said defendant, in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant would [*here state the consideration and promise, according to the fact, and which may be thus,*] forbear to proceed against the said defendant *for recovery of the said sum of —*l.* so bequeathed as aforesaid, for six months then next following, he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of —*l.* so bequeathed by the said E. F. as aforesaid; and the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, so made as aforesaid, did [*here state the plaintiff's performance of the consideration, which may be thus,*] forbear and give time to the said defendant for the payment of the said sum of —*l.*, for upwards of six months after the making of the said promise and undertaking of the said defendant, to wit, at, &c. (*venue*) aforesaid whereof the said defendant afterwards, to wit, on, &c. there had notice; and thereby, and according to the tenor and effect of the said promise and undertaking, he the said defendant became liable to pay to the said plaintiff the said sum of —*l.* when he the said defendant should be thereunto afterwards requested.—[*Add money counts, account stated, and breach.*]

FOR CON-
TRIBU-
TIONS TO
PARTY
WALLS.

On 14
Geo. 3. c.
78. s. 41
(b), for

XIV. FOR CONTRIBUTIONS TO PARTY-WALLS.

For that whereas, after the making of a certain act of parliament made and passed in the 14th year of the reign of our sovereign lord the late

plaintiff a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands, it was held he might recover it from them by action. 1 Moore & Pay. 209. The plaintiff, in that case, declared specially, but it should seem the common counts, for money lent, had and received, and account stated, would have sufficed. It is not necessary to aver

in the declaration, that the defendant had assets at the time of the promise, 9 Co. 94. —2 Saund. 137 c.—1 Saund. 210 n. See 2 Chit. Gen. Pract. 466, 467, 498, 499, as to the excellent and summary remedy for a pecuniary legacy in the court of Arches.

(b) See the notes, ante, 54: Chit. Col. Stat. vol. i. 127, see other forms, 1 Wentw. 184.—3 Id. 682, and post. It should seem

King George the Third, to wit, on, &c. a certain old party-wall had been pulled down, and a certain other party-wall built in lieu thereof, by and at the expense of the said plaintiff, agreeably to the directions of the said Statute, between a certain house and building of the said plaintiff, situate and being in the parish of, &c. and a certain other building adjoining thereto, being of the same rate or class of building as the said house and building of the said plaintiff; and the said defendant, at the same time pulling down the said old party-wall, and of building and finishing the said new party-wall, was the owner of and entitled to the improved rent of the said house and building so adjoining the said house and building of the said plaintiff as aforesaid, and upon that occasion the said defendant then and there made use of the last-mentioned party-wall so built by the said

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a moiety of the expense of pulling down an old wall and building a party-wall where the two buildings were of the same rate or class.

that plaintiff might recover on the common count for money paid. 5 T. R. 130.—8 T. R. 602.—Comyn on Cont. 407.

To enable the plaintiff to recover the contribution, he must be prepared to prove, that in every respect his *proceedings* have been regular within the Building act, 14 Geo. 3. c. 78.—10 East, 227. But the formalities as to notices, &c. required by the Act, may be dispensed with by agreement between the parties, 5 T. R. 130.—Holt, C. N. P. 321.—7 Taunt. 158.—2 Marsh. 425, S. C. In *Readay v. Barnard*, June 8th, 1827, K. B. at Westminster, Chit. Col. Stat. vol. i. 129, n. g. Lord Tenterden held, that an account of what the defendant is liable to pay must be delivered to him, as required by the 41st section of the Act; but that a demand was only essential to entitle the plaintiff to double costs; and see, as to the demand, 2 Taunt. 62. The Statute requires a three months' notice of action to entitle plaintiff to double costs. In 1 Moo. & Mal. 61, it was held, that an account, claiming more than the sums prescribed by the act, was nevertheless sufficient. But it seems that no more than such prescribed sum can be recovered, though the price of brickwork is much higher. The account or estimate required by the act, to be given in *ten days* after the building of the wall, does not apply to the case of a new wall to a house, there being no house on the property adjoining it, but only where an old wall is removed, 1 M. & P. 454.—4 Bingh. 551, S. C. In the former case it suffices to give in the account in a *reasonable* time, which is a question for the Judge. Id.

As to the *party liable*, as observed in Chit. Col. Stat. vol. i. 127, note (c) it seems to have been the intention of the legislature to throw the burthen on the lessees of building leases, by whom the value of the estate is considerably improved, and who afterwards made under-leases, reserving *improved rents*.—*Southal v. Leadbetter*, 3 T. R. 461: that is, the *best or highest rent*, 1 B. & P. 305; and to make the owner of the improved rent and not of the improved *value* liable. 2 B. & A. 467. In case of a lessor at a rack rent (there being no other person entitled to any other kind of rent) he is liable though the lessee has improved the house demised. See 8 T. R. 214. 3 T. R.

461. And a tenant who rebuilds a house without a lease, or agreement for a lease, and in so doing makes use of the party-wall of the adjoining house, cannot be sued for half the cost as owner of the improved rent, though the house was worth 60*l.* *per annum*, and he afterwards, in consideration of the re-building, obtained a beneficial lease at the low ground-rent of less than seven guineas *per annum*. 6 Taunt. 249. So where the lessee has sold his term for a large sum in gross, and not underlet, the original lessor is still liable to pay the moiety. 3 T. R. 458; and it seems that the *dicta* ascribed to Gibbs, C. J. in 2 Marsh. R. 436, and to Lord Kenyon, in 3 T. B. 461, are not law; See Chit. Col. Stat. vol. i. 128, n.—2 B. & Ald. 467, where the defendant held land under a lease from J. S. and underlet a portion of it at an *advanced rent*, to one G. who built thereon, using the party-wall of plaintiff, it was held the defendant was the owner of the *improved rent*, and liable to a moiety of the expense of building a party-wall. 1 M. & P. 454.—4 Bing. 551, S. C. If there be several improved rents the owner of the highest must bear the expense, although at the time of the using the party-wall his interest had nearly expired, and there is no provision in the act for dividing the burthen between the owners of the different improved rents. 1 B. & P. 305.

A tenant who means to recover from his landlord must not perform the work himself, 10 East, 227, and 1 R. & M. 357, and in a late case it was held that a tenant who is under a covenant to repair cannot maintain an action on the above act against his landlord for a moiety of the expense of building a party-wall, which being out of repair the tenant pulled down and rebuilt at the joint expense of himself and the occupier of an adjoining house to whom he had given the notice required by the Statute, in the landlord's name, but without his authority. 1 R. & M. C. N. P. 357.

A general covenant to repair will not subject a tenant to pay any part of the expense of a party-wall. 1 B. & P. 305.—8 T. R. 214. But a tenant may by express stipulation become liable to such contribution. 8 T. R. 605.—See 5 Taunt. 90.

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[*248] plaintiff, to wit, at, &c. (*venue*) aforesaid, by means whereof and according to the tenor and effect of the said Statute in that behalf, the said defendant then and there became liable to reimburse and pay to the said plaintiff a certain sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, being a moiety of the expense of building so much of the said party-wall, so built by the said plaintiff as aforesaid, as the said defendant did make use of as aforesaid, according to the said act, together with the like proportional part of certain other expenses which were necessary to the pulling down of the said old party-wall, amounting in the whole, to a large sum of money, to wit, the sum of —*l.* of like lawful money, together with certain other reasonable expenses of shoring up the said house and building of the said defendant, amounting in the whole to a large sum of money, to wit, the further sum of —*l.*; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sums of money when he the said defendant should be thereunto afterwards requested; and the said plaintiff further says, that as soon as conveniently might be and within *ten days* (*c*) after the said new party-wall had been so built as aforesaid, to wit, on, &c. he the said plaintiff so being such first builder as aforesaid, did leave at the said adjoining house and building of the said defendant, *to wit, at, &c. (*venue*) a true account, in writing (*d*), of the number of rods in the said party-wall, for which the owner of the said adjoining building was liable to pay, and of the deduction which such owner was entitled to make thereout on account of such materials, in the said act mentioned, as did belong to the said adjoining building, and an account of such other expenses so incurred as aforesaid; and the said plaintiff afterwards, and upwards of twenty-one days before the commencement of this suit, to wit, on, &c. did demand (*e*) of the said defendant payment of the said sum of money which he was so liable to pay as aforesaid, to wit, at, &c. (*venue*) aforesaid. —[*Add indebitatus count, as ante, 54, or post, 251; also counts for work and labor, and materials found, money paid, account stated, and breach.*]

The like
where
there was
no old party-wall
before the
new party wall
was erected
(*f*).

For that whereas heretofore, to wit, on, &c. (*day of defendant's using the wall, or about it*), the plaintiff was lawfully possessed of a certain piece or parcel of ground, situate within the weekly bills of mortality, to wit, in the parish of, &c. in the county of *Middlesex*, and at his own expense had erected and built thereon, a certain messuage and building, and had erected and built a certain party-wall, parcel of the said messuage and building, agreeably to the directions of the Statute in that behalf made and passed in the 14th year of the reign of our sovereign lord the late King George the Third: And whereas also, the said plaintiff having so erected and built the said messuage and building, and the said defendant then being the owner and occupier of a certain piece or parcel of ground situate within the weekly

(*c*) It seems, that the account in this case must be left during the *ten days*. See 1 M. & P. 454.—4 Bing. 551, S. C.

(*d*) An account must be delivered, see section 41 of the Act, and the cases *supra*, as to the form of the account, &c.

(*e*) Such demand is only necessary to entitle the plaintiff to *double costs*. See *ante*, 247, note.

(*f*) See 1 Moo. & Pay. 454.—4 Bing. 551, S. C.—See notes, *ante*, 247.

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bills of mortality, to wit, in the parish aforesaid, and adjoining to the said messuage and building so erected and built by the said plaintiff, and abutting thereupon, he the said defendant afterwards, to wit, on the same day and year aforesaid, did begin to erect and build, and did erect and build, and cause and procure to be erected and built on the said last-mentioned piece or parcel of land, a certain messuage or building, of the same rate or class of building as the messuage and building first above mentioned, and did, for the purpose of erecting and building the same, cut into and make use of the said party-wall of the plaintiff, to wit, at, &c. (*venue*) aforesaid. And the said plaintiff in fact says, that at the time of the making use of the said party-wall, and cutting into the same by the said defendant as aforesaid, *the defendant was the owner of, and entitled to, the improved rent of the said adjoining building*, so erected and built as aforesaid, to wit, at, &c. (*venue*) aforesaid. And the said plaintiff further says, that he the plaintiff did, as soon after the cutting into and using the said party-wall by the said defendant *as conveniently might be, to wit, on, &c.* aforesaid, at, &c. (*venue*) aforesaid, deliver and cause to be delivered to the said defendant, a true account in writing of the number of rods in the said party-wall so cut into and made use of by the said defendant, for which the defendant, *as owner of such adjoining building* as aforesaid, by virtue of the said Statute, was liable to pay to the said plaintiff a large sum of money, to wit, the sum of 100*l.*, (there being no deductions to be made thereout for old materials or otherwise), and did then and there demand payment thereof from the said defendant; by reason whereof, and by force of the Statute, he the said defendant became liable to pay to the said plaintiff the said sum of 100*l.*, within twenty-one days next after such demand thereof as aforesaid. And the said plaintiff further says, that being so liable, the said defendant did afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, undertake and faithfully promise the said plaintiff to pay him the said sum of 100*l.*, within twenty-one days next after such demand thereof as aforesaid. Nevertheless the said defendant, not regarding his said promise and undertaking, did not nor would, within such twenty-one days, which have long since elapsed, or at any other time, pay the said plaintiff the said sum of 100*l.*, or any part thereof, but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse, to wit, at, &c. (*venue*) aforesaid.—[*Add an indebitatus count like the one ante, 54, or post, 251, the common money counts, and account stated.*]

For that whereas, before and at the time of the making of the indentures of demise hereinafter mentioned, and after, &c. one E. F. was lawfully possessed of a certain peice or parcel of ground, hereinafter mentioned, to be demised to the said plaintiff, and at his own expense had erected and built a certain messuage or tenement, coach-house, and stables upon the ground, hereinafter mentioned, to be demised, and had also erected and built a certain party-wall, parcel of the said messuage or tenement, and according to the form of the Statute in such case made and provided, to wit, at, &c. (*venue*), and the said E. F. being so possessed of the said

The like by lessee for years, in whom the property of the party-wall was vested, for defendant's share of expenses of party-wall which he had cut into (*g*).

(g) See notes to last precedent. This declaration was settled by an eminent Pleader at the bar. *Query*, whether an action

lies by the tenant in such a case, as the act directs the money to be paid to the party at whose expense the wall was built.

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premises, and having so built and erected the said messuage and tenement as aforesaid, upon the said ground as aforesaid, at his own expense, by a certain indenture made on, &c. (*date of lease*), to wit, at, &c. (*venue*) aforesaid, between the said E. F. and the said plaintiff, and after reciting that, &c. [*here set out the indenture, so far as it relates to the demise to the plaintiff*] (as by the said indenture will more fully and at large appear) ; by virtue whereof, he the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, entered into the said demised premises, with the appurtenances, and became and was thereof possessed, and being so possessed thereof, he the said defendant afterwards, to wit, on, &c. was the owner and occupier of a certain piece of ground adjoining to the said demised premises of the said plaintiff, and abutting throughout at the east end of the same ; and as such owner and occupier of the said piece and parcel of ground, did there erect and build, and cause and procure to be erected and built, a certain tenement of the said defendant, and did, for the purpose of erecting and building the same, cut and make use of the said party-wall of the said plaintiff ; and the said plaintiff in fact saith that at the time of the making use of the said party-wall, and cutting into the same by the said defendant, the property of the said party-wall was vested in the said plaintiff, by virtue of the said indenture of demise, and that he, the said defendant was the owner of and entitled to the improved rent of the said adjoining building so erected and built as aforesaid, to wit, at, &c. (*venue*) aforesaid ; and that he the said plaintiff afterwards, and on the day and year last aforesaid, to wit, at, &c. (*venue*) aforesaid, did cause to be estimated the expense of building of so much of the said party-wall as was *made use of by the said defendant, at the rate of —*l.* by the rod, of the new brick-work, according to the form of the Statute in such case made and provided, there being no deductions to be made thereout, in respect of old materials or otherwise, and that the said expense, estimated at the said rate, did amount to a large sum of money, to wit, the sum of —*l.* of lawful, &c. to wit, at, &c. (*venue*) aforesaid, whereof the said defendant afterwards, to wit, on the day and year last aforesaid, there had notice. And the said plaintiff avers, that he the said plaintiff, as soon after the cutting into and using the said party-wall by the said defendant as aforesaid, as conveniently might be (*h*), to wit, on, &c. at, &c. (*venue*) did deliver and cause to be delivered to the said defendant, a true account, in writing, of the number of rods in such party-wall for which the said defendant, as such owner of such adjoining building as aforesaid, was liable to pay to the said plaintiff, a large sum of money, to wit, the sum of —*l.* according to the form of the said Statute, and did demand (*i*) payment thereof from the said defendant, to wit, at, &c. (*venue*) aforesaid ; by reason whereof, and by force of the said Statute, the said defendant became liable to pay to the said plaintiff the said sum of —*l.* within twenty-one days next after such demand thereof as aforesaid ; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook*, and then and there faithfully promised the said plaintiff to pay him the said sum of —*l.* within twenty-one days next after such demand thereof as aforesaid ; nev-

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(*h*) As to this, see ante, 247, note.

(*i*) As to this demand, see ante, 247, note

ertheless the said defendant, not regarding his said, promise and undertaking so by him made as aforesaid, nor the said Statute, but contriving and intending, did not pay to the said plaintiff the said several sums of money, or either of them, or any part thereof, within the said space of twenty-one days next after such respective demands, nor hath he yet paid the said several sums of money, or either of them, or any part thereof, to the said plaintiff, although often requested so to do, but to pay the same, or any part thereof, hath hitherto altogether refused, and still doth refuse, to wit, at, &c. aforesaid.—[*Second count same as the first, only stating that plaintiff was *possessed under a demised term, from, &c.—Add the indebitatus count, as ante, 54, or post, 251.*]

FOR CONTRIBUTIONS TO PARTY-WALLS.

[*250]

For that whereas, after the making of a certain act of parliament made in the 14th year of the reign of his late Majesty King George the Third, intituled, “ An Act for the better regulation of buildings and party-walls, and for the more effectually preventing mischiefs by fire, within the cities of London and Westminster, and the liberties thereof, and other the parishes, precincts, and places within the weekly bills of mortality, the parishes of St. Mary-le-bone, Paddington, St. Pancras, and St. Luke at Chelsea, in the county of Middlesex, and for indemnifying, under certain conditions, builders, and other persons, against the penalties to which they are or may be liable, for erecting buildings within the limits aforesaid, contrary to law ;” and in the life-time of the said E. F. to wit, on, &c. a certain party-wall had been built, at the expense of the said E. F. agreeably to the directions of the said Statute, between a certain messuage or building, situate and being in, &c. and certain ground, then also situate and adjoining the said party-wall ; and whereas afterwards, and after the death of the said E. F. to wit, on, &c. at, &c. (*venue*) he the said defendant being then and there the owner, and entitled to the improved rent of the said adjoining ground, did cut into and make use of the said party-wall by then and there beginning to build, and afterwards building against the same, a certain messuage or building of the same rate or class of building, as the said first-mentioned messuage or dwelling-house ; by means whereof and according to the tenor and effect of the said Statute in that behalf, he the said defendant then and there became liable to reimburse and pay to the said plaintiffs, as executors as aforesaid, a certain sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, being one moiety of the expense of building the said party-wall, after the rate, in the said Statute mentioned ; and being so liable, he the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiffs, as executors as aforesaid, to pay to them the said sum of —*l.* when he the said defendant should be thereunto afterwards requested.

The like by executor to recover a moiety of the expenses of building a party-wall, used by defendant after death of testator (*k*).

*And whereas also the said defendant, afterwards, to wit, on, &c. at, &c. (*venue*) was indebted to the said plaintiffs as executors as aforesaid, in the sum of —*l.* of like lawful money, for part of the expense of build-
[*251] *Indebitatus count.*

(*k*) See notes, ante, 54, 247.

FOR CON-
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WALLS.

ing a certain party-wall, before then built at the expense of the said E. F. in his life-time agreeably to the directions of the said Statute, between a certain messuage or building, situate and being within the weekly bills of mortality, and certain ground there also situate next to and adjoining the said last-mentioned party-wall, and which said last-mentioned party-wall had before then been cut into and made use of by the said defendant, who before and at the time of cutting into and making use of the same, was the owner of, and person entitled to the improved rent of such last-mentioned ground, and being so indebted, &c. undertook, &c.—[*Add common counts as directed ante, 248.*]

TO PAY
MONEY
FOR
FORBEAR-
ANCE TO
DEFEND-
ANT.

XV. TO PAY MONEY FOR FORBEARANCE TO DEFENDANT.

On a promise to pay the costs of an action within a week, in consideration of plaintiff staying proceedings (l).
[*252]

For that whereas before the making of the promise and undertaking of the said defendant hereinafter next mentioned, *a certain action had been commenced and prosecuted by and at the suit of the said plaintiff against the said defendant, in the court of our said lord the now king, before the king himself (m), (or if in C. P. say "in the court of our lord the king, before his Majesty's justices of the bench at Westminster,") for the recovery of a certain sum of money, to wit, the sum of —l. then and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, due and owing from the said defendant to the said plaintiff. And which said action, at the time of the making of the said promise and undertaking of the said defendant hereinafter next mentioned, was depending in the said court, to wit, at, &c. (venue) aforesaid, whereof the said defendant then and there had notice. And thereupon heretofore, to wit, on, &c. (day of promise, or about it,) at, &c. aforesaid, in consideration of the premises, and that the said plaintiff,

(l) See forms, Plead. A. 95, 127. See a form, ante, 245, against an executor, on his promise to pay a legacy in consideration of forbearance. Forbearance to sue is a good consideration for a promise where it is absolute only, Cro. Jac. 683; or for a definite portion of time, Cro. Jac. 47; or a reasonable time, 1 Roll. Abr. 24, pl. 33; forbearance for a title, 1 Roll. Abr. 23, pl. 5; or for some time, id. pl. 26, is not sufficient. Forbearance to sue seems an insufficient consideration, unless a right of action be known to have existed, 4 East, 455.—1 New Rep. 172.

Assumpsit in consideration that the plaintiff, at the request of the defendant, would consent to suspend proceedings against A. On a cognovit, defendant promised to pay 3*l.* on account of the debt (for which the cognovit was given) on the 1st of April then next. Averment that the plaintiff did suspend the proceedings on the cognovit. The plaintiff, at the trial, proved the following agreement in writing:—"The plaintiff having at my request consented to suspend pro-

ceedings against A. I do hereby, in consideration thereof, personally promise to pay 3*l.* on account of the debt, on the 1st day of April next:" held, that as the request must have preceded the consent to suspend proceedings, the contract might be declared on as an executory contract, and, consequently that there was no variance. Secondly, that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least until the 1st of April. Thirdly, that after verdict, the averment that plaintiff had suspended proceedings without specifying for what period, was sufficient. 7 Bar. & Cres. 423.—1 M. & R. 708, S. C. It is not necessary to state the subject-matter of the debt, Com. Dig. Action on the case on *Assumpsit*. F. 8. H. 3.—Hob. 18. Though it must be shown that there was some cause of action against the defendant, or some other person, 4 East, 455.—1 New Rep. 172.—4 Taunt. 177.—Post, 353, note.

(m) The court must be accurately described, 3 M. & S. 166.

at the special instance and request of the said defendant, would (n) cease to prosecute the said action, and would stay all further proceedings therein (1), he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay the costs of commencing and prosecuting the said action, in a week then next following. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did then and there cease (o) to prosecute the said action, and hath thence hitherto stayed all further proceedings therein; and that the costs of commencing and prosecuting the said action amounted to a large sum of money, to wit, the sum of —*l.* (*state enough*) of lawful money of Great Britain, whereof the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) had notice. And although a week from the time of the making the said promise and undertaking of the said defendant hath long since elapsed, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, not regarding the said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this respect, hath not as yet paid the said costs of commencing and prosecuting the said action, or any part thereof, (although he the said defendant afterwards, and after the expiration of a week from the time of making his said promise and undertaking, to wit, on, &c. (*any day before the title of declaration*) at, &c. aforesaid, was requested by the said plaintiff so to do.) But he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse, to wit, at, &c. (*venue*) aforesaid.—[*If any doubt as to the exact nature of the promise, add another or more special counts accordingly. Add a count on the original debt—money paid—the account stated—and the usual breach applicable to those counts only.*]

TO PAY
MONEY
FOR
FORBEAR-
ANCE TO
DEPEND-
ANT.

XVI. TO PAY MONEY FOR FORBEARANCE TO THIRD PERSONS.

For that whereas one E. F. before and at the time of the making of

TO PAY
MONEY
FOR
FORBEAR-
ANCE TO
THIRD
PERSONS.

(a) When it suffices to declare on an executory consideration, though the contract was in its terms on an executed consideration, see 7 Bar. & Cres. 423. 1 Moo. & Ry. 708, 8 C.—Ante, 251, note.

(o) See id.

(p) Observe the notes to the preceding form. See forms, Morg. 152, 166.—Plead. A. 129.—Rob. Ent. 100—2 Went. 405, &c. and Index to ditto.—See also post, 314, precedent for declaration on guarantee for goods sold.

The mere promise of a third person to pay the debt of another, without a stipulation by the plaintiff to forbear, or some other new consideration, is not valid, 1 Saund. 211 a.—Com. Dig. Action on the case on *Assumpsit*, B. 1, 2. The promise of an heir, who has no assets by descent, to pay the debt of his ancestor in consideration of forbearance, is not binding, (2 Saund. 137.—Com. Dig. Action of *Assumpsit*, F. 8. —4 East, 445; (*Sed vide*, 4 Johns. Rep.

237, 239.) see the form of declaring against an heir, 2 Saund. 135); but a promise by an executor, in consideration of forbearance, is valid, though he have no assets at the time, because by the forbearance the plaintiff is precluded from obtaining judgment of assets, *quando acciderint*, 2 Saund. 137.—Ante, 245, notes; and see a form, ante, 245. See form of declaration by baron and feme on promise to render third person or pay debt, 4 B. & Adolp. 739; and a declaration on a promise to pay a larger sum than debt, in consideration of plaintiff's forbearing to execute *fi. fa.* against a third person, *Smith v. Algar*, 1 B. & Adol. 603; and see Chit. jun. Contr. 2 ed. 99; and see a declaration on a promise to give a note on plaintiff's discharging a debtor out of custody, 5 B. & Adol. 848.

As to what is, or is not a collateral promise within the Statute, see 3 Chit. Com. Law, 318 to 322; 1 Chit. Coll. Stat. 369; 1 B. & A. 297.

On a promise to pay the debt of a third person, in consideration of forbearance (p).

(1) It is unnecessary to allege that the plaintiff promised to forbear. 10 Mass. 230. 237.

TO PAY
MONEY
FOR
FORBEAR-
ANCE TO
THIRD
PERSONS
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the promise and undertaking of the said defendant hereinafter next mentioned, was indebted to the said plaintiff in a certain sum of money, to wit, the sum of —*l.* **(state enough)* of lawful money of Great Britain (*q*), to wit, at, &c. (*venue*); and thereupon heretofore, to wit, on, &c. (*day of guarantee or about it*) at, &c. in consideration of the premises, and that the said plaintiff, at the special instance and request of the said defendant, would (*r*), forbear and give time to the said E. F. for the payment of the sum of money until the — day of — (1) (*let this agree with the consideration*) (*r*), he the said defendant undertook, and then and there faithfully promised (*s*) the said plaintiff to pay him the said sum of —*l.* on, &c. (*let this agree with the promise.*) And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, so made as aforesaid, did forbear and give time to the said E. F. for the payment of the said sum of money, until the said — day of — (*let this agree with the consideration.*) to wit, at, &c. (*venue*) aforesaid; but that the said E. F. although he was afterwards, to wit, on, &c. (*any day before title of declaration*) at, &c. (*venue*) aforesaid, requested (*t*) by the said plaintiff so to do, hath not as yet paid (*u*) the said sum of money, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do; whereof the said defendant, afterwards, to wit, on the day and year last aforesaid, there had notice, and thereby and according to the tenor and effect of his said promise and undertaking, he the said defendant became liable to pay the said plaintiff the said sum of money on the said — day of — to wit, at, &c. (*venue*) aforesaid.—[*If there be any doubt as to the meaning of the guarantee, let one count follow the very words of it, and add another count, stating the substance of it.—Add an account stated, and breach.*]

On a promise, that if plaintiff would withdraw distress for rent on the goods of a third person, defendant would pay the rent (*w*).

For that whereas before the making of the said distress hereinafter next mentioned, one J. S. held, occupied, and enjoyed certain premises, with the appurtenances, as tenant thereof to the said plaintiff, by virtue of a certain demise thereof before then made, at a certain rent, to wit, the rent of (20*l.*) *per annum*, to wit, at, &c. (*venue*) and because a certain sum of money, to wit, the sum of 10*l.* of the aforesaid rent, at the time of making the distress hereinafter mentioned, was then and there due and owing

(*q*) It is not necessary to state the subject-matter of the debt, though some demand recoverable at law or in equity, must be stated, 4 Taunt. 117.—Ante, 251, n. (*l*). It is better not to state it with unnecessary particularity, Peake's Rep. 117.—Though a larger sum be stated under a videlicet to be due, it need not be proved, 8 Taunt. 197.—2 J. B. Moore, 114, S. C.

(*r*) See 7 B. & C. 423.—1 M. & R. 708, S. C. Ante, 251, n.

(*s*) Though the promise must, under the stat. 29 Car. 2. c. 3. s. 4, be in writing, and the whole consideration must be stated in such writing, see 4 B. & A. 595. 5 East, 10.—6 J. B. Moore, 86; it need not be so

stated in the declaration, 1 Saund. 276, n. 1. See Bing. 529.

(*t*) From Cro. Jac. 500.—Cro. Eliz. 85, 91.—2 Hen. Bla. 131.—It seems necessary to aver this request. *Sed quare*, and see 1 Stra. 88, 9. If it be not necessary to state it, the statement will not require to be proved, see Plowd. 128.

(*u*) It should seem, from 1 Sid. 178.—2 Roll. 738, l. 15, that this averment of the non-payment by the principal is unnecessary, and that it suffices to aver merely a non-payment by the defendant.

(*w*) A promise of this nature, whether the distress was begun or not, is not within the Statute of frauds, and need not be in

(1) In a declaration on a promise to pay, in consideration that the plaintiff would forbear to sue another, it is sufficient to state that other to be indebted, without averring that the debt was then payable. *Jones v. Potter*, 5 Serg. & Rawle, 519.

from the said J. S. to the said plaintiff, he the said plaintiff, during the said tenancy, and before the making of the promise and undertaking of the said defendant, hereinafter last-mentioned, to wit, on, &c. (*day of distress or, about it*) to wit, at, &c. (*venue*) took and distrained divers goods and chattels of the said J. S. then being in and upon the said demised premises, as a distress for the said sum of money, to wit, the said sum of 10*l.*, so then due and owing to the said plaintiff as aforesaid, and the said plaintiff then intended, after the expiration of five days after the making of the said distress, to sell the said distress, according to the form of the Statute in such case made and provided, &c. whereof the said defendant then and there had notice; and thereupon, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of defendant, would withdraw the said distress, and forbear to proceed on such distress, he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of 10*l.* in one month then next following—(*let this be according to the promise.*) And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did then and there withdraw the said distress, and forbear to proceed in such distress, and hath thence hitherto forborne to proceed on the same, to wit, at, &c. (*venue*) And although a month from the making of the said promise and undertaking hath long since elapsed, and although the said J. S. afterwards, to wit, on, &c. (*any day before the title of the declaration*) at, &c. (*venue*) aforesaid, was requested (*x*) by the said plaintiff to pay him the said sum of 10*l.*, yet the same still wholly remains due and unpaid by him, of all which said premises the said defendant then and there had notice. Nevertheless, the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not paid to the said plaintiff the said sum of 10*l.* or any part thereof, and the said sum of 10*l.* still remains wholly due and unpaid to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Add another count more general, depending on the nature of the agreement, and commencing at once with the statement of plaintiff's having distrained, without stating the terms of tenancy. If there be any doubt as to the distress having been actually commenced, merely state defendant's intention to distrain, and that defendant promised to pay the rent if he would forbear doing so.—Add counts for money paid, had and received, account, and a breach applicable thereto.*]

TO PAY
MONEY
FOR
FORBEAR-
ANCE TO
THIRD
PERSONS.

*XVII. TO PAY MONEY IN CONSIDERATION OF MARRIAGE.

For that whereas heretofore, to wit, on, &c. (*day of promise, or about*

writing. 3 Burr. 1886. 2 Wils. 308, S. C.; and see 4 Taunt. 117.—3 Esp. 86. As to what is a sufficient commencement of a distress, see 5 Bingh. 10. 8 B. & Cres. 456; (and see a declaration on a promise that in consideration plaintiff would give up his lien on goods for debt of third person, defendant promised to pay debt. *Clancy v. Figgott*, 4 Nev. & M. 496. On a promise

that in consideration that plaintiff would withdraw distress made on effects of a bankrupt, defendant being his assignee, promised that the amount of distress should be paid to plaintiff out of the produce of the same effects distrained on. *Stephens v. Fell*, 4 Tyr. 6: and see pleas and law, *id.*)

(*x*) This request does not seem necessary.

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TO PAY
MONEY IN
CONSIDER-
ATION OF
MAR-
RIAGE.
On a pro-

TO PAY
MONEY IN
CONSIDER-
ATION OF
MAR-
RIAGE.

mise to
pay 200l.
if plaintiff
would
marry a
girl (y).

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Second
count, to
pay in a
reasona-
ble time.

it) at, &c. in consideration that the said plaintiff, at the special instance and request of the said defendant, would marry one E. F. he the said defendant undertook, and faithfully promised the said plaintiff to pay him the sum of —l. of lawful money of Great Britain, whenever after such marriage he the said defendant should be thereunto requested; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on, &c. at, &c. aforesaid (z), did marry the said E. F. whereof the said defendant, afterwards, to wit, on, &c. at, &c. aforesaid had notice; yet the said defendant, not regarding his said promise and undertaking so by him in manner and form aforesaid made, bnt contriving and craftily and subtly intending to deceive and defraud the said plaintiff in this respect, hath not yet paid the said sum of money, or any part thereof, to the said plaintiff, although he the said defendant, afterwards, to wit, on, &c. and oftentimes afterwards, to wit, at, &c. was requested by the said *plaintiff to pay him the same, but the said defendant, to pay the same, or any part thereof to the said plaintiff, hath hitherto wholly refused, and still doth refuse, to wit, at, &c. aforesaid. And whereas also, afterwards, to wit, on the day and year first above-mentioned, at, &c. aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, would marry the said E. F. he the said defendant undertook, and then and there faithfully promised the said plaintiff, within a reasonable time after such marriage should have taken place, to pay unto him the said plaintiff, the sum of —l. of like lawful money; and the said plaintiff, in fact says, that he, confiding in the said last-mentioned promise and undertaking of the said defendant, afterwards, to wit, on, &c. at, &c. aforesaid, did marry the said E. F. whereof the said defendant, afterwards, to wit, on, &c.

(y) See other forms, 2 Wentw. 491, 2. 1 Mod. Ent. 128.—Pl. A. 51, 137.—Morg. 143. And see form of declarations on mutual promises to marry, post, 321.—2 Wentw. 487, 8, 9. Pl. A. 47, 99.—2 Rich. C. P. 128.—1 Sid. 180.

When action lies.—An action will lie on a contract or promise to pay money in consideration of marriage, Cro. Eliz. 63. If the promise be to pay 20 French *pieces*, it is sufficiently certain, and shall be intended to mean French *crowns*, Cro. Car. 194. So if it be to pay 100l. at a time to come, and in the mean time, after the rate of 8l., the promise is good and not usurious. 1 Vin. Ab. 297, pl. 15.—2 Sid. 116. S. P. So if a man promises another, in consideration of his marrying his daughter, to give him as much as he should give to any of his daughters, and afterwards dies, leaving another of his daughters a sum of money, an action lies against his administrator or executor, 3 Bulst. 248. 1 Vin. Abr. 287. pl. 3.

A promise by a father after his daughter's marriage, to pay a sum of money to her husband, is a good promise, 2 Leon. 111.—Cro. Eliz. 59. See also Dyer, 272 b. pl. 32. in margin. A promise by a man to pay a woman a sum of money if he marry any body but herself, is considered a restraint upon marriage, and therefore void, 5 Burr. 2295. Upon a promise to a father to give a

sum of money with his daughter in marriage, the daughter may have the action, for she is the meritorious cause of action, Bull. Ni. Pri. 133. Promises to pay money in consideration of marriage, must be in writing, by the Statute of Frauds, 29 Car. 2. c. 3. s. 4. But mutual promises to marry are not within the provisions of this act, Stra. 34; see 1 Chit. Coll. Stat. 371, n. (l). Letters from parents or persons standing in *loco parentis*, containing promises of provisions in consideration of marriage, if explicit in their terms, have been held to satisfy the Statute, 2 Vent. 361.—2 Pre. Ch. 560.—2 Vern. 600, 602.

Form of Declaration.—An inducement of a discourse having taken place respecting the marriage is unnecessary, and is usually omitted in modern pleadings; a promise to the plaintiff must be shown in express terms: an allegation that the defendant asserted and published that he would give 100l. to whoever should marry his daughter is too indefinite and uncertain, 1 Roll. Ab. 6 M. pl. 1.—Noy. 11. Cro. Jac. 4. The marriage need not be stated to have taken place, *ad instantiam defendantis*, for that will be intended, Cro. Car. 194. *Indebitatus assumpsit*, will not lie, 1 Vent. 268.

(z) The words "at the special instance and request of the defendant" are unnecessary here, Cro. Car. 194.

at, &c. aforesaid, had notice; yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this respect, hath not yet paid the said last-mentioned sum of money, or any part thereof to the said plaintiff, although a reasonable time for that purpose since the said last-mentioned marriage so took effect as aforesaid, hath long since elapsed; and although the said defendant afterwards, to wit, on, &c. last aforesaid, and oftentimes afterwards, at, &c. aforesaid, was requested by the said plaintiff to pay him the same, but the said defendant, to pay the same or any part thereof hath hitherto wholly refused, and still doth refuse, to wit, at, &c. aforesaid.—[*Another count may be added upon an executed consideration.*]

TO PAY
MONEY IN
CONSIDERATION OF
MARRIAGE.

*XVIII. TO PAY MONEY SERVICES, &c.

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TO PAY
MONEY
FOR
SERVICES.
Special
count for
board wages as an
hired servant (a).

For that whereas heretofore, to wit, on, &c., (*day of retainer or about it*) at, &c. in consideration that the said plaintiff, at the special instance and request of the said defendant, would enter into the service of the said defendant, as an hired servant, and serve the said defendant in that capacity, he the said defendant undertook, and then and there faithfully promised the said plaintiff, during the continuance of such service and employment, to pay him the said plaintiff for such service certain wages, after the rate of —*l. per annum*, and certain board wages for his support and maintenance during such service, after the rate of — shillings per week; and the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on, &c. aforesaid, enter into the service of the said defendant, and served the said defendant in the capacity aforesaid for a long space of time, to wit, for the space of — weeks then next following, and that the board wages of the said plaintiff during the time aforesaid, and after the rate aforesaid, amounted to a large sum of money, to wit, the sum of —*l.*, whereof the said defendant afterwards, to wit, on, &c. (*any day before title of declaration*) at, &c. aforesaid, had notice.—[*Add the common count for wages, as ante, 65, and counts for work and labor, money paid, account stated, and breach.*]

For that whereas, before and at the time of the making of the promise and undertaking of the said defendant hereinafter *next mentioned, he the said defendant was one of the bailiffs of the sheriff of Middlesex, to wit,

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For a reward defendant advertised he would give, in consideration of any person's retaking one who escaped out of his custody (b).

(a) See precedents for wages, Thomp. Ent. 22.—Pl. A. 49.—3 Burr. 1778.—1 Saund. 264.—2 Id. 346.—4 East, 546.—4 Esp. Rep. 75.—7 T. R. 241.—2 B. & P. 116. As to recovery of wages and remuneration in general, see Bac. Ab. tit. Master and Servant, H.—Burn, J. tit. Servants.—Ante, 74, note.

(b) See other forms, 2 Wentw. 499—3 Id. 30, 31, where see form of advertisement and notes, as to the plaintiff's having recovered. An advertisement or general promise of a reward to any who will apprehend a felon, or do any other act for the de-

fendant, should not, in general, be declared upon as a promise to the particular plaintiff, for there is no privity between the parties themselves, Rol. Ab. 6, M. pl. 1.—Noy, 11, where a similar advertisement promised a reward to the person who would give information respecting a lost child, so that it might be restored to its parents, and a person communicated his suspicions on the subject to a third person, who gave the information and received the reward: accordingly it was held, that the person who had so received the reward was not liable to repay the whole, or any portion of it, to the

FOR
SERVICES.

at, &c. and whereas also before the time of the making of the said promise and undertaking, one E. F. had been arrested, and was in custody of the said defendant as such bailiff as aforesaid, for debt, to wit, at &c. And whereas also before the time of the making of the said promise and undertaking, the said E. F. had escaped out of the custody of the said defendant, so being such bailiff as aforesaid, and the said defendant was desirous of apprehending and retaking the said E. F. to wit, at, &c. aforesaid; and thereupon, afterwards, to wit, on, &c. at, &c. aforesaid, in consideration that any person (c) would apprehend the said E. F. or by private information, or otherwise, be the means of apprehending or causing him to be apprehended and delivered into the custody of the said defendant, he the said defendant undertook, and then and there faithfully promised, upon such apprehending and delivery of the said E. F. into the custody of him the said defendant, to pay to such person who should apprehend, or cause to be apprehended, the said E. F. a reward of 100*l*. And the said plaintiff avers, that afterwards, to wit, on, &c. at, &c. aforesaid, he the said plaintiff took and apprehended the said E. F. and afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, delivered him into the custody of the said defendant, by reason whereof the said defendant then and there became liable to pay, and ought to have paid to the said plaintiff, the aforesaid reward of 100*l*., to wit, at, &c. aforesaid.—[*Add other counts, varying the undertaking, according to the circumstances, and the common count for work and labor, journees, account stated, and breach.*]

For a reward advertising for discovering an offender (d).

For that whereas the said defendant, to wit, on, &c. (*day of publication or about it*) at, &c. (*venue*) printed and published a certain advertisement, stating (*here set out the advertisement in the past tense, as thus*) that one A. S. had then lately defrauded the said defendant and other people of money, wearing apparel, and table linen and other things, of value, to a great amount, and the said defendant did thereby then and there undertake and faithfully promise, that if any person would discover the said A. S. so that she might be brought to justice, such person should receive 20*l*. reward of the said defendant; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, did discover the said A. S. to the said defendant; and the said A. S. afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) was committed to the custody of the keeper of the gaol at, [Worcester,] to answer for the said offence, whereof the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, had notice, and by reason of the premises the said defendant became liable to pay the said sum of 20*l*. to the said plaintiff, when he the said defendant should be

person from whom he originally received his information. 1 M. & S. 108. When the reward is advertised to be paid to any person who shall apprehend, or cause to be apprehended, &c. and one person apprehended the offender, and another procured his apprehension, they are both entitled to be remunerated. 3 Wentw. 30.

The 7 & 8 G. 4. c. 29, s. 59. prohibits the

advertising a reward for stolen goods with no questions asked, &c. under a penalty of 60*l*. and full costs.

The 7 Geo. 4. c. 64. s. 28. allows rewards in certain cases. See Burn's Justice, title Reward.

(c) See note, *supra*.

(d) See a form, 3 Wentw. 30, and the notes to the preceding form.

thereunto afterwards requested. And whereas also afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant had before that time caused and procured one A. S. who then and there was charged by the said defendant to have then lately defrauded the said defendant and other people of money, wearing apparel, table linen, and other things, of value, to a great amount, to be taken into custody, to be detained in custody by the said defendant to answer the said last-mentioned charge, he the said defendant afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and to the said plaintiff faithfully promised to pay him the said sum of 20*l.* of lawful money of Great Britain, whenever afterwards he the said defendant should be thereunto requested.—[*Add counts for work and labor and journies—money paid—accounts stated—and breach.*]

FOR
SERVICES.
Second
count,
more gen-
eral.

*For that whereas, before the making of the promise and undertaking of the said defendants hereinafter next mentioned, to wit, on, &c. divers goods and chattels of the said defendant had been feloniously taken and carried away from a certain dwelling-house of the said defendant, to wit, at, &c. and thereupon, heretofore, to wit, on, &c. aforesaid, to wit, at, &c. aforesaid, in consideration of the premises, and that the said plaintiff, at the special instance and request of the said defendant, would apprehend the said offenders, so that the property of the said defendants should be recovered, he, the said defendant undertook, and then and there faithfully promised the said plaintiff (*f*) therefore to pay him, as a reward, the sum of 20*l.*; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the day and year aforesaid, that is to say, at, &c. (*venue*) aforesaid, apprehended and took into custody the said offender, to wit, one E. F. for the said felony; and the said E. F. was afterwards, to wit, on the day and year aforesaid, to wit, at, &c. aforesaid, in due course of law tried for the said felony, and was, upon the said trial, upon the evidence of the said plaintiff found guilty thereof, and duly sentenced to be punished according to law for his said offense, and the said property of the said defendant was then and there restored to the said defendant, and he, by means of the premises, then and there recovered the same; of all which said premises the said defendant afterwards, to wit, on, &c. last aforesaid, there had notice; yet the said defendant not regarding his said promise and undertaking, but contriving and craftily and subtly intending to deceive and defraud the said plaintiff in this behalf, hath not (although he was afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid requested by the said plaintiff so to do) as yet paid the said reward of 20*l.*, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to wit, at, &c. aforesaid. And also for that, whereas heretofore, and before the making of the promise and undertaking of the said defendant hereinafter next mentioned, the said plaintiff had at the like special instance and request of the said defendant discovered and caused to be apprehended the said E. F. on suspicion of having feloniously stolen certain goods and merchandize of the said de-

[*258]
On prom-
ise to re-
ward
plaintiff if
he would
arrest a
felon (e).

Second
count.

(e) See precedent, and note, ante, 256, (f) But see ante, 256, n. (b).
n. (b).

FOR
SERVICES.

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defendant, of great value, and had attended as a witness on the trial of the said E. F., by means whereof the said E. F. had been and was convicted of the said offense, and a great part of the said last-mentioned goods and merchandizes were restored and re-delivered to the said defendant; and thereupon he, the said defendant, in consideration thereof, afterwards, to wit on, &c. at, &c. aforesaid, undertook, and *then and there faithfully promised the said plaintiff to pay him the sum of 20*l.*, when he the said defendant should be thereunto afterwards requested; yet the said defendant (although often requested so to do) hath not as yet paid to the said plaintiff the said last-mentioned sum of 20*l.* or any part thereof, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. aforesaid.—[*Add common counts for work and labor, and journies, money paid, account stated and breach.*]

By a
school-
master, a-
gainst the
father of a
pupil, for
taking a-
way the
latter from
the school
without
giving a
quarter's
notice (g).

[*260]

For that whereas, before and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, the said plaintiff was a schoolmaster, and the profession and business of a schoolmaster exercised, followed, and carried on, to wit, at, &c. (*venue*) and thereupon, heretofore, to wit, on &c. at &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would admit and receive one L. into the school of the said plaintiff, and would instruct the said L. in reading, writing, and arithmetic, and other necessary and useful accomplishments and qualifications, for certain reasonable reward to the said plaintiff in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to continue the said L. at the said school, to be instructed by the said plaintiff as aforesaid, until the expiration of a quarter's notice of his the said defendant's intention to take the said L. away from the said school (*h*). And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) admit and receive the said L. into the said *school of the said plaintiff, and did instruct the said L. in reading, writing, and arithmetic, and other necessary and useful accomplishments and qualifications for a certain space of time, to wit, for [a quarter] of a year then next following, and hath always hitherto been ready and willing to instruct the said L. as aforesaid, and thereof the said defendant hath always had notice, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive the said plaintiff in this respect afterwards, and before the expiration of [half] a year after the said L. had been so admitted and received as aforesaid, to wit, on, &c. [*day of removal or about it*], at, &c. (*venue*) wrongfully and injuriously took away the said L. from the said school of the said plaintiff before the expiration of a quarter's notice given by

(g) This count is proper, but it would seem from the cases in 2 New Rep. 333—5 Bingh. 132—4 Campb. 375—id. 186—1 Stark. 198, that the plaintiff may recover under the common indebitatus count, as ante, 81. And for the same reason he might recover on the common count for work and labor. See the notes, ante, 74. In a late case, where a child at school, for whom payment had been made quarterly, was sent home for illness four days after the

commencement of a quarter, and did not return, it was held that the master was entitled to a whole quarter's schooling, although there was no express contract for a quarter's notice, or a quarter's pay; and although the school was a day school, at which the child was the only boarder. 5 Bingh. 132.

(h) This should be described as in the plaintiff's terms, which are usually contained in a printed prospectus.

the said defendant to the said plaintiff of the said defendant's intention to take the said L. away from the said school, and without giving the said plaintiff any such notice as aforesaid, and hath thence hitherto wholly neglected and refused to continue the said L. at the said school to be instructed by the said plaintiff, to wit, at, &c. aforesaid, whereby he the said plaintiff hath wholly lost and been deprived of all the benefits, profits, and advantages which he otherwise might and would have derived and acquired from instructing the said L. as aforesaid, to wit, at, &c. aforesaid.—*[Second count, laying it as an executed consideration like the next precedent.—Add common count, as ante, 81, for work and labor as a school-master, add counts for work and labor generally, board and necessities, money paid, account stated, and breach.]*

BY A
SCHOOL-
MASTER.

For that whereas, before and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, the said plaintiff was a schoolmaster, and the profession and business of a schoolmaster exercised, followed, and carried on, to wit, at, &c. (*venue*) and thereupon, heretofore, to wit, on, &c. in consideration that the said plaintiff, at the special instance and request of the said defendant had admitted and received one E. F. into the school of the said plaintiff, to be there boarded and taught English, and other languages and accomplishments, for certain reasonable reward to the said plaintiff in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff that he would, previously to his removing the said E. F. from the said school, give one quarter of a year's notice to the said plaintiff of his intention so to do, or pay a quarter's stipend to the said plaintiff; and the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant did afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid continue the said E. F. in his said school, and did board him there, and teach him English, and other languages and accomplishments, for a certain space of time, to wit, until and upon the, &c.—*[day of removal, or about it]*; and hath always hitherto been ready and willing to continue the said E. F. in the said school, and to board and teach him as aforesaid, whereof the said defendant hath always had notice, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending to deceive and defraud the said plaintiff heretofore, to wit, on, &c. *[day of taking away, or about it,]* at, &c. aforesaid, wrongfully and injuriously took away the said E. F. from the said school of the said plaintiff without giving, according to his said promise and undertaking to the said plaintiff, a quarter's notice of his intention so to do, whereby the said plaintiff hath wholly lost and been deprived of all the benefits, profits, and advantages which he might and would otherwise have derived and acquired from continuing the said E. F. in the said school, and boarding and teaching him therein; nor hath the said defendant, although he was afterwards, to wit, on, &c. at, &c. aforesaid, requested by the said plaintiff so to do, as yet paid to the said plaintiff a quarter's stipend, amounting to a large sum of money, to wit, the sum of —*l.* but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to wit, at, &c.—*[Add counts as advised in the last precedent.]*

The like
on an executed
consideration.

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RELATING
TO SALES
OF GOODS.

XIX. RELATING TO SALES OF GOODS AND PERSONALTY.

For not
delivering
a bill of
exchange
in pay-
ment for
goods
sold (i).

For that whereas heretofore, to wit, on, &c. (*day of delivery of the goods*) at, &c. (*venue*) in consideration that the *said plaintiff, at the special instance and request of the said defendant, would sell and deliver to him the said defendant a certain quantity of goods, to wit, [100 sacks of malt] at a certain rate or price, then and there agreed upon between the said plaintiff and the said defendant, to wit, at the rate or price of — [for each and every of the said sacks of malt (*j*)], amounting in the whole to a large sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him for the said goods, by accepting a bill of exchange, to be drawn by the said plaintiff upon the said defendant, and payable in [four] months from the delivery of the said malt (*k*) to the said defendant, whenever, after such delivery, he the said defendant should be thereunto requested. And the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year at, &c. (*venue*) aforesaid, sell and deliver the said quantity of goods to the said defendant on the terms aforesaid.—[*If the defendant has not paid for any part of the goods, omit the following words in this form between brackets.*] And although the said defendant, in part performance of his said promise and undertaking, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, paid to the said plaintiff, by accepting a certain bill of exchange, for a part of the said price of the said goods, to wit, the sum of [100*l.*]; and although the said plaintiff afterwards, and before the expiration of [four] months from the delivery of the said goods as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, did draw a certain bill of exchange upon the said defendant, and bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, for the [residue of the] said price of the said goods, to wit, the sum of —*l.* and payable in four months from the day and year aforesaid, being four months from the delivery of the said goods as aforesaid; and the said plaintiff then and there to wit, on the day and year aforesaid, at,

(i) See other forms, 16 East, 130.—3 Campb. 329. When necessary to declare specially, see ante, vol. 1. 302. See also ante, 55, n. (r). By thus declaring specially, a set-off may be avoided. How to declare in such a case, see 2 Marsh. 41. 6 Taunt. 340. When goods have been sold on a credit not elapsed at the time of declaring, and on the terms that the defendant should deliver a bill of exchange to the plaintiff, or accept a bill in his favor, it is necessary to declare specially for not delivering or accepting the bill, as in the above precedent, 4 East, 147.—3 B. & P. 582.—2 Camp. 582.—3 Camp. 329; but if the credit has elapsed at the time of declaring, though after the writ issued, and after the

first day of Term, the plaintiff may recover on the common counts, the declaration being entitled specially of a day after the credit elapsed. 4 East, 75. 2 B. & A. 431. And so if credit be given as a mere voluntary act it may be revoked, and the vendor may sue under the common counts for the price. 1 Esp. Rep. 430. As to when interest is recoverable, see 13 East, 98.—Ante, 38.

(j) See 6 Taunt. 108.—13 East, 102. 2 B. & P. 425.—Post, 269, n. (z).

(k) Sometimes the understanding is from the date of the contract. 2 Marsh. 41.—6 Taunt. 340; the contract must be described precisely according to the agreement of the parties.

&c. (*venue*) aforesaid, requested (l) the said defendant to pay the said plaintiff the said [residue of the said] price of the said goods, by accepting the said [last mentioned] bill of exchange, so drawn as aforesaid; yet the said defendant not regarding his said promise and undertaking, but contriving and wrongfully and unjustly intending, craftily and subtly to deceive and defraud the said plaintiff in that behalf, did not, nor would, when he was so requested as aforesaid, or at any time before or afterwards, pay the said plaintiff the said [residue of the said] price of the said goods, or any part thereof, by accepting such bill of exchange as aforesaid, or otherwise howsoever, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do; and by reason thereof he the said plaintiff hath lost and been deprived of the use and benefit of the said bill of exchange, which he the said defendant ought to have accepted as aforesaid, to wit, at, &c. (*venue*) aforesaid.—[If there be any doubt as to the terms of the contract, add another special count, stating the facts as they will probably be proved.—Add one count for goods bargained and sold—another for goods sold and delivered—money had and received—and the account stated, and breach.]

RELATING
TO SALES
OF GOODS.

*For that whereas heretofore, to wit, on, &c. (*day of delivery of the goods or about it*) at, &c. in consideration that the said plaintiff, at the special instance and request of the said defendant, would deliver to the said defendant a certain quantity of goods, to wit, &c. (*set them out shortly*) on the terms that he the said defendant should purchase the same at a reasonable price (*or if a fixed price be named say "at and for a certain price, to wit, the sum of —l. for," &c.*), or return the same to the said plaintiff, he the said defendant then and there undertook, and faithfully promised the said plaintiff to purchase the said goods of him, and to pay him the reasonable (*or "the said"*) price thereof, or to return and re-deliver the said goods to him within a reasonable time then next following; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, deliver to the said defendant the said quantity of goods on the terms aforesaid, and was always ready and willing to sell the said goods to the said defendant at a reasonable (*or "the said"*) price, to wit, the price of, &c. whereof the said defendant then and there had notice; yet the said plaintiff in fact saith, that although a reasonable time for the said defendant's purchasing or returning the said goods to the said plaintiff, as last aforesaid, hath long since elapsed, yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and injure *the said plaintiff in this behalf, hath not, although often requested so to do, paid the said plaintiff the said price of the said goods, or returned or re-delivered the same, or any part thereof, to the said plaintiff, but hath hitherto wholly

[*263]
For not
paying for
or re-de-
livering
goods de-
livered to
defend-
ant, on
terms of
sale and
return
(m).

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(l) It is necessary to aver and prove this request to accept. *Reed v. Mesteer*, Com. Cont. 181.

(m) As to conditional sales of property, see 3 Chit. Com. Law, 274. If goods are delivered on the terms of sale and return, and the person receiving them does not re-

turn them in a reasonable time, the value of them may, it seems, be recovered in an action for goods sold and delivered. *Peake's Rep.* 56.—See also 16 *East*, 45.—*Ante*, vol. i. 302. It is usual, however, and safest, to add a special count as above.

FOR NOT ACCEPTING GOODS SOLD. *counts for goods bargained and sold, work and labor, and materials, money paid, account stated, and breach.]*

For not taking away (within a specified time,) goods sold at a public auction (g).

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For that whereas the said plaintiff heretofore, to wit, on, &c. at, &c. put up and exposed to sale by public auction in lots, amongst other things, a large quantity of goods, to wit, [hams,] then lying and being in certain piles, at a certain warehouse situate and being at, &c. *as in the particulars *of sale,*] under and subject to the following conditions of sale, that is to say, that the highest, &c.—[*Here set out the conditions of sale.*—]—As by the said conditions of sale, reference being thereunto had, will, amongst other things, more fully appear, of all which said premises the said defendant, before and at the time when the said goods were so put up and exposed to sale as aforesaid, to wit, on the day and year aforesaid, at, &c. had notice; and thereupon afterwards, to wit, on the day and year first aforesaid, at, &c. in consideration of the premises, and also in consideration that the said plaintiff, at the special instance and request of the said defendant, had undertaken, &c.—[*Here insert mutual promises, as ante, 228.*—]—And the said plaintiff in fact saith, that afterwards, to wit, on the day and year first aforesaid, at, &c. aforesaid, the said defendant became, and was the highest bidder for, and declared the buyer of a certain lot of goods called [Lot 2,] parcel of the said goods so put up and exposed to sale, under and subject to the said conditions as aforesaid, consisting of divers, to wit, [18 hams,] at and for a certain sum of money, to wit, the sum of —l. then and there bid by the said defendant for the same, *and which said lot of hams, at the time the same was purchased by the said defendant, as aforesaid, was, and from thence continually, until, and upon, and after the said — day of —, remained and continued in the said warehouse: and although the said plaintiff hath always, from the time of the said putting up and exposing to sale of the said goods as aforesaid, hitherto been ready and willing (r) to suffer and permit, and would have suffered and permitted the said defendant to take and clear away the said goods so purchased by him as aforesaid, from the said warehouse, on payment of the said purchase-money for the same, together with the sum of —l. for the said lot, [and also the further sum of —l. for the charges of the delivery of the said lot to the said defendant, the same being a reasonable sum in that behalf;] and the said goods were, during all that time, lotted out for him, the said defendant; and although the said plaintiff hath always, from the time of making his said promise, and undertaking, hitherto well and truly performed and fulfilled the said conditions *of sale, in all things therein contained on his part and behalf, as the seller of the said goods, to be performed and fulfilled, to wit, at, &c. (*venue*) aforesaid, yet the said defendant, not regarding his said promise and undertaking so made as aforesaid, but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said

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(g) Where goods are bought at a public auction, and one of the conditions of sale is, that the goods shall be taken away at the buyer's expense, within fourteen days, and afterwards, a bought-note is entered into, with this clause, "fourteen days for receiving and delivering;" the meaning of the two contracts taken together is, that fourteen

days shall be allowed to the purchaser only, and the vendor is bound at all times to be ready to deliver. 1 Marsh. 514.

(r) The time allowed for clearing away the goods, is only for the benefit of the purchaser, and the vendor must at all times be ready to deliver, 1 Marsh. 514; but see Salk. 112.

plaintiff in this behalf, did not nor would (although often requested so to do) on or before the — day of — or at any time afterwards, take or clear away the said goods, so purchased by him, from the said warehouse, or pay the said purchase-money for the same, together with the sum of —l. for the said lot, and the said sum of —l. so being the reasonable charge of delivery of the said lot to the said defendant as aforesaid, or any or either of them, or any part thereof, but hath hitherto wholly refused and neglected so to do, to wit, at, &c. aforesaid, whereby the said plaintiff hath not only lost and been deprived of the benefit of the said sale, but, in order to take care of the said lot, hath been forced and obliged to stow, place, and keep the same in the said warehouse (s) to wit, at, &c. aforesaid.—[Add counts for warehouse room, ante, 48, goods bargained and sold, and an account stated.]

FOR NOT
TAKING
AWAY
GOODS
SOLD.

[Proceed nearly the same as in the last precedent, to the asterisk, and then as follows:]—And although he the said defendant, in pursuance of the said conditions of sale, ought to have cleared away and paid for the said lots or parcels of the said goods, within the space of one month from the said sale, and although he the said defendant did, during the space of one month, to wit, on, &c. at, &c. aforesaid, clear away and pay for some of the said lots of goods, yet the said plaintiff in fact saith, that the said defendant (although often requested) did not nor would, at any time during the said space of one month, or at the expiration thereof, clear away or pay for the residue of the said lots of goods, or any part thereof, according to the said conditions of sale, and his said promise and undertaking so by him in manner and form aforesaid made; but on the contrary thereof, he the said defendant suffered and permitted the residue of the said lots of goods to remain uncleared, without paying for the same, at and after the expiration of the said space of one month, (being the time above limited for clearing away the same,) *and thereupon afterwards, and after the expiration of the said space of one month, and whilst the residue of the said lots of goods remained uncleared and unpaid for, as aforesaid, to wit, on, &c. (day of re-sale or about it,) at, &c. (venue) he the said plaintiff, according to the said conditions of sale, and in pursuance thereof, did re-sell the residue of the said lots of goods (so remaining uncleared and unpaid for as aforesaid,) that is to say, by public sale, at and for certain sums of money, amounting in the whole to a much less sum of money, to wit, the sum of —l., (any sum sufficient to cover the loss,) less than the amount of the said sum of money so as aforesaid bid by the said defendant for the same, and thereby there was a deficiency upon such re-sale to a large amount, to wit, to the amount of the said sum of —l., over and besides the charges attending such re-sale, amounting to a certain other sum of money, to wit, the sum of —l. and making, together with the said sum of —l., the sum of —l., of lawful money of Great Britain, of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) had notice; and was then and there requested by the said plaintiff to pay him the said sum of —l., and which said sum of —l., he the said defendant then and there ought to have paid to the said plaintiff, accord-

The like
where, ac-
cording to
conditions
of sale,
there has
been a re-
sale.

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FOR NOT
DELIVER-
ING GOODS
SOLD.

ing to the said conditions of sale, and his said promise and undertaking so by him in manner and form aforesaid made.—[Add other special counts, as any doubt in the case may suggest; also counts for goods bargained and sold, sold and delivered, and the money counts, accounts stated, and breach.]

For not
delivering
goods
within a
specified
time (t).

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[*270]

For that whereas heretofore, to wit, on, &c. at, &c. the said plaintiff at the special instance and request of the said *defendant bargained with the said defendant, to buy of the said defendant, and the said defendant then and there sold to the said plaintiff a large quantity of goods, to wit, [ten loads of wheat,] at the rate or price of [—l. for each and every load thereof (u)] [or, if no price named, say, “at and for *a reasonable price,”] to be delivered by the said defendant to the said plaintiff [in a week then next following, at — (v),] and to be paid for by the said plaintiff to the said defendant on the delivery thereof as aforesaid; and in consideration

(t) See the old Forms, 1 Lil. Ent. 16 to 95.—1 Rich. C. P. 470, 542.—Plead. A. 135, 283.—Morg. 160, 161, 163, 165. Chit. 97, pl. 82. Flow. 180.—Herne, 131.—2 Wentw. 189; and the modern precedents and notes, post, 270, &c. A special count is necessary, 3 Price, 68. If there was a special written agreement, begin with a count thereon, stating mutual promises. See a form, 1 East, 203, which, with the addition of an averment of notice of the plaintiff's readiness to pay, will be found useful. It is advisable in most cases in one count to set out the whole contract; in a second to state the contract to be to deliver on request, averring a particular request; and in a third count, to state the contract to be to deliver within a reasonable time, averring that a reasonable time has elapsed. In each count a readiness to pay the price must be alleged, 1 East, 203.—2 B. & P. 447.—2 Saund. 352, n. 3. When the contract is to deliver generally, or on request, a special request by the plaintiff must be averred, 5 T. R. 409, or else it must be shown that the defendant has incapacitated himself from delivering the goods as by his having re-sold them or the like, see 5 B. & Ald. 712.—1 D. & R. 361. S. C.—10 East, 359; or else that defendant has discharged the plaintiff from completing the sale. It is not necessary to set out more of the contract than relates to the breach. 3 Price, 68. Ante, vol. i. but the contract must be set out correctly, and a variance would be fatal, 2 Campb. 328. Ante, vol. i.

An agreement to sell a certain quantity of goods, expected by a particular vessel, on arrival, is a conditional contract, dependent on the arrival of the goods. No action, therefore, will lie for the non-delivery of the goods, if the ship arrive without them, 2 Campb. 327, n. 3 Id. 274, S. P. So where the agreement is to sell all the hemp not exceeding three hundred tons, which shall be shipped by the agent of a particular concern, and the agent only ships seventy-one for the vendors, they are not liable

to an action for non-delivery of the residue of the three hundred tons, 2 Campb. 56. But if the engagement be absolute that the goods shall be shipped, an action may be supported for neglecting to do so, from whatever cause the circumstance has arisen, 2 Campb. 57, n.—10 East, 530. Though there may have been a sufficient delivery of the goods within the Statute of Frauds, the vendors may, nevertheless, be liable to this action. Thus, where upon the purchase of wine, the vendor's clerk cut the spills from the casks, and marked them with the purchaser's initials, the delivery was held to have been sufficient to take the case out of the Statute of Frauds, 1 Campb. 235, n. but the delivery not having been perfected, it was held to be no bar to an action for not delivering the goods according to contract, Id. ibid. A delivery of goods by the vendor, on behalf of the vendee, to a carrier not named by the vendee, he having given general directions to the vendor to send the goods by a carrier, is a delivery to the vendee, 3 B. & P. 589.

Evidence.—If a written contract for the sale of goods specified no time for delivering them, the defendant in this action cannot give parol evidence that it was a condition of sale, that the goods should be taken away immediately, or that by the usage of trade where goods sold, are to be delivered at a distant day, the time is always mentioned in the written contract, 3 Campb. 426.

(u) The price of the goods must be stated, 13 East, 102.—2 B. & P. 425. Where there is a given latitude as to the price, that the goods shall not exceed such a sum, the declaration may aver that it was for a reasonable price, 6 Taunt. 108.

(v) This must be stated accurately. Where on an agreement to sell goods on the arrival of a ship, a variance was made in the name of a ship, it was held fatal, 2 Campb. 328.

The damages are to be calculated according to the market price of the same kind of

thereof, and that the said plaintiff, at the like special instance and request of the said defendant, had then and there undertaken, and faithfully promised the said defendant to accept and receive the said goods, and to pay him for the same at the rate or price aforesaid; he the said defendant undertook, and then and there faithfully promised the said plaintiff to deliver the said goods to the said plaintiff as aforesaid; and although the said time for the delivery of the said goods as aforesaid, hath long since elapsed (w), and the said plaintiff hath always been ready and willing (x) to accept and receive the said goods, and to pay (y) for the same at the rate or price aforesaid, to wit, at, &c. (venue) aforesaid, whereof the said defendant hath always had notice; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf did not nor would within the time aforesaid, or at any time afterwards, deliver the said goods, or any part thereof for the said plaintiff, at, &c. aforesaid, or elsewhere, but wholly neglected and refused so to do, whereby the said plaintiff hath lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to him from the delivery of the said goods to the said plaintiff as aforesaid, to wit, at &c. (venue) aforesaid.—[Add one or more special counts, varying the statement—and one count like that in 1 East, 203, money had and received, and an account stated.]

FOR NOT
DELIVER-
ING GOODS
SOLD.

For that whereas heretofore, to wit, on, &c. (day of sale or about it) at, &c. the said plaintiff, at the special instance and request of the said defendant, bargained for and agreed to buy of the said defendant certain — goods, to wit, [— quarters of oats,] upon the following terms, that is to say, that [here set out the terms of the contract of sale, and which may be thus;] [such oats should be of fair quality and color, and of the weight of — pounds per bushel, and should be delivered for the said plaintiff within a reasonable time, free of expense, to him on board some ship or vessel in the river —, to be carried and conveyed in such ship or vessel from thence to —, at a freight not exceeding — shillings per quarter, and that the said plaintiff should pay the said defendant for the said oats, at and after the rate of — £ . for each and every quarter thereof]; and thereupon, in consideration of the premises, and also in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to accept a delivery and shipment in the said river —, of the said goods, and to pay the said defendant for the same at the rate in that behalf aforesaid, the said defendant on the day and

For not
delivering
goods at a
particular
place (z).

goods on the day on which the contract ought to have been performed, 2 B. & C. 604.—4 D. & R. 161.—8 Taunt. 540.—9 B. & Cres. 145.

(w) If the contract be to deliver goods generally and not in any named time, a special request to deliver must be averred, 5 T. R. 409, or else it must be shown defendant has incapacitated himself from completing the agreement by re-selling, &c. 10 East, 359.—5 B. & Ald. 712.—1 D. & R. 361, S. C.

(z) In support of the averment that the

plaintiff was ready and willing to accept the goods and pay for the same, it will not be necessary to prove a tender of the money, 1 East, 203.—2 B. & P. 447. A demand of delivery would be sufficient proof of this readiness, 3 Price, 68.—1 Marsh. 412.—7 Taunt. 318.

(y) It is not necessary to state or prove an offer to pay, 1 J. B. Moore, 56.—1 East, 203.—1 Marsh. 512.—2 B. & P. 447.

(z) See the notes to the preceding form, ante, 268.

FOR NOT
DELIVER-
ING GOODS
SOLD.

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year aforesaid, at, &c. (*venue*) undertook, and then and there faithfully promised the said plaintiff that he the said defendant would, within a reasonable time then next following, procure to be delivered and shipped for the said plaintiff in manner aforesaid, the said goods to be so carried and conveyed as aforesaid; and although a reasonable time for that purpose hath long since elapsed, and the said plaintiff was always during that time and until the commencement of this action, ready and willing to have accepted a delivery and shipment of such goods as aforesaid, and to have paid (a) the said defendant for the same, at the rate in that behalf aforesaid, to wit, at, &c. (*venue*) aforesaid, whereof the said defendant then and there had notice; yet the said defendant not *regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff, did not nor would, (although often requested so to do) within such reasonable time as aforesaid, or at any time since, procure to be delivered or shipped for the said plaintiff in manner aforesaid or otherwise, the said goods or any other goods whatsoever, but on the contrary thereof the said defendant hath hitherto wholly refused and still refuses so to do; by means and in consequence whereof the said plaintiff hath been deprived of sundry great gains and profits, which he might and would otherwise have acquired to himself by re-selling the said goods at much higher and advanced prices, to wit, at, &c. (*venue*) aforesaid.

Second
count, for
not deliver-
ing
within a
reasonable
time.

[*272]

And whereas also heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then and there contracted and agreed with him to buy and purchase of the said defendant certain other goods, to wit, [— quarters of oats,] and to pay him a certain price, that is to say, the price of [—l. for each and every quarter thereof,] within a reasonable time after the delivery and shipment of the said last-mentioned goods for the said plaintiff, he the said defendant undertook, and then and there faithfully promised the said plaintiff to procure the said last-mentioned goods to be delivered and shipped for the said plaintiff on board some proper ship or vessel in the said river —, and to be sent in such ship or vessel for the said plaintiff agreeably to the orders and directions which the said defendant might receive from the said plaintiff in that behalf; and although the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) received orders and directions from the said plaintiff to procure the said last-mentioned goods to be so delivered and shipped as aforesaid, and to be sent for him to —, and the said defendant could and might have so delivered and shipped the said last-mentioned goods, and sent the same long before the commencement of this action; yet the said defendant not regarding his said last-mentioned promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this respect, hath not (although often requested so to do) since the receipt of such orders and directions as aforesaid, or at any other time since procured the said last-mentioned goods, or any goods whatsoever, to *be delivered or shipped for the said plaintiff on board any ship or vessel in the river —, or elsewhere, neither hath he in any other

(a) There is no necessity to aver an actual tender of the money. 1 East, 203.—2 B. & P. 447.—1 J. B. Moore, 56, ante, 270. n. (y).

manner delivered or sent such goods as aforesaid, or any part thereof for him to, &c. aforesaid, or any other place, but to procure the said last-mentioned goods or any part thereof, to be delivered or shipped for the said plaintiff, or to be otherwise sent to him he the said defendant hath hitherto wholly refused and still refuses so to do; and the said last-mentioned goods remained altogether undelivered to the said plaintiff, to wit, at, &c. aforesaid.—[*Add other special counts, as the circumstances of the case may suggest, also money counts, account stated, and breach.*]

FOR NOT
DELIVER-
ING GOODS
SOLD.

[*After framing the special counts for non-delivery, proceed as follows:*] —And the said plaintiff further saith, that after the making of the said respective bargains and contracts with the said defendant as aforesaid, to wit, on, &c. and on divers other days and times between that day and the commencement of this suit, he the said plaintiff, confiding in the said promises and undertakings of the said defendant, and expecting his performance thereof, to wit, at, &c. aforesaid, did make and enter into divers bargains and agreements with divers persons for the sale to them respectively of divers quantities of such goods, so bargained for and purchased by the said plaintiff as aforesaid, to wit, with E. F. for the sale to him of one hundred hogsheads of crushed sugar, and with one G. H. for the sale to him of, &c. and with one J. K. for the sale of, &c. and for want of the said sugar, which the said defendant ought to have delivered to the said plaintiff *as aforesaid, he the said plaintiff was forced and obliged to deliver to them the said persons respectively, divers quantities, amounting in the whole to —hogsheads of certain other sugar of the said plaintiff of much greater value, to wit, of —l. more than the value of the said sugar, which the said defendant ought to have delivered to the said plaintiff as aforesaid; and thereby the said plaintiff hath sustained great loss, to wit, a loss amounting to the sum of —l., to wit, at, &c. aforesaid.—[*Add the money counts, accounts stated, and breach.*]

Special
damage
that by
reason of
non-per-
formance
of a con-
tract to
deliver
goods the
plaintiff
sold di-
vers quan-
tities to
different
persons,
and defen-
dant not
delivering
them,
plaintiff
was oblig-
ed to pro-
cure other
sugars at
a much
higher
price.

[*273]

For that whereas heretofore, to wit, on, &c. (*day of bargain or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would buy of the said defendant a certain mare, at and for a large sum of money, to wit, the sum of —l. of lawful money of Great Britain, he the said defendant undertook, and then and there faithfully promised the said plaintiff that the said mare was sound and without blemish, and that if the said mare should prove unsound, he the said defendant would, on the same being returned to him, provide the said plaintiff with another mare or horse that was sound and unblemished in lieu thereof, or repay him the said sum of —l. so paid by the said plaintiff to the said defendant for the said mare; and the said plaintiff, in fact saith, that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. did buy the said mare of the said defendant at and for the said price or sum of —l. and did then and there pay to the said defendant the said sum of —l. for the same; and the said plaintiff further saith, that the said defendant, not regarding his said promise and undertaking, thereby craftily and subtly deceived the said defendant in this, that the

Against a
party, who
had sold
plaintiff a
mare, and
promised,
if she
proved
unsound,
to provide
another, or
return the
money (b).

FOR NOT
DELIVER-
ING GOODS
SOLD.

said mare, at the time of the making of the said promise and undertaking of the said defendant was not sound, but was unsound and blemished, whereupon the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, returned the said mare to the said defendant, and the said defendant then and there accepted and took back the same; and the said plaintiff in fact further saith, that the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. gave and delivered to the said plaintiff another mare in lieu of the said mare so returned to him as aforesaid; and the said defendant, again disregarding his said promise and undertaking so made as aforesaid, again craftily and subtly deceived the said plaintiff in this, that the said mare so given and delivered to the said plaintiff in lieu of the said first-mentioned mare returned to and accepted back by the said defendant as aforesaid, was not sound at the time of the delivery thereof as last aforesaid to the said plaintiff, but was then and there unsound and blemished; whereupon the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) returned the said last-mentioned mare to the said defendant, and then and there requested the said defendant to provide the said plaintiff with another mare or horse, which was sound and unblemished or repay him the said sum of money so paid

[*274] *by the said plaintiff for the said first-mentioned mare, according to the said promise and undertaking of the said defendant; and the said plaintiff further says, that although the said defendant did accept and take back the said last-mentioned mare so returned to him as aforesaid, yet the said defendant, not further regarding his said promise and undertaking, but contriving and intending to injure the said plaintiff in this behalf, hath not yet delivered to the said plaintiff a sound mare or horse, or any mare or horse whatsoever, in lieu of the said last mentioned mare so returned to the said defendant as last aforesaid, or repaid to the said plaintiff the said sum of —*l.* so paid to the said defendant for the said first-mentioned mare, or any part thereof, but to provide the said plaintiff with a sound mare or horse, in lieu of the said last-mentioned mare so returned to the said defendant as last aforesaid, or with any other mare or horse, or to repay the said plaintiff the said sum of —*l.* so paid to the said defendant for the said first-mentioned mare as aforesaid, he the said defendant hath hitherto wholly refused, and still refuses so to do, to wit, at, &c. (*venue*) aforesaid.—
[Add other special counts, as any doubt in the case may suggest, counts, for horse keep, money paid, and had and received, accounts stated, and breach.]

[*275]

RELATING
TO CON-
TRACTS OF
EX-
CHANGE.

On a promise to pay money in consideration of the exchange of horses (c).

XX. RELATING TO CONTRACTS OF EXCHANGE.

For that whereas heretofore, to wit, on, &c. (*day of contract or about it*) at, &c. (*venue*) in consideration that the *said plaintiff, at the special

(c) See a form, Morg. 141. For the distinction between a sale and an exchange, see 2 Bla. Com. 446.—3 Salk. 157.—The principles of law which prevail in contracts of sale, are applicable to those of exchange. See 2 Bla. Com. 323, 446.—Upon agreement between two traders to change goods for

goods, after a balance is struck between them, such balance is to be paid in money. 1 Stark. 185. Where two traders agree to deal with each other by way of barter, if one refuses to account, the other may arrest for the whole value of the goods. 5 Taunt. 259. (But in an action on an

instance and request of the said defendant, would deliver to the said defendant a certain horse of the said plaintiff of great value (1), in exchange for a certain horse of the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to deliver the said horse of the said defendant to the said plaintiff, and to pay him a certain sum of money, to wit, the sum of—*l.* of lawful money of Great Britain, in exchange for the said horse of the said plaintiff. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, deliver to the said defendant the said horse of the said plaintiff on the terms aforesaid. And although the said defendant, in part-performance of his said promise and undertaking, did then and there deliver to the said plaintiff the said horse of the said defendant in exchange for the said horse of him the said plaintiff; yet the said defendant not further regarding his said promise and undertaking, hath not (although often requested so to do) as yet paid to the said plaintiff the said sum of—*l.* or any part thereof, but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, to wit, at, &c. (*venue*) aforesaid.—[*Add a count for horses, mares, and geldings, bargained and sold, and for horses, &c. sold and delivered, and the account stated, and breach.*]

RELATING
TO CON-
TRACTS OF
EX-
CHANGE.

XXI. RELATING TO CONTRACTS OF LOAN.

For that whereas the said plaintiff, before and at the time of the making of the promise and undertaking of the *said defendants hereinafter mentioned, was possessed of and lawfully entitled to a certain interest or share, to wit,—*l.* in the joint stock of annuities, commonly called [consolidated bank long annuities,] transferrable at the Bank of England, the said—*l.* consolidated bank long annuities, then standing in the name of

RELATING
TO CON-
TRACTS OF
LOAN.

[#276]

For not replacing stock and paying the dividends thereof, which plaintiff sold out of the bank annuities, to lend the defendant (d).

agreement to exchange horses, the plaintiff should show a demand before action brought. 5 Term Rep. 409.)

The contract should, in general, be declared on specially. 1 Hen. Bla. 287. Holt, C. N. P. 179. It should seem however that an indebitatus count, stating that defendant was indebted unto the said plaintiff in a certain horse or divers horses, &c. and in a certain sum, to wit, the sum of, &c. would suffice. See the form, ante, 38, and 6 B. & C. 385. And in a late case, where A. agreed to give a horse, warranted sound, in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, pretending that A.'s horse was unsound, it was held that it might be recovered on an indebitatus count for horses sold and delivered. 3 B. & Cres. 420.—5 D. & R. 277, S. C.

(d) As to contracts to replace stock, see

3 T. R. 418.—8 East, 304. 11 East, 616.—See a form for not accepting stock, 4 East, 607, and 5 East, 107. Stock in the public funds cannot be recovered in an action of *indebitatus assumpsit* as money lent, but the lender must declare specially upon the promise to replace it, 5 Burr. 25, 89.—2 Bla. Rep. 684, S. C. 1 East, 1.—4 T. R. 687. So an agreement to pay a per centage on the day on which any money should be received by the defendant, through the medium of the plaintiff's information, does not entitle the plaintiff to the stipulated reward upon the transfer of stock, 1 East, 1.

On a failure to replace stock, the measure of damages is the price at the day when it ought to have been replaced, or at the day of trial, at the option of the plaintiff, 2 Taunt. 257. 2 East, 211.—8 Taunt 450.

If the lender oblige the borrower to take stock at a rate exceeding the market price, it is usury, 1 Esp. Rep. 11.—11 East, 616. And

(1) Vide 10 Mass. 238.

RELATING
TO CON-
TRACTS OF
LOAN.

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the said plaintiff in the books of the Governor and Company of the Bank of England, by them kept for that purpose, to wit, at, &c. (*venue*); and thereupon, heretofore, to wit, on, &c. [*day of transfer or about it,*] at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant would sell and dispose of his said interest or share in the said consolidated bank long annuities, and would then and there lend and advance the produce thereof to the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to replace, in the name of the said plaintiff, in the books of the Governor and Company of the Bank of England, by them kept for that purpose, the said sum of —*l.* consolidated bank long annuities aforesaid, in [nine months then next following,] and until the said —*l.* consolidated bank long annuities should be replaced, to pay unto him the said plaintiff, the amount of the interest, dividends, or produce which he the said plaintiff would have been entitled to in case the said consolidated bank long annuities of the said plaintiff had remained and continued standing, in the books of the said Governor and Company, *in the name of the said plaintiff; and the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) sell and dispose of his said interest or share in the said consolidated bank long annuities, and did then and there lend and advance the produce thereof, that is to say, the sum of —*l.* of lawful money of Great Britain, to the said defendant, and the said plaintiff in fact further saith, that although [nine months from the making of the said promise and undertaking of the said defendant] have long since elapsed, and although afterwards, to wit, on &c. at, &c. aforesaid, he the said plaintiff requested (e) the said defendant to replace, in the name of the said plaintiff in the said books of the Governor and Company of the Bank of England, the said sum of —*l.* consolidated bank long annuities, according to the said promise and undertaking of the said defendant; yet the said defendant, not regarding his said promise and undertaking, but contriving, and craftily and subtly intending to deceive and defraud the said plaintiff, in this behalf, did not nor would, [in nine months after the making of his said promise and undertaking,] or at any time since, replace in the name of the said plaintiff, in the books of the Governor and Company of the Bank of England, the said sum of —*l.* consolidated bank long annuities, or any part thereof, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do; and the said consolidated bank long annuities still remain wholly unreplaced as aforesaid. And the said plaintiff further saith, that if the said consolidated bank long annuities of the said plaintiff had remained and continued standing on the books of the said Governor and Company, in the name of

where the lender of stock reserved to himself the dividends by way of interest, and the option of deciding, at a future day, whether he would have the stock replaced, or the sum produced by the sale of it repaid to him in money, with 5 per cent. interest, it was held that this bargain was usurious, and that it made no difference whether the whole of the agreement was contained in one instrument, or whether the

lender procured the execution of two instruments, by one of which he might compel the replacing of the stock, by the other the payment of the money and interest, 3 B. & Cres. 273. What not usury in loan of stock, 3 Chit. Ccm. Law, 411. 3 T. R. 531.—8 T. R. 162.—8 East, 304—1 Chit. Col. Stat. 1091, "Usury."

(e) Such request would seem unnecessary.

the said plaintiff, the interest or produce thereof would have amounted in the whole to a large sum of money, to wit the sum of —*l.* [*state enough*] whereof the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. had notice; nevertheless the said defendant further disregarding his said promise and undertaking, hath not, although often requested so to do, as yet paid to the said plaintiff the amount of the said interest or produce, or any part thereof, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at, &c. (*venue*) aforesaid. — [*Add money counts, interest count, account stated, and breach.*]

FOR NOT
REPLAC-
ING STOCK.

For that whereas heretofore, to wit, on, &c. (*date of bill*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request, of the said defendant, would indorse and deliver to the said defendant a certain bill of exchange, bearing date, to wit, the same day and year aforesaid, and drawn by the said plaintiff upon one E. F. whereby he, the said plaintiff, requested the said E. F. (two) months after the date thereof, to pay to his, the said plaintiff's order, the sum of —*l.* for value received, to be discounted by the said defendant for the said plaintiff; and also in consideration that the said plaintiff had then and there agreed to pay and allow to the said defendant, a certain sum of money, for interest or discount upon the said sum of —*l.* in the said bill of exchange specified, at and after the rate of 5*l.* per cent. until the said bill of exchange would become due and payable, according to the tenor and effect thereof; [and also in consideration that the said plaintiff had then and there agreed to take, accept, and receive of and from the said defendant, in part of the said sum of money in the said bill of exchange specified, between —*l.* and —*l.* worth of certain goods and merchandize], (*omit this statement between the brackets, if not according to fact*), he the said defendant undertook, and then and there faithfully promised the said plaintiff to discount the said bill of exchange by delivering to the said plaintiff, in part of the said sum of money in the said bill of exchange specified, between —*l.* and —*l.* worth of certain goods and merchandize, and advancing and paying the said plaintiff the residue of the said sum of money in the said bill of exchange specified, within a certain time, which long since elapsed, (*let these averments agree with the facts*) and the said plaintiff in fact, says, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, indorse and deliver the said bill of exchange, to the said defendant, to wit, at, &c. (*venue*) aforesaid; and he the said plaintiff hath always hitherto been ready and willing to pay and allow to the said plaintiff the said sum of money, for interest or discount as aforesaid, and to take, accept, and receive, of and from the said defendant, in part of the said sum of —*l.* in the said bill of exchange specified, between —*l.* and —*l.* worth *of goods and merchandize as aforesaid, to wit, at, &c. aforesaid; whereof the said defendant afterwards, to wit on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, had notice. And although the said defendant did, on the day and year aforesaid, at, &c. aforesaid, in part-performance of his said promise and undertaking, in part

For not
discount-
ing a bill
of ex-
change,
which
plaintiff
had deliv-
ered to de-
fendant
for that
purpose
(f).

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(f) See 1 New Rep. 433.—6 East, 333. ceeds of a bill delivered to defendant to get
—2 Wentw. 482.—See a form of declaration, discounted.
post, 350, for not accounting for the pro-

FOR NOT
DISCOUNT-
ING
A BILL.

discount the said bill of exchange, by advancing and paying to the said plaintiff the sum of—*l.* part of the said sum of money in the said bill of exchange specified, yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would, although he was afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do, within such time as aforesaid, or at any time afterwards, deliver to the said plaintiff between—*l.* and—*l.* worth of goods and merchandize, or any goods and merchandize whatsoever, in part of the said sum of money in the said bill of exchange specified, or pay and advance to the said plaintiff the residue of the said sum of money in the said bill of exchange specified, or any part thereof, but hath hitherto wholly refused and neglected so to do; and the residue of the said sum of money in the said bill specified, to wit, the sum of—*l.* still remains wholly due and unpaid to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Add another count on an executed consideration, and money had and received, account stated, and breach.*]

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ON
WARRANTIES.

On a warranty of a horse, &c. to be sound, &c. (*g*).

*XXII. ON WARRANTIES.

For that whereas heretofore, to wit, on, &c. (*day of sale, or about it,*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would buy of the said defendant,

(*g*) As to actions for breaches of warranties in general, see 1 Vin. Abr. tit. Act. Case Deceit, P. b. 1.—1 Com. Dig. Action on the case of a Deceit, A. 8—2 East, 446.—Chit. jun. Contr. 133, &c.—See old precedents, Morgan, 256. Herne, 92. It was formerly more usual to declare in case than in assumpsit. Dougl. 18; but of late assumpsit is most usual. See 2 East, 451, 452. See the forms in case, post, 679, and 3 Wils. 40.

(And see a declaration in case and law relating to warranties, 1 Adol. & El. 508.) If there was no warranty, but a written contract, and a false representation, the declaration should be in case for the deceit, 4 Camp. 22.—12 East, 11, and see further, for precedent and law, post, 679; and in some cases, though there be a warranty and stipulation that vendor will take the article back, yet vendee may sue for the deceit. 2 Stark. 162.

A warranty on the sale of a personal chattel, as to the *right* thereto, is generally implied. 2 Bla. Com. 451.—3 Id. 166.—3 T. R. 57.—Peake, C. N. P. 94.—Cro. Jac. 474.—1 Rol. Ab. 90.—1 Salk. 210.—Dougl. 18. but not as to the right of real property, (Dougl. 654.—2 B. & P. 13.—3 B. & P. 166) if a regular conveyance has been executed, 6 T. R. 626. A warranty however, of the soundness, goodness, quality, or value of a horse, or other personalty, is not implied on the sale or exchange thereof, 3 Campb. 351.—2 East, 314.—2 Bla. Com. 451.—3

Bla. Com. 165.—2 Rol. Rep. 5.—F. N. B. 94. But there is an implied warranty that goods are of a merchantable quality, where the vendee has had no opportunity before or at the time of the sale of inspecting them, 4 Campb. 144. So if a person sells an article he thereby warrants that it is merchantable, that is, fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose.—Upon such principles therefore, if a man sells a horse generally, he warrants no more than it is a horse; but if the vendee asks for a carriage-horse, or a horse to carry a female or a timid and infirm rider, he who sells undertakes, on every principle of honesty, that it is fit for the purpose indicated. See *per* Best, C. J.—5 Bingh. 544. So if beer be sold to be consumed at Gibraltar, the sale is an affirmation that it is fit to go so far. 4 Campb. 169. 6 Taunt. 108. And in the case in 4 B. & C. 115. 6 D. & R. 208, S. C. Abbott, C. J. observed, "that on the trial it occurred to him if a person sold a commodity for a particular purpose, he must be understood to warrant it *reasonably fit and proper for such purpose*, and that he was still strongly inclined to adhere to that opinion," but some of his learned brothers thought differently. A warranty may be implied from the production of a sample, in a parol sale by sample.—4 Campb. 22, 144, 169.—4 B. & A. 387.—3 Stark. 32, and see note; and if the

a certain horse, [or dog, &c.] at and for a certain price or sum of money, to wit, the sum of —l. to be therefore paid by the said *plaintiff, he the said defendant undertook, and then and there faithfully promised the said

ON WAR-
RANTIES.

bulk of the goods do not correspond with the sample, it would be a breach of the warranty. If the contract describe the goods as of a particular denomination, there is an implied warranty that they shall be of a merchantable quality, of the denomination mentioned in the contract, 4 Campb. 144.—3 Chit. Com. Law, 303. 1 Stark. 504. 4 Taunt. 853.—5 B. & A. 240. In all contracts for the sale of provisions there is an implied contract, they shall be wholesome. 1 Stark. 384.—2 Campb. 391.—3 Campb. 286. If goods are ordered to be manufactured, a stipulation that they shall be proper is implied. 4 Campb. 144.—6 Taunt. 108; especially if for a foreign market, 4 Campb. 169.—6 Taunt. 108. See a form, post, 282. An implied warranty will arise from the non-observance of an usage in specifying defects, 4 Taunt. 847. Holt. C. N. P. 95. and see 4 B. & C. 110, 114.

A simple affirmation, or assertion by the vendor as to the value or quality of the goods does not amount to a warranty unless it be made and received as such, although, the purchaser may have bought the goods on the faith of such recommendation, Cro. Jac. 4 Rol. Ab. 101. Chit. jun. Contr. 135. and in many cases the positive recommendation of the seller is not, from the nature of the case, to be regarded as a warranty, but merely as an expression of his belief and opinion on a matter of which he could have no certain knowledge, and on which the purchasers were generally capable of forming an opinion, Chitty jun. Contr. 135. Thus where the defendant not knowing the age of a horse, but having a written pedigree which he received with him, sold him as a horse of the age stated in the pedigree, at the same time stating that it was his source of information.—Lord Kenyon held this was no warranty. Peake Rep. 123.—2 Esp. 572, and see 5 B. & Ald. 240. Chit. jun. Contr. 135.—1 Bingh. 344. (In the case in 4 Car. & P. 45, it was decided, that if a person, at the time of selling a horse, say, "*I never warrant, but he is sound as far as I know*," this is a qualified warranty, and may be sued on even in *assumpsit*, showing that the plaintiff knew of the unsoundness. *Sed quære*.)

A general warranty will not extend to guard against defects that are plain and obvious to the senses of the purchaser. As if a horse be warranted perfect, and wants an ear, or a tail, &c. 2 Bla. Com. 165.—1 Salk. 211. But if on the sale of a horse, the seller agree to deliver it sound and free from blemish at the expiration of a specified period, the warranty is broken by a fault in the horse when delivered, although such defect

existed, and was apparent or obvious at the time of the sale. 2 Bingh. 183. As to a sale of goods with all faults, see 5 B. & Ald. 240. 3 Campb. 154.

Where a horse has been warranted sound, any infirmity rendering it unfit for immediate use, is an unsoundness; it is not necessary the infirmity should be of a permanent nature, 1 Stark. 127, and a warranty of soundness is broken if the disease existed in the constitution of the animal at the time of the sale, although its fatal appearance could not be discovered, and did not appear until two months afterwards, 1 R. & M. 136. A cough of a permanent nature is an unsoundness, 2 Chit. Rep. 425. A *nerved* horse is unsound, 1 R. & M. 290. But *crib biting*, Holt. C. N. P. 630, or *roaring*, 2 Campb. 523, do not of themselves constitute unsoundness; but if the roaring be of such a nature as to incommode the horse, when pressed to its speed, it is an unsoundness, 2 Stark. 81. It is a disputed question, whether thrushes, splints, or guidding, to be an unsoundness, 2 Camp. 524, n. (Badness of shape of a horse is not unsoundness, though it might occasion lameness from badness of action, 1 Mood. & Rob. 299.) The question of unsoundness is for the opinion of the jury, 7 Taunt. 153.—8 J. B. Moore, 32. (Per Baron Parke, Hilliard v. Orbell, sittings in Exchequer, 11 June, 1834, Times, 12 June, "where a horse is warranted sound, and turns out otherwise, the purchaser has no right to return him unless the warranty was *fraudulent*; his only remedy is an action on the warranty. This has been lately settled, but the general impression formerly among the profession, and now amongst all others, is, that the purchaser is to return the horse,"—referring to *Street v. Blay*, 2 B. & Ad. 456.)

If not otherwise stipulated, an action for the *breach of warranty*, may be supported without returning the horse, or even giving notice of the unsoundness, and although the purchaser have re-sold the horse. 1 Hen. Bla. 17.—1 T. R. 136.—2 T. R. 745.—9 B. & Cres. 265. But unless the horse be returned as soon as the defect is discovered, or if the horse has been long worked, the purchaser cannot recover back the purchase money on the count for money had and received. 1 T. R. 136.—5 East, 449.—7 East, 274.—2 Campb. 410.—1 New Rep. 360. and in all cases the vendee should object within a reasonable time, otherwise a strong presumption arises that the article, at the time of the sale, corresponded with such warranty, and the plaintiff is called upon to give the strictest proof of the breach, 9 B. & C. 265.—1 J. B. Moore, 106. 1 H. Bla. 19.

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RANTIES.

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plaintiff that the said horse [or dog, &c.] then was [sound (h)]. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, buy the said horse [or dog, &c.] of the said defendant, and then and there paid him for the same the said sum of money, nevertheless, the said defendant, contriving, and fraudulently intending to injure the said plaintiff, did not perform or regard his said *promise and undertaking, so by him made as aforesaid, but thereby craftily and subtly deceived and defrauded the said plaintiff in this, to wit, that the said horse, [or dog, &c.] at the time (i) of the making of the said promise and undertaking of the said defendant was not [sound] but, on the contrary thereof, was at that time [unsound (k)], whereby the said horse [or dog, &c.] became *and was of no use or value to the said plaintiff; and he the said plaintiff hath been put to great charges and expense of his monies in and about the feeding, keeping, and taking care of the said horse (l), in the whole amounting to a large sum of money, to wit, the sum of —l. to wit, at, &c. (*venue*) aforesaid.

Second
count on
an execut-
ed consid-
eration.

And whereas also afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then and there (m)

When the purchaser has not returned the goods, or endeavored to do so within a reasonable time after the sale, on account of the breach of the warranty, or cannot return the goods or horse in the same state by reason of doctoring, &c. 3 Esp. 82.—5 East, 452. he has no defense to an action by the vendor for the price, but must proceed in a cross action on the warranty, 1 T. R. 136. 5 East, 449.—7 Id. 274.—2 Campb. 410.—1 N. R. 260.—3 Esp. Rep. 82.—4 Esp. Rep. 95, and it seems, if the vendee has accepted a bill or given any other security, the breach of warranty is no defense to an action thereon, but he must proceed by cross action. 2 Taunt. 2.—1 Stark. 51.—3 Campb. 38, S. C.—14 East, 486.—3 Stark. 175. but this seems otherwise when the purchaser has returned, or endeavored to return the goods in a reasonable time after the sale, see 2 Taunt. 2.—14 East, 484.—3 Campb. 38.—Peake, C. N. P. 33. (2 B. & Adol. 456: 4 Nev. & M. 195.) In a late case whereby a contract of sale of cinq-foin seed, the vendor warranted it to be new growing seed; and soon after the sale, the buyer was told it did not correspond with the warranty, and he afterwards sowed part, and sold the residue, but which being unproductive was never paid for, it was held the buyer might defend an action for the price of the seed, by showing the breach of the warranty, and that the seed was good for nothing, 9 B. & C. 259.

For what damage defendant is liable in this action, post, 281, note. (Evidence. A prior vendor who warranted on his sale to the defendant is not a competent witness for the defendant in an action by a purchaser from him on a warranty. *Bliss v. Mountain*, 1 Mood. & Rob. 302.)

(h) This form may readily be applied to any description of warranty, as that the horse was "free from vice," &c. The warranty must be described accurately, and co-extensive with the breach complained of. If any conditional or exceptional terms be used, they must be followed in setting out the contract. Therefore if a horse be warranted sound, every where except a kick on the leg, the exception must be stated, 4 B. & C. 445.—What a variance, 2 D. & R. 10.—7 Taunt. 405.—1 J. B. Moore, 109.—4 B. & C. 108. (See *Heming v. Parry*, 6 Carr. & P. 589, Where Alderson, B. observed on *Jones v. Cowley*, 6 D. & Ryl. 533.)

(i) This is necessary.

(k) The particular description of unsoundness need not be stated, it being a rule in pleading, that the breach may in general be assigned in the negative of the words of the contract, Com. Dig. Pleading, C. 45.—2 Saund., 481 b.—3 T. R. 307.—9 Co. 60 b.—Ante, vol. i. 291, &c.

(l) When not recoverable, see 2 Campb. 82.—2 Chitty's Rep. 416. If the horse has not been tendered to the defendant the plaintiff cannot recover damages for the expense of his keep. 1 Taunt. 566. But where there has been an express warranty, and the plaintiff relying thereon, had resold the horse with a similar warranty, and being sued thereon by his vendee, offers the defense to his vendor, who gives no directions as to the action, the plaintiff may recover the costs of his defense, as part of the damages occasioned by the breach of warranty. 7 Taunt. 153.—1 J. B. Moore, 106.—1 R. & M. 426.—8 Taunt. 535.

(m) 1 Vin. Ab. 578.

bought of the said defendant a certain other horse, at and for a certain other price or sum of money then and there agreed upon between the said plaintiff and the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that the said last-mentioned horse, at the time of the said sale thereof was sound; nevertheless, the said defendant, contriving and intending to injure the said plaintiff, did not regard his said last-mentioned promise and undertaking, but thereby craftily and subtly deceived and defrauded him in this, to wit, that the said last-mentioned horse, at the time of the said sale thereof was not sound, whereby the said last-mentioned horse then and there became, &c.—[*Conclude as in the first count from the**, and add counts for horse-keep, as ante, 59, if there were any contract to that effect, and the money counts, and account stated, and breach.]

ON WARRANTY.

For that whereas heretofore, to wit, on, &c. (*day of contract or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would deliver to the said defendant a certain horse of the said plaintiff, of great value, and would also pay to the said defendant a certain sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, in exchange for a certain mare of the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that the said mare of the said defendant was then and there sound: and the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, deliver to the said defendant the said horse of the said plaintiff, and did also then and there pay to the said defendant the said sum of —*l.* in exchange for the said mare of the said defendant; yet the said defendant contriving, and fraudulently intending to injure the said plaintiff, did not perform or regard his said promise and undertaking; but thereby craftily and subtly deceived the said plaintiff in this, to wit, that the said mare, at the time of the making of the said promise and undertaking of the said defendant as aforesaid, was not sound, but on the contrary thereof was at that time unsound, whereby the said mare became and was of no use or value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid; and whereby also, [*State special damage, if any, by expense of feeding, &c. as ante, 281.*] And whereas afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then and there delivered to the *said defendant, a certain other horse of the said plaintiff, of great value, and had also paid to the said defendant, a certain other sum of money, to wit, the sum of —*l.* in exchange for a certain other mare of the said defendant, he the said defendant then and there undertook, and then and there faithfully promised the said plaintiff that the said last-mentioned mare, at the time of such last-mentioned exchange, was sound; yet the said defendant, contriving and intending to injure the said plaintiff,

On a warranty of soundness on the exchange of horses (n).

Second count on an executed consideration.

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(*) When not necessary, see 9 East, 349. Generally speaking, as in a contract of sale, there is no implied warranty in the exchange of one commodity for another, 3 Campb. 351; see ante, 279, notes. In a contract for the exchange of a watch for

candlesticks warranted silver, the owner of the watch cannot recover it back though the warranty be false, 3 Campb. 299; see a precedent, ante, 274, for not paying money on an exchange of horses.

ON WAR-
RANTIES.

did not perform or regard his said last-mentioned promise and undertaking; but thereby craftily and subtly deceived the said plaintiff in this, to wit, that the said last-mentioned mare, at the time of the said last-mentioned exchange, was not sound, but was at that time unsound, and thereby became and was of no use or value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Add statement of the damage and the common counts, as pointed out, ante, 281.*]

For not
furnish-
ing and
packing
up good
hams for
foreign
markets
(o).

[*283]

For that whereas, heretofore to wit, on, &c. (*day of sale or about it*) at, &c. (*venue*) in consideration that the said *plaintiff, at the special instance and request of the said defendant, had then and there undertaken, and faithfully promised the said defendant to buy of him divers goods and merchandize, to wit, &c. [*here describe the goods generally,*] for certain large prices then and there agreed upon by and between the said plaintiff and the said defendant, amounting together to a large sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, he the said defendant undertook and then and there faithfully promised the said plaintiff, to furnish such goods and merchandize as aforesaid, properly preserved and packed up for the East Indies aforesaid, and to pack them properly for the said voyage; and the said plaintiff in fact says, that although he, confiding in the said promise and undertaking of the said defendant, did, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, buy of the said defendant a large quantity of goods and merchandize, as and for the same goods and merchandize so agreed to be bought as aforesaid, and which the said defendant then and there supplied and furnished to the said plaintiff, as and for such goods and merchandize, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, not regarding his said promise and undertaking, did not nor would, although often requested so to do, furnish such goods and merchandize as aforesaid, fit to be sent to the East Indies as aforesaid, or pack them properly for the said voyage, according to his said promise and undertaking so made as aforesaid, but wholly neg-

(o) See note, ante, 279. See other forms, 1 Wentw. 482.—1 Campb. 190.—2 East, 314. Upon a parol sale of goods by sample, an implied warranty arises that they shall correspond with the sample. 4 B. & A. 387.—3 Stark. 32, and notes.—4 Campb. 22. But this is not so in a written sale by sample.—4 Campb. 144, 169.—2 Campb. 22. And upon a sale of goods by sample, the law does not raise an implied warranty that the goods should be merchantable, though a fair merchantable price were given, and if there be a latent defect then existing, unknown to the seller, and without fraud on his part, the seller is not answerable, though the goods turn out to be unmerchantable, and the contract is satisfied, if the sample answers fairly to the commodity in bulk. 2 East, 314. If the goods do not correspond with the sample, the vendee is not bound to complete the purchase on being allowed a compensation for the inferiority, notwithstanding a usage in the trade to that effect. 1 Campb. 113. Where a purchaser finds that the commodity does not accord with the order, and is unfit for his purpose, he

should immediately return it, or give notice to the vendor to take it back. 1 Campb. 193.—7 Ves. 247.—And after an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover the full price agreed upon, he cannot maintain a cross action, on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered. —1 Campb. 190. *semb.* In an action for the price of goods ordered by defendant, which are sent to the purchaser, and immediately returned, it lies upon the plaintiff to show that the articles correspond with the order given. 1 Campb. 180. If the goods delivered are generally the same as those contracted for, and have been paid for by the purchaser, the price cannot be recovered back in an action for money had and received, as upon a failure of consideration, however bad their quality may be, and although they are quite unfit for use. 2 Id. 411.

ON WAR-
RANTIES.

lected and refused so to do, and therein made default; and then and there so negligently and improperly conducted and behaved himself in and about the furnishing and packing of the said goods and merchandize, that the same, by reason thereof, were wholly unfit for the purpose aforesaid, and thereby the said plaintiff not only lost all the benefit, profit, and advantage which he otherwise might and would have *derived and acquired from the purchase of the said goods and merchandize, but also was put to great expense of his monies, to wit,—*l.* in and about the shipping and conveying of the same to the East Indies aforesaid, in and about other expenses relating to the same; and was also put to great expense, loss, and inconvenience, in and about the sale and disposal of the said goods and merchandize, and sustained great loss and damage on occasion of his not being able to sell or dispose of the same, at, &c. aforesaid. And whereas heretofore, to wit, on, &c. at, &c. aforesaid, in consideration that the said plaintiff, at the like special, &c. of the said defendant, had then and there undertaken, and to the said defendant faithfully promised to buy of him divers other goods and merchandize, to wit, &c. [*here describe the goods, &c. as in first count*], at and for a certain sum of money, to wit, the sum of —*l.* of like lawful, &c. to be therefore paid by the said plaintiff for the same, he the said defendant undertook, and to the said plaintiff then and there faithfully promised to furnish such goods and merchandize as aforesaid, as were reasonably fit and proper (*p*) to be sent to the East Indies aforesaid. And the said plaintiff in fact says, that although he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the day and year aforesaid, did buy of him a large quantity of goods and merchandize, as and for the said goods and merchandize so bought as aforesaid: and the said defendant then and there supplied and furnished the same to him accordingly, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, not regarding his said last-mentioned promise and undertaking, then and there craftily and subtly deceived and defrauded the said plaintiff in this, to wit, that the said last-mentioned goods and merchandize were not, when they were so furnished and supplied as aforesaid, reasonably fit or proper to be sent to the East Indies as aforesaid, but on the contrary thereof, were then and there wholly unfit for that purpose, and by reason thereof, the said plaintiff hath not only lost all the benefit, profit, and advantage which he otherwise might and would have derived *and acquired from the said last-mentioned bargain, but also confiding in the said last-mentioned promise and undertaking of the said defendant, on, &c. aforesaid, at, &c. aforesaid, expended divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the shipping and conveying and insuring of the said last-mentioned goods and merchandize, and for other expenses incurred in and about the same goods and merchandize, and relating thereto, and thereby also the said plaintiff was put to great expense, loss, and inconvenience, in and about the sale and disposal of the same goods and merchandize, in the East Indies aforesaid, to wit, at, &c. And whereas also heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration

[*284]

Second
count, for
not selling
goods, &c.
that were
fit and
proper to
be sent to
foreign
markets.

[*285]

Third
count,
like to se-

(*p*) That an implied warranty in general arises on the part of the seller, that the article sold shall be reasonably fit and proper for

the purpose for which it is sold. See 4 B. & Cres. 108.—6 D. & R. 200, S. C.—5 Bingh. 533.—Ante, 279, note.

ON YEAR-
RAFFERS.
—
cond, but
on an exe-
cuted con-
sideration.

that the said plaintiff, at the like special instance and request of the said defendant, had then and there purchased of the said defendant a large quantity of goods and merchandize, to wit, &c. [*here describe as aforesaid*], at, and for a certain large sum of money, then and there agreed to be paid for the same, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that the said last-mentioned goods and merchandize, at the time of the purchase thereof, were reasonably good and fit to be sent to the East Indies aforesaid; nevertheless the said defendant contriving and fraudulently intending to injure the said plaintiff in this behalf, did not nor would perform or regard his said last-mentioned promise and undertaking so by him made in manner and form aforesaid, but thereby craftily and subtly deceived the said plaintiff, in this, to wit, that the said last-mentioned goods and merchandize were not, at the time of the said purchase thereof, reasonably good or fit to be sent to the East Indies aforesaid, but on the contrary thereof, were then and there bad goods and merchandize, and wholly unfit to be sent to the East Indies aforesaid; and by reason thereof, the said plaintiff hath not only lost all the benefit, profit, and advantage which he otherwise might and would have derived and acquired from the last-mentioned purchase, but also confiding in the said last-mentioned promise and undertaking of the said defendant, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, expended divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the shipping and conveying and insuring of the said last-mentioned goods and merchandize, and for other expenses incurred in and about *the same and relating thereto, and thereby also the said plaintiff was put to great expense and inconvenience, in and about the sale and disposal of the same goods and merchandize, in the East Indies aforesaid, to wit, at, &c. (*venue*) aforesaid.—[*Add money counts, accounts stated, and breach.*]

[*286]

For a false
warranty
of a Bank
of Eng-
land note.

For that whereas the said defendant before and at the time of the making of his promise and undertaking hereinafter next mentioned, was indebted to the said plaintiff in a certain sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, and in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant, would accept and receive of and from the said defendant, in part satisfaction and payment and discharge of the said debt or sum of —*l.* a certain piece of paper, as and for a certain promissory note of the Governor and Company of the Bank of England, for the payment of the sum of —*l.* to the bearer thereof, on demand, he the said defendant undertook, and then and there faithfully promised the said plaintiff that the said piece of paper was a good, true, and valid promissory note of the Governor and company of the Bank of England. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) take, accept, and receive, of and from the said defendant, the said piece of paper, in part satisfaction, payment, and discharge of the said sum of —*l.* to wit, at, &c. (*venue*) aforesaid; yet the said defendant contriving and intending to deceive and defraud the said plaintiff in this behalf, did not perform or regard his said promise and undertaking so by him made as aforesaid, but thereby craftily and subtly deceived and defrauded the

said plaintiff in this, to wit, that the said piece of paper was not a good, true, or valid promissory note of the Governor and Company of the Bank of England, but on the contrary thereof, was a bad, forged, and invalid note, and a piece of paper of no use or value whatever to the said plaintiff, whereby the said plaintiff hath lost and been deprived of the use and benefit of the said note, and of the said sum of —*l.* therein mentioned, for which he accepted and received the same, of and from the said defendant as aforesaid, and hath been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid —[*Add counts for the original debt—money counts—and account stated.*]

ON WARRANTS.

*XXIII. RELATING TO THE SALE, USE, &c. OF REAL PROPERTY.

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RELATING
TO THE
SALE, USE,
&c. OF
LANDS,
&c.

For that whereas the said defendant, heretofore, to wit, on, &c. (*day of sale, or about it*) at, &c. (*venue*) caused to be put up and exposed to sale, by public auction, certain premises, to wit, — [*describe the premises shortly, as in the particulars of sale,*] upon and subject to the follow-

Against
vendor of
an estate
at public
auction,
for not
making a
good title
(*q*).

(*q*) See Sugden's Law of Vendors, &c. 8th edit. 205, 240. See forms, 4 Taunt. 334.—Plead. A. 62. (1 Chit. Gen. Pract. 295; and see a form and law, *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492; 1 *Hodges' R.* 40. and decision as to what expenses are reasonable, *id.*)

If the vendor of the estate be not prepared to produce his title deeds, or make a title at the appointed day, the purchaser, without waiting to see whether or not the vendor may ultimately be able to establish a good title, may disaffirm the contract and recover back the deposit money, under the count for money had and received. 4 Taunt. 334. 2 Esp. Rep. 641, 2. 4 Esp. 221.

And that form of declaring is the only remedy, and the deposit money is all that can be recovered where there is no contract signed by the vendor or his agent, within the Statute of Frauds. If there be such a contract in writing signed by the vendor or his agent, then the purchaser may affirm the contract, and declare specially for the non-performance of it, by defendant, and, in general, recover damages beyond the mere deposit. See Sugden's Law of Vendors, 8th edit. 220, 1, &c.

As to *damages*, however, a purchaser will, in general, be entitled only to nominal damages for the mere loss of his bargain, because a purchaser is not entitled to any compensation for the fancied goodness of his bargain which he may suppose he has lost, where the vendor is, without fraud, incapable of making a title.—2 Blackst. 1078; and see 3 B. & P. 167.—Palm. 364.—(1 Bing. N. C. 492; 1 *Hodges' Rep.* 40.) Sugden, 8th edit. 222. And in a late

case, where an auctioneer had advanced some money on an estate, sold it by auction after the authority from his principal had expired, and the principal refused to confirm the sale, the Court of Common Pleas, in an action brought by the purchaser, in which he declared on the agreement, and for money had and received, &c. would not allow him damages for the loss of his bargain, although it was proved that the estate was worth nearly twice the sum which he gave for it, Sugd. 222. But in 6 B. & C. 31, where a person who had contracted for the purchase of an estate, but had not obtained a conveyance of it, sold it by auction, with a stipulation to make a good title by a day named, but which he was unable to do, as his vendor refused to convey, it was held, that the purchaser by auction might, beyond his expenses, recover damages for the loss which he sustained by not having the contract carried into effect. In this case the defendant had not any title at all, either legal or equitable. Mr. Sugden observes, p. 213, "this case is one of great importance, and will, I fear, tend to much litigation before the distinction which it introduces is thoroughly understood."

A purchaser is not entitled to any compensation, although he may be a loser by having sold out of the funds, which may have arisen in the mean time because he had a chance of gaining as well as losing, by a fluctuation of the price.—2 Blackst. 1078. But a purchaser is, in general, entitled to interest on his deposit, and if the residue of the purchase-money has been lying ready without interest being made by it, he is entitled to interest on that, Sugden,

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ing, amongst other conditions, that is to say, [*here set out the conditions which may have any reference to the plaintiff's claim, as they appear in the particulars of sale, but in the past tense, as thus:*] that the purchaser should pay to the vendor or his agent, a deposit of —*l.* per cent. in part of the purchase-money, and should likewise pay one-half of the auction-duty, and should also pay the remainder of the purchase-money, and complete the purchase on or before the — day of — then next, and that a good title should be made out at the expense of the vendor, and upon payment of the remainder of the purchase-money, a proper conveyance at the purchaser's expense. And the said plaintiff in fact saith, that on such exposure to sale as aforesaid, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, he the said plaintiff became and was the purchaser of the said premises, upon and according to the said conditions, for a certain price, to wit, the sum of —*l.* of lawful money of Great Britain, and then and there paid to the said defendant a large sum of money to wit, the sum of —*l.* as a deposit of [10*l.*] per cent. in part of the said purchase-money, and then and there also paid another large sum of *money, to wit, the sum of —*l.* of like lawful money, as one-half of the said auction-duty payable in that behalf. And thereupon afterwards, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, in consideration that the plaintiff, at the special instance and request of the said defendant, had then and there undertaken, and faithfully promised the said defendant to perform and fulfill all things in the said condition of sale contained, on the said plaintiff's part and behalf, as such purchaser as aforesaid, to be performed and fulfilled; he the said defendant undertook, and faithfully promised the said plaintiff to perform and fulfill all things in

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promises.

8th edit. 223, 4. But where the vendee proceeds against the auctioneer, to whom the deposit was paid, he cannot recover interest unless under particular circumstances; as if when the title was not made out, the auctioneer, upon being called on to pay it over, he refused, might be liable from that time, or, perhaps, if he actually made interest on the deposit, 7 Taunt. 5. 592.—8 Taunt. 45.—1 J. B. Moore, 481, S. C.—5 Esp. 1.—Sugden, 8th edit. 512. (But see *Harrington v. Hoggart*, 1 B. & Adol. 577.) And as to when the auctioneer is not liable, see 2 Yo. & Jerv. 549. (The 3 & 4 W. 4. c. 42 s. 28, enables a jury now to give a verdict for interest in all cases where there has been a *written* demand of such interest.)

Where the plaintiff recovers under a special count on the original contract, by which he affirms the agreement, interest will be given as part of the damages for non-performance of the agreement, but where he recovers under a count for money had and received, which disaffirms the contract, and to which is mostly added a count for interest: interest may, it should seem, be recovered as damages sustained by the plaintiff, by reason of the money having been withheld from him. If however, the original contract is void, as if it be a parol agreement for the sale of lands, the

purchaser, it seems, can only recover his deposit in an action for money had and received, and will not be allowed interest, 1 B. & P. 306. And see 2 B. & P. 472.

To recover special damages, the plaintiff must declare on the original contract, and state the special damages, such as the expenses incurred in investigating the title, &c. 2 Blackst. 1078.—2 Taunt. 145.—*Turner v. Beaurain*, Sugden, 8th edit. 224. Clearly the expenses cannot be recovered under a count for money had and received; and Lord Ellenborough has decided, that they cannot be recovered under a count for money paid, &c. to the defendant's use, as the money is expended for the purchaser's own satisfaction, as to the title which he is about to take, 4 Esp. 221; nor can the expenses of investigating the title in general be recovered from the auctioneer, *Holt*, C. N. P. 569.

When the action is for not making a good title, and the declaration is special, the court will compel the plaintiff to give the defendant particulars of all objections to the title founded on matter of fact, 3 B. & P. 246.

As to when purchaser may recover back deposit where there has been a misrepresentation or concealment, see 2 Stark. 422.—1 Marsh. 206.—5 B. & A. 257.—3 B. & C. 623, and forms, post, 687, &c.

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the said conditions of sale contained, on the vendor's part and behalf to be performed and fulfilled. And the said plaintiff saith, that although he, on the day and year first aforesaid, and from thence until and upon the said — day of — then next, at, &c. (*venue*) aforesaid was ready and willing to perform and fulfill all things in the said conditions contained, on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled, and to pay the remainder of the said purchase-money and to complete the said purchase (*r*), whereof the said defendant, on the day and year last aforesaid, there had notice, and was then and there requested by the said plaintiff to make to him a good title to the said premises; yet the said defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending to injure and defraud the said plaintiff in this behalf, did not nor would, when he was so requested as aforesaid, or at any time before or since, make or procure to be made to the said plaintiff a good title to the said premises, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid, contrary to the said conditions of sale, and the said promise and undertaking of the said defendant; by reason whereof he the said plaintiff hath been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and hath been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of —*l.* of like lawful money, in endeavoring to procure such title as aforesaid, and to get the said purchase completed, and hath lost all gains and profits which he might and would otherwise have made and acquired from using and employing the said sums of money so paid by him as deposit and duty as aforesaid, and other monies provided and kept by him the said plaintiff for the completion of the purchase, to wit, at, &c. (*venue*) aforesaid. —[Add such of the following counts, as the case may require.]

Damages
(*s*).

And whereas also heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there bargained with the said defendant for the purchase of certain other premises, with the appurtenances, at and for a large sum of money, to wit, the sum of —*l.* and had paid to the said defendant a certain sum, to wit, the sum of —*l.* in part of the last-mentioned purchase-money, and had also agreed to pay the residue thereof, and to accept a proper conveyance of the said last-mentioned premises, on or before the — day of — in the year aforesaid, on having a good and valid title *made to him to the said last-mentioned premises; he the said defendant then and there, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff that he the said defendant would procure an abstract of a good and valid title to the said last-mentioned premises, to be furnished to the said plaintiff in

Second
count, for
not deliver-
ing an
abstract of
title in due
time.

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(*r*) Though in general the purchaser is required to tender a conveyance and the purchase-money, Sugden, 8th edit. 231, 232, 233. Yet if a bad title be produced, he may maintain an action without tendering either, 5 East, 198.—Sugden, 233. So where a vendor has, by selling the estate, incapacitated himself from executing a conveyance

to the first purchaser, that renders further trouble and expense on his part unnecessary, and he may sue without tendering a conveyance or the purchase-money, 1 Esp. Cas. 189.—1 Hen. Bla. 270.

(*s*) As to the damages, see ante, 287, note.

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due and convenient time for enabling him to get such title examined, and a proper conveyance of the said last-mentioned premises prepared, and the said last-mentioned purchase completed on or before the said — day of — A. D. — aforesaid; yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this behalf, did not nor would, although he was afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do, procure an abstract of a good and valid title to the said last-mentioned premises, to be furnished to the said plaintiff in due and convenient time for enabling him to let such title be examined, and a proper conveyance of the said premises prepared, and the said last-mentioned purchase completed, on or before the day and year last aforesaid; but therein wholly failed and made default, to wit, at, &c. (*venue*) aforesaid, and the said defendant then and there wrongfully and injuriously neglected and omitted to furnish any abstract of title to such premises as last aforesaid, for a long and unreasonable time, and until an insufficient and inadequate time remained for the examination of such title, and for the preparation of a proper conveyance, and the completion of such purchase as last aforesaid, by the day appointed for that purpose as aforesaid, according to the said last-mentioned promise of the said defendant in that behalf; and the said plaintiff in fact further saith, that by means and in consequence of such neglect and omission as aforesaid, the said plaintiff hath been deprived of all benefit and advantage which would have arisen to him from the completion of the said last-mentioned purchase, and hath necessarily been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of —*l.* in endeavoring to procure the said title as last aforesaid, and hath lost, &c. (*same damage as in last count.*)—[*Add counts for money paid, had, and received—interest—account stated—and breach.*]

General
count, for
not mak-
ing a good
title to
premises
for resi-
due of a
term with-
in a rea-
sonable
time.

And whereas also heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then and there bargained with the said defendant to purchase of him certain premises, to wit, [three other houses] with the appurtenances, for the residue of a certain other term then unexpired, at and for a certain other large sum of money, to wit, the sum of —*l.* and upon certain terms then and there agreed upon between the said plaintiff and the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to make to him a good title of the said last-mentioned premises, for the residue of the said last-mentioned term, within a reasonable time then next following; and although the said plaintiff hath always been ready and willing to pay the said last-mentioned sum of money, and to perform the said last-mentioned purchase in all things on his part and behalf to be performed and fulfilled, whereof the said defendant hath always had notice, to wit, at, &c. (*venue*) yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not, although a reasonable time for that purpose hath long since elapsed, as yet made or caused to be made to the said plaintiff a good title to the said last-men-

tioned houses, for the residue of the said last-mentioned term, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*); by means whereof he the said plaintiff hath been deprived of all the benefits and advantages which would have arisen from the completion of the said last-mentioned purchase, and hath been put to great expenses, in the whole amounting to a large sum, to wit, the sum of —*l.* in endeavoring to procure such title as aforesaid, and to get the said last-mentioned purchase completed, to wit, at, &c. (*venue*) aforesaid.—[*Add money counts, interest, and account stated.*]

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TY.

For that whereas the said defendant, before and at the time of the making of the agreement, and his promise and undertaking hereinafter next mentioned, represented to the said plaintiff that he the said defendant was lawfully possessed for the residue and remainder of a certain term of years then next to come and unexpired therein, of a certain messuage and premises, situate, &c. wherein he the said defendant then exercised and carried on the business of a victualler, to wit, at, &c. (*venue*) and thereupon heretofore to wit, on, &c. (*day of sale or about it*) at, &c. aforesaid, by a certain agreement then and there made by and between the said defendant and the said plaintiff, it was agreed in manner and form following (that is to say), &c. [*here set out the agreement in the past tense, and state mutual promises, as ante, 228, and that defendant also undertook, as follows:*] and that he the said defendant then and there had lawful right to sell and assign over the said lease of the said messuage and premises to the said plaintiff, and that he would perform and fulfill the said agreement in all things therein contained on his part and behalf to be performed and fulfilled. And although the said plaintiff hath always performed and fulfilled all things on the said plaintiff's part and behalf, therein, to be performed and fulfilled, yet the said defendant contriving and intending to defraud the said plaintiff in this behalf did not perform or regard the said agreement, or his said promise and undertaking, but thereby craftily and subtly deceived the said plaintiff in this, to wit, that he the said defendant at the time of making the said agreement, and his said promise and undertaking as aforesaid, had not lawful right to sell or assign over the lease of the said messuage and premises to the said plaintiff, whereby the said defendant was hindered and prevented from selling or assigning over the same, or performing the said agreement, on the part and behalf of the said defendant, and by means of the said several premises, he the said plaintiff not only lost and was deprived of all the profits, benefits, and advantages, which might and would otherwise have arisen and accrued to him from the performance of the said agreement, on the part and behalf of the said defendant, but was forced and obliged to and did necessarily lay out and expend a large sum of money, to wit, the sum of —*l.* of lawful money, of Great Britain, in and about the appraisement and valuation of the said household furniture, and endeavoring to obtain the completion of the said agreement, and hath been and is by means of the premises otherwise greatly injured and damaged, to wit, at, &c. aforesaid.—[**Add another general count like the next mutatis mutandis, and the common counts.*]

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Against a publican on an agreement to assign his lease, and on his implied contract, that he had lawful title so to do (t).

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(t) See a useful form, 1 Wentw. 71. A vendor of a lease is not impliedly bound to show his lessor's title at law. 1 Ry. & Moo. 417.—3 Campb. 451. Blackst. 1078, cited in 1 B. & C. 33. The

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OF REAL
PROPERTY.
By vendor
of an es-
tate in fee,
sold by
public
auction
against
purchas-
er, for not
complet-
ing pur-
chase, and
paying
the loss on
a re-sale
(u).

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Defend-
ant the
purchas-
er.

Mutual
promises.

For that whereas the said plaintiff, heretofore, to wit, on, &c. (*day of sale by auction*) at, &c. (*venue*) by one E. F. his auctioneer and agent in that behalf, caused to be put up and exposed to sale by public auction a certain messuage, orchard, and garden and premises, with appurtenances, situate (*w*) in the parish of — in the county of — (*describe the premises shortly from the particulars of sale*) upon and subject to the following, amongst other, conditions of sale (*x*); [*here set out such parts of the conditions as have immediate reference to the cause of action, and the breach*] that is to say, that the highest bidder should be the purchaser; that the purchaser should immediately pay down into the hands of the auctioneer, that is to say, the said E. F. —*l.* per cent. in part of his purchase-money, and enter into an agreement for payment of the residue of the said purchase-money, on the — day of — then next ensuing, at which time he should have possession of the premises, on having a good title, and that the auction-duty (*y*) payable to government should be paid and borne by the vendor and purchaser in equal shares, and the purchaser should pay down his share thereof to the auctioneer at the time of sale; and that in case the purchaser should fail to comply with the said conditions, the deposit money should be forfeited, and *the vendor be at liberty to re-sell the said tenements, with the appurtenances, and the deficiency, if any, together with all charges, should be made good by the defaulter; as by the said conditions of sale (reference being thereunto had) will, amongst other things, more fully and at large appear (*z*). And the said plaintiff in fact saith, that on the said exposure to sale, to wit, on the same day and year first aforesaid, at, &c. (*venue*) the said defendant was the highest bidder for, and then and there became, and was in due manner declared to be, purchaser of the said messuage, orchard, garden and premises, with the appurtenances as aforesaid, at and for a certain large sum of money, to wit, the sum of —*l.* (*a*) And thereupon afterwards,

(u) As to the law applicable to this subject, see Sugden's Law of Vend. & Purch. 8th edit. 225, 227. There are but few precedents in print by a vendor against a vendee for not completing his purchase. See a declaration by a vendor seised in fee against a purchaser at a public auction for non-payment of the purchase money, and the law relative to these declarations in 6 East, 555.—3 East, 410.—2 H. Bla. 123; and against a purchaser of an estate in fee, by private agreement, 3 You. & Jerv. 129.—2 Wentw. 91. 105.—1 H. Bla. 270; and against a purchaser of a chattel interest, Jones v. Barkley, Dougl. 684: and Luxton v. Robinson, Dougl. 620; at a suit of vendor of an equitable interest, in Dougl. 684. (And see declaration against purchaser of a lease and evidence, Laythorpe v. Bryant, 1 Hodg. Rep. 19; 1 Bing. N. C. 421. It seems from 3 East, 410, the vendor may at law recover a verdict for the whole purchase-money (1). The above precedent is given, as it often occurs in practice.

(w) It seems not absolutely necessary to

state the local situation. See 6 East, 348. (1 Taunt. 570.)

(z) It is not necessary to set forth more of the conditions of sale than those which are essential to a clear statement of the cause of action, and the breach of which is complained of.

(y) 17 Geo. 3 c. 50 s. 7.—13 Price, 76.

(z) Some of the precedents here state the mutual promises: but it appears better to insert them after the allegation that the defendant became the purchaser.

(a) Though it is necessary that the purchaser should in person, or by his agent, sign an agreement to purchase, see 2 Taunt. 38, yet it is not necessary to aver that such written contract was entered into. (1 Caine's Rep. 45. 4 Johns. Rep. 237.) The purchaser cannot object that the vendor did not sign. See 5 East, 16. (Vide Ballard v. Walker, 3 Johns. Cas. 60. Ruggett v. Merritt & Clapp, 2 Caine's Rep. 417. 6 East's Rep. 108. Phillip's Ev. 440.)

(1) As to a sale of land in lots, where there is a defect of title as to some of the lots, vide Van Eps v. Corporation of Schenectady, 12 Johns. 326.

to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to perform and fulfill all things in the said conditions of sale contained, on the part of the vendor to be performed and fulfilled, he the said defendant undertook, and then and there faithfully promised the said plaintiff to perform and fulfill every thing in the said conditions of sale on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled. And although the said defendant in part-performance of the said terms and conditions of sale, and of his said promise and undertaking, did then and there pay down a certain sum of money, to wit, the sum of—*l.*, being at and after the rate of—*l.* per cent. as a deposit, upon and in part payment of the said purchase-money; and did then and there sign an agreement for the payment of the remainder of the said purchase-money, on or before the said — day of — in the year of our Lord — aforesaid, on having a good title, to wit, at, &c. aforesaid (*b*). And although the said plaintiff for a long time before and upon and after the said — day of —, in the *year last aforesaid, was ready and willing to make, and did make appear to the said defendant a good and sufficient title in fee-simple, of, in, and to the said tenements with the appurtenances (*c*), so as to enable him the said plaintiff to convey the same to the said defendant in fee-simple as aforesaid, and to execute and cause to be executed proper conveyances thereof to the said defendant, and afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, offered (*d*) to the said defendant to make and convey to him such good and sufficient title in fee-simple to the said tenements, with the appurtenances, upon payment of the remainder of the said purchase-money, according to the said terms and conditions of sale, to wit, at, &c. aforesaid; yet the said defendant not regarding the said terms and conditions of sale, nor his said promise and undertaking, but contriving and intending to defraud the said plaintiff in this behalf, did not nor would, on or before the said — day of — in the year aforesaid, on having such good title as aforesaid or at any other time, pay or cause to be paid, to the said plaintiff the re-

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Defendant's part performance.

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Plaintiff's title and readiness to complete sale.

Defendant's refusal.

(*b*) This averment is not necessary, see note (*a*) *supra*.

(*c*) According to the case of *Phillips v. Fielding*, 2 H. Bla. 123, this allegation is not sufficient, and it ought to be shown that the plaintiff really had an estate in fee-simple, or according to the terms of sale, and the particulars of such estate; but see 6 East, 555.—*Sugd. Vend. & Purch.* 8th edit. 225. In *Luxton v. Robinson*, Dougl. 620, it was also held, that the plaintiff ought to state his title: and where it is quite certain that the vendor was seised of the legal estate, it may be prudent, at least in one count, to make an averment accordingly, instead of risking the declaration in the above form. Where the title has been made out to the satisfaction of the defendant, an av-ment to that effect may suffice. See *Martin v. Smith*, 6 East, 555.—2 Wentw. 105. Where the agreement is that the vendor need not make out his title, he need not set it forth. 8 Taunt. 62—1

J. B. Moore, 498. See precedent, *id.* The precedents by way of *inducement*, usually aver, that the plaintiff was seised in fee at the time of the sale. See 3 East, 410.—6 East, 555.—2 Wentw. 91. But this seems unnecessary, as it is not absolutely requisite that the vendor should have the legal title in him at that time, and it is sufficient if he obtain it at a reasonable time before the day appointed for the completion of the sale. *Sugd. Vend. & Pur.* 8th edit. 225.—*Thompson v. Miles*, 2 Esp. Rep. 184.

(*d*) This seems sufficient without an averment that the plaintiff tendered the conveyances. 8 Taunt. 62.—1 *J. B. Moore*, 498. But a vendor cannot bring an action for the purchase money without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing, as if he has refused to execute it, &c. See 6 B. & C. 506.—*Dougl.* 684.—2 Hen. Bla. 123.—3 East, 443.

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Re-sale
and loss.

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Defend-
ant's non-
payment
of the
differ-
ence.

mainder of the said purchase-money, or any part thereof, but then and there wholly neglected and refused so to do, and there wholly refused then or at any other time to complete the said purchase, or to accept a conveyance of the said tenements, with the appurtenances, to him the said defendant. And thereupon the said plaintiff afterwards, and after the said — day of — in the year last aforesaid, to wit, on, &c. (*day of re-sale or about it*) at, &c. aforesaid, according to and by virtue of the said conditions of sale, again exposed the said tenements, with *the appurtenances, to sale by public auction, under and subject to certain terms and conditions of sale, and the same were then and there, at such last-mentioned exposure to sale as aforesaid, re-sold for a much less price or sum of money than the said price or sum for which the same had been so sold to the said defendant, as aforesaid, to wit, for the sum of —*l.* whereby there then and there was a deficiency between the said price for which the said tenements, with the appurtenances, were so sold to the said defendant as aforesaid, and the said price for which the same were so sold on such re-sale to a large amount, to wit, to the amount of —*l.*; and the charges attending such re-sale then and there amounted to a certain other large sum of money, to wit, the sum of —*l.* Of all which said premises, the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice, and by reason of the premises, and according to the said terms and conditions of sale, he the said defendant then and there became liable to pay, and ought to have paid to the said plaintiff the several sums of —*l.* and —*l.*, to wit, at, &c. aforesaid; yet the said defendant further disregarding the said conditions of sale, and his said promise and undertaking, hath not (although he was afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do) as yet paid the said sum of —*l.* and —*l.*, or either of them, or any part thereof to the said plaintiff, but so to do hath hitherto wholly refused, and still doth refuse, to wit, at, &c. (*venue*) aforesaid.—
[*Add the following counts.*]

Second
count
more gen-
eral (e).

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And whereas also heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, at the special instance and request of the said defendant bargained and agreed to sell to the said defendant, and the said defendant then and there bought of the said plaintiff certain other premises with the appurtenances, to wit, one other messuage, and divers other buildings, and a certain other large quantity, to wit, — other acres of land with the appurtenances, at and for a certain price or sum of money, to wit, the sum of —*l.* upon the terms and conditions following, that is to say, that the said defendant should pay down immediately a deposit of —*l.* per cent. in part of the purchase-money, and should pay the remainder on or before the — day of — on having a good title; and that the said defendant *should have proper conveyances, together with such attested copies as might be thought necessary, at his own expense, on payment of the remainder of the purchase-money. And thereupon heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, in consideration of the premises, and that the said plaintiff, at the special instance and request of the said defend-

ant, had, &c. [*State mutual promises, as in first count.*] And although the said defendant in part performance of the said last-mentioned terms and conditions, and his said last-mentioned promise and undertaking, did then and there pay down a desposit of —*l.* per cent. in part of the said last-mentioned purchase-money; and although the said plaintiff before, and on the said — day of — was ready and willing to make and convey to the said defendant a good and sufficient title to the said last-mentioned premises, with the appurtenances, and to procure to be executed to the said defendant, at the expense of the said defendant, proper conveyances thereof, with such attested copies as should be thought necessary, according to the said terms and conditions, on payment of the remainder of the said purchase-money, and to perform and fulfill the said last-mentioned terms and conditions, and his said last-mentioned promise and undertaking in every thing on his part and behalf to be performed and fulfilled, to wit, at, &c. (*venue*) aforesaid; whereof the said defendant afterwards, to wit, on the day and year last aforesaid, there had notice; yet the said defendant not regarding the said last-mentioned conditions, nor his said last-mentioned promise and undertaking, but contriving and craftily and subtly intending to deceive and defraud the said plaintiff in this behalf, did not nor would, on or before the — day of — or at any other time, pay the remainder of the said purchase-money, or any part thereof to the said plaintiff, but then and there wholly neglected and refused so to do, and afterwards, to wit, on the — day of — in the year aforesaid, wholly refused to complete the said last-mentioned purchase, and wholly discharged the said plaintiff (*f*) from all further performance on his part of his said last-mentioned promise and undertaking, contrary to the said last-mentioned promise and undertaking of the said defendant, to wit, at, &c. (*venue*) aforesaid.—[*Other special counts should be added as particular circumstances may require; also add two counts for an estate bargained and sold, as ante, 39, omitting the statement *of the release, or other conveyance—a count for money paid—and the account stated, and breach.*]

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OF REAL
PROPERTY.

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For that whereas the said plaintiff, before and at the time of the making of the agreement and the promise and undertaking of the said defendant hereinafter next mentioned, was lawfully possessed, that is to say, for the residue of a certain term of years, to expire on, &c. (*h*) of a certain dwelling-house and premises, with the appurtenances, situate in the parish of — in the county of —, and the said plaintiff was also then lawfully possessed of certain wine and spirit licenses, and other licenses, and of certain liquors, and also of certain household furniture, fixtures, chattels, and other effects, then being on the said premises, to wit, at, &c. (*venue*) and thereupon, heretofore, to wit, on, &c. (*date of agreement or about it*) aforesaid, at, &c. aforesaid, by a certain agreement then and there made between the said plaintiff, of the one part, and the said defendant, of the other part, it was agreed by and between the said plaintiff

On a public house agreement against the vendee (*g*). First count for not procuring a broker to appraise the stock, &c.

(*f*) See *Jones v. Barkley*, Dougl. 684.— and 293, n. (*e*) and Dougl. 620, 684.— 6 B. & C. 506.—Ante, 283, note. Marsh. 332.

(*g*) See a form, 1 M. & P. 717. As to declarations of this nature, see ante, 291 note. (*h*) As to what is a variance in stating the Term, see 1 M. & P. 717; post, 564, note.

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and the said defendant that the said plaintiff should, &c.—[*Here copy the agreement verbatim to the following words :*—But that if either of them should neglect or refuse to perform the said agreement on his part, the party so neglecting or refusing should pay to the other of them the sum of 200*l.* on demand, by the said agreement mutually agreed to be the damages, ascertained and fixed (i) on breach thereof, and to *become a just debt, and recoverable in any of his Majesty's courts of law, as by the said agreement, reference being thereunto had, will fully appear. And, &c.—[*State mutual promises to perform the agreement as ante, 228, and proceed with the averment of plaintiff's performance of all conditions precedent, and which must depend on the words of the agreement. In the case from which this form was taken, the averment in this respect was as follows (k) :*—And although the said plaintiff was always from the time of the making of the said agreement, until and upon the said — day of — to wit, at, &c. aforesaid, ready (l) and willing to assign and convey his said estate and interest in the said dwelling-house and premises, with the appurtenances, to the said defendant, and to assign and deliver to the said defendant the said licenses, and to mend and allow for all the damaged windows of the said messuage and premises, with the appurtenances, and to clear the said premises from all incumbrances of rent and taxes, and to sell and deliver to the said defendant the said household furniture, fixtures, liquors, chattels, and other effects, at a fair appraisement thereof, as aforesaid, and also to deliver possession, and complete and fulfill the said agreement upon the said — day of — at the joint expense of himself and the said defendant, according to the effect and meaning of the said agreement in that behalf, and although the said plaintiff afterwards, to wit, on, &c. aforesaid, appointed and procured one E. F. a broker, on his part, in order to make a fair appraisement and valuation of the said household furniture, fixtures, liquors, chattels, and effects, and the said E. F. was then and there ready to appraise and value the same accordingly ; and although the said defendant then and there had notice of the premises, and was requested by the said plaintiff to appoint and procure some person as a broker on his part, to make such appraisement and valuation and to perform the said agreement on his part, according to the effect and meaning thereof ; yet the said plaintiff in fact saith, that the said defendant did not nor would, when he was so requested, as aforesaid, or at any other time, appoint or procure a broker on his part (m),

(i) As to the distinction between a *penalty* and *liquidated* damages, see 2 B. & P. 346, and 3 B. & P. 632.—13 East, 345.—1 H. Bla. 227.—Holt C. N. P. 46.—8 J. B. Moore, 244.—1 Bing. 302, S. C. 5 Taunt. 247.—3 Chit. Com. Law. 627.—4 Id. 3. n. and Chit. jun. Contr. 336, and the late important case, in 6 B. & Cres. 216, from which it should seem that all the parts of the instrument must be looked at in order to ascertain whether it was the intention of the parties that the sum named should be a penalty or liquidated damages ; and that where the sum which is to be a security for the performance of an agreement to do several acts, will, in case of breaches of the agreement be, in some instances too large,

and in others too small, a compensation for the injury thereby occasioned, that sum is to be considered a *penalty*.

(k) The averments of performance on the part of the plaintiff must always depend on each particular agreement ; those in the precedent are such as most frequently occur in actions on public-house agreements.

(l) As to the necessary averments in this part of the declaration, see 2 Marsh. 332.—Ante, 293, n.

(m) Where A. agreed to sell to B. his interest in a public house, and his furniture, &c. at an appraisement to be made by two appraisers, the same to be paid for on B.'s taking possession, which was to be done on or before the 25th of March, then next, and

to appraise and value the said household furniture, fixtures, liquors, and other effects or any of them, according to the effect and meaning of the said agreement, but hath hitherto wholly neglected and refused so to do, and by reason thereof, the said household furniture, fixtures, liquors, and other effects, still remain unvalued and unpaid for by the said defendant, to wit, at, &c. (*venue*) aforesaid, contrary to the said agreement and the said promise and undertaking of the said defendant, whereby the said defendant hath become liable to pay the said plaintiff the said sum of 200*l.* in the said agreement mentioned, when he the said defendant should be thereunto afterwards requested. Nevertheless the said defendant (although often requested so to do) hath not as yet paid the said sum *of 200*l.*, or any part thereof to the said plaintiff, but hath hitherto wholly neglected and refused so to do, and therein failed and made default, contrary to the form and effect of the said agreement and his said promise and undertaking, to wit, at, &c. (*venue*) aforesaid. And whereas also the said plaintiff, heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, was lawfully possessed of a certain other dwelling-house and premises, with the appurtenances, situate at, &c. for the residue of a certain term of years, to expire on, &c. (o) in which said last-mentioned dwelling-house and premises, the said plaintiff had carried on the business of a victualler, and the said plaintiff was then also in the possession of divers excise licenses, and the said plaintiff was also then and there possessed of certain other chattels and effects in the said dwelling-house and premises, whereof he the said defendant then and there had notice. And the said plaintiff being so possessed, thereupon, heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, in consideration (p) that the said plaintiff, at the like special instance and request of the said defendant, and for the sum of —*l.* then and there paid to the said plaintiff by way of earnest, and such further sum of money as the said last-mentioned chattels and effects should be valued at, upon a fair appraisement by a broker on each side, or their umpire, to be paid to the said plaintiff, as hereinafter mentioned, had agreed, &c.—[*State the substance of the agreement in the first count, with proper averments, and proceed as follows :*—] And although the said plaintiff afterwards, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, nominated and appointed one E. F. a broker, to value and appraise the said last-mentioned

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VENDEE
OF REAL
PROPER-
TY.

Breach,
non-pay-
ment of
the stipu-
lated dam-
ages (*).
[*298]
Second
count, for
prevent-
ing the
plaintiff's
broker
from
valuing.

30*l.* was paid by B. as a deposit: and he agreed that if he should not complete his part of the agreement, the sum so paid should be forfeited. The buyer and seller appointed appraisers respectively. On the 25th of March the two appraisers met, and the seller's appraiser was then informed, that the appraiser of the buyer could not conveniently, on that day, complete the valuation, but would finish the business the next day; no objection was then made to the proposed delay. The appraiser of the buyer went to the seller's premises the following day to make the valuation, but the seller refused to allow him so to do, and said he would not complete the contract: held, that under the circumstances, it was incumbent on the seller, if he intended to

insist that the contract should be completed on the day mentioned in the agreement to have notified such intention to the buyer: and not having so done, the latter was entitled to recover back the deposit, 8 B. & Cres. 575.

(n) When the contract was to pay stipulated damages, it is advisable thus to declare for them in one count, see 6 East, 567. —13 East, 345; for otherwise, the jury may give less. Another count may be added, omitting that part of the contract and breach. *Id. ib.*

(o) What a variance, post, 564. n.

(p) As to the necessity for the statement of the whole of the consideration on each side, see 6 East, 568, 9.

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VENDOR
OF REAL
PROPERTY.

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chattels and effects for and on behalf of the said plaintiff, and the said defendant then and there had notice of the premises last-aforsaid, and then and there nominated and appointed a certain other person, to wit, one G. H. as a broker to appraise and value the same chattels and effects, for and on behalf of the said defendant, and although the said E. F. and G. H. as such brokers as aforsaid, then and there began such valuation and appraisement, and the same would have been proceeded with and completed, if the said *defendant would have suffered and permitted the said G. H. to have proceeded therein; yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would (although often requested so to do) suffer or permit the said G. H. to proceed in or go on with the valuation and appraisement of the said last-mentioned chattels and effects on his part, but afterwards and before the completion thereof, to wit, on the day and year first aforsaid, at, &c. (*venue*) aforsaid, wholly refused to suffer or permit him so to do, and then and there countermanded and prevented the said G. H. from proceeding and going on with the said valuation and appraisement, and then and from thence hitherto hath neglected to nominate or appoint any other person to value or appraise the said last-mentioned chattels and effects for and on behalf of the said defendant, and hath hindered and prevented the completion of such valuation and appraisement as last aforsaid, and the same chattels and effects still remain wholly unpaid for by the said defendant, contrary to the said last-mentioned promise and undertaking of the said defendant, to wit, at, &c. (*venue*) aforsaid. — [*Add one count for a leasehold estate bargained and sold, ante, 39.—Two counts for goods bargained and sold, ante, 56.—Money paid, the account stated, and breach.*]

For the
penalty
in a writ-
ten agree-
ment to
take fix-
tures and
stock in
trade at
an ap-
praise-
ment (g).

[*300]

For that whereas the said plaintiff, before and at the time of making the agreement, promise and undertaking of the said defendant hereinafter next mentioned, was lawfully possessed of certain stock in trade, fixtures, chattels and effects of great value, as of his own proper goods and chattels, to wit, at, &c. (*venue*). And thereupon, heretofore, to wit, on, &c. (*day of agreement, or about it*) at, &c. (*venue*) it was agreed by and between the said plaintiff and the said defendant in manner following, that is to say, the said plaintiff then and there agreed to sell and deliver to the said defendant, who then and there agreed to purchase and take of the said plaintiff, the said stock, fixtures, chattels, and effects, at a fair appraisement, by a person agreeable to both parties, on, &c. then next, and to pay the money for the same on the day of appraisement; and it was then and there further agreed, that either party refusing to perform the *said agreement, should forfeit to the other the sum of 20*l.* (*r*); and the said agreement being so made, afterwards, to wit, on the day and year first aforsaid, at, &c. aforsaid, in consideration, &c. — [*Mutual promises, as ante, 228.*] And the said plaintiff, in fact saith, that under and by virtue of the said agreement, and in pursuance thereof, the said stock, fixtures, chattels, and effects, were, afterwards, to wit, on, &c. (*day of appraisement, or about it*) at, &c. aforsaid, appraised by a person agreeable to both parties, that is to say, by one E. F. at a large sum of money, to wit,

(g) 12 East, 1.—Post, 301, note (e).

(r) As to this stipulation for a penalty, see the note, ante, 296, n. 297. n.

AGAINST
VENUE
FOR NOT
TAKING
FIXTURES
AT A VAL-
UATION.

the sum of —*l.* lawful money of Great Britain, whereof the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid had notice; and although the said plaintiff was then and there willing to deliver the said stock, fixtures, chattels, and effects to the said defendant, upon his paying the said sum of —*l.* to the said plaintiff for the same, and then and there requested the said defendant to take the said stock, fixtures, and chattels, at such appraisement as aforesaid, and to pay him the said sum of —*l.* for the same; and although the said plaintiff hath always, from the time of the said agreement, hitherto well and truly performed and fulfilled the same in all things therein contained on his part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof, to wit, at, &c. (*venue*) aforesaid; yet the said plaintiff in fact saith, that the said defendant did not, nor would, at the said time, when he was so requested as aforesaid, or at any time afterwards, take the said stock, fixtures, chattels and effects, or any part thereof, at such appraisement as aforesaid, or pay the said sum of —*l.* or any part thereof, to the said plaintiff, but wholly neglected and refused so to do, and therein failed and made default, whereby, and according to the form and effect of the said agreement, the said defendant forfeited and became liable to pay to the said plaintiff, the said sum of —*l.* in the said agreement in that behalf mentioned, to wit, at, &c. aforesaid; nevertheless, the said defendant (although often requested) hath not, as yet paid the said sum of —*l.* or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, and therein failed and made default, contrary to the form and effect of the said agreement and his promise and undertaking aforesaid, to wit, at, &c. (*venue*) aforesaid.

Second
count, for
general
damages
for not tak-
ing fix-
tures, &c.
at an ap-
praise-
ment.

And whereas also, heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then and there agreed to sell and deliver to the said defendant, certain other stock in trade, fixtures, chattels and effects of the said plaintiff, of great value, in manner hereinafter mentioned, he the said defendant undertook, and then and there faithfully promised the said plaintiff to take the said last-mentioned stock, fixtures, *chattels and effects, at a fair appraisement, by a man agreeable to both parties, on, &c. then next, and to pay the money for the same on the day of appraisement; and the said plaintiff in fact saith, that afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, the said last-mentioned stock, fixtures, chattels and effects were fairly appraised by a man agreeable to both parties, that is to say, by the said E. F. at a large sum of money, to wit, the sum of —*l.* of like lawful money, whereof the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) had notice; and although the said plaintiff was then and there ready and willing to deliver the said last-mentioned stock, fixtures, chattels and effects, to the said defendant, upon his paying the said sum of —*l.* to the said plaintiff for the same, and then and there requested the said defendant to take the said last-mentioned stock, fixtures, chattels, and effects, at such appraisement as last aforesaid, and to pay him the said sum of —*l.* for the same: yet the said plaintiff in fact saith, that the said defendant did not nor would, at the said time when he was so re-

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VENUE
FOR NOT
TAKING
FIXTURES
AT A VAL-
UATION.

quested as last aforesaid, or at any time afterwards, take the said last mentioned stock, fixtures, chattels and effects, or any part thereof, at such appraisement as aforesaid, or pay the said sum of —*l.* or any part thereof, to the said plaintiff, but wholly refused and neglected so to do, to wit, at, &c. (*venue*) aforesaid.—[*Add counts for goods bargained and sold, ante, 56, money paid, account stated, and breach.*]

[*302]
On an agree-
ment between
out-going
tenant a-
gainst in-
coming,
for not
paying
amount of
valuation
of crops,
labor, ma-
nure, &c.

For that whereas, before and at the time of the making of the agree-
ment, and the promise and undertaking of the said *defendant hereinafter
next mentioned, the said plaintiff was lawfully possessed of a certain
farm, lands, and premises, with the appurtenances, situate in the parish of
—— in the county of —— as tenant thereof, for a certain term then un-
expired, and at the expiration of which said term, the said plaintiff was
about to quit and yield up the said farm, lands, and premises, with the
appurtenances, to and in favor of the said defendant, as the succeeding
tenant thereof, and on which said farm, lands, and premises, he the said
plaintiff had, before then, laid and spread divers large quantities of dung
and manure, and there were then growing and being on the said farm di-
vers large quantities of turnips, corn, *grass, herbage, and underwood,
and the said plaintiff was then also lawfully possessed of divers large
quantities of corn and grain in the straw, hay, dung, manure, fixtures,
chattels, and effects then lying and being upon and about the said farm,
with the appurtenances, and of great value, to wit, of the value of —*l.*

(s).
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(s) See other forms, 2 Wentw. 52, 56. 12 East, 1.—Post, 305, 7. A custom that tenants shall have the way-going crops, after the expiration of their terms, is good. Dougl. 201; and see Holt, C. N. P. 197.—3 J. B. Moore, 536 (1). But this custom does not entitle the tenant to remuneration for his growing crops from the landlord or in-coming tenant, if there be any express stipulation between the out-going tenant and his landlord, inconsistent with such usage of the country, 16 East, 71.—1 Taunt. 19.—1 Mer. 15.—2 B. & Ald. 746. A custom that a tenant may leave these crops in the barns, &c. of the farm for a certain time after the lease is expired, and he has quitted the premises, is a good custom, and the landlord may distrain corn so left for rent in arrear, after six months have expired from the determination of the term. 1 H. Bla. 5. See further as to the tenant's right to emblements, &c.—4 Bing. 207. As to what erections an out-going tenant is entitled to remove, see 2 East, 88.—3 East, 38.—1 Leach, Crown Law, 389.—2 B. & A. 165.—4 J. B. Moore, 281.—2 D. & R. 1.—5 B. & A. 826, S. C.—2 Stark. 403.—2 Chit. Com. Law, 268. If a tenant in a trade has covenanted to leave all erections, he cannot remove any, though erected for the purpose of the trade. 1 Taunt. 19.

But where the out-going tenant has cove-
nanted with his landlord to leave manure,
&c. on the farm, and to sell it to the in-
coming tenant at a valuation, the out-going
tenant nevertheless retains his property in
such manure, &c. and he may maintain
trespass or trover against the in-coming
tenant if he remove and use them before such
valuation, 16 East, 116. The right to the
usual way-going crop may be confined or
removed by the agreement between the
landlord and tenant, and though the in-
coming tenant may in general maintain an
action against the off-going for a breach of
the custom of the country, yet the custom
of the country can have no place where
the off-going tenant holds under a lease ex-
pressly making a different provision, 16
East, 71. 1 Taunt. 19.—1 Meriv. 15.—2
B. & A. 747. See also Holt's C. N. P. 197.
—3 J. B. Moore, 536.

Form of Declaration.—If there be an ex-
press agreement between the parties which
is set out in the declaration, it must be stat-
ed with accuracy, 12 East, 1; but the plain-
tiff in this action may recover under the gen-
eral indebitatus count, when only personal
property was sold, but not so if the valuation
included labor, sowing, &c. in which case
the declaration must be special. *Id. ibid.*

(1) Stultz v. Dickey, 5 Binn. 295. Van Dorens v. Everitt, 2 South 285. The custom in Pennsylvania, is confined to fall grain, sowed in the autumn, before the expiration of the lease, and cut in the summer after it determines. Demi v. Boosler, 1 Penn. 224.

to wit, at, &c. (*venue*) aforesaid ; and the said plaintiff being so possessed thereof, heretofore, to wit, on, &c. (*day of agreement or about it*) at, &c. (*venue*) it was agreed between the said plaintiff and the said defendant, that the said plaintiff should leave on the said premises, and the said defendant should take and purchase of the said plaintiff the said dung and manure so laid on the said farm as aforesaid, and the said turnips, corn, grass, herbage, and underwood, so growing and being thereon, and that the said plaintiff should sell and deliver to the said defendant the said hay, dung, manure, fixtures, chattels, and effects, and the said defendant thereby agreed to pay for the same at a fair valuation, to be made by certain persons, that is to say, by E. F. then and there named and appointed by and on behalf of the said plaintiff and G. H. then and there named and appointed by the said defendant to value the premises.—[*Then state mutual promises as ante 228 and proceed as follows.*]:—And the said plaintiff in fact saith, that afterwards, to wit, on, &c. at, &c. (*venue*) under and by virtue of the said agreement, the said dung and manure, so laid on the said farm as aforesaid, and the said turnips, corn, grass, herbage, and underwood, and the said other hay, dung, and manure, fixtures, chattels and effects, were fairly valued by the said E. F. and G. H. at a certain sum of money, to wit, the sum of—*l.* whereof the said defendant afterwards, to wit, on the day and year last aforesaid, had notice, to wit, at, &c. (*venue*) aforesaid : And the said plaintiff further saith, that he, confiding in the said agreement and promise and undertaking of the said defendant did afterwards, to wit, on the day and year first aforesaid, at, &c. (*venue*) leave on the said premises the said dung and manure, so laid thereon as aforesaid, and the said turnips, corn, grass herbage, and underwood, so growing and being thereon as aforesaid ; and the said plaintiff did then and there sell and deliver to the said defendant the said hay, dung, and manure, fixtures, chattels and effects, so lying and being upon and about the said farm with the appurtenances as aforesaid ; and the said defendant hath had and received the benefit thereof to his own use, to wit, at, &c. (*venue*) aforesaid ; yet the said defendant not regarding the said agreement, nor his said promise and undertaking, hath not paid to the said plaintiff the said sum of—*l.* or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to wit, at, &c. (*venue*) aforesaid.—[*Add the following counts.*]

BY OUT-
GOING
AGAINST
IN-COMING
TENANT.

And whereas also the said plaintiff, before and at the time of making the promise and undertaking of the said defendant hereinafter next mentioned, was lawfully possessed of a certain other farm, with the appurtenances ; and in which said last-mentioned farm, he the said plaintiff had before then laid divers large quantities of muck, and there were then growing and being on the same farm, divers large quantities of turnips, grass, herbage, and underwood : and the said plaintiff was then also possessed of divers large quantities of corn and grain in the straw, hay, muck, fixtures, chattels and effects of great value, then growing and being upon and about the same farm, with the appurtenances, to wit, at, &c. (*venue*) aforesaid ; and being so possessed, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant would relinquish and give up the possession of the said last-mentioned farm, with the appur-

Second
count, not
stating
the valuation,
but
an en-
gagement
to pay the
value, &c.

BY OUT-
GOING
AGAINST
IN-COMING
TENANT.

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tenances, to the said defendant, in order that he the said defendant might hold and enjoy the same, as tenant thereof, in lieu and stead of the said plaintiff and would suffer and permit the said defendant to have the benefit of the said muck, so laid upon the said farm as aforesaid, and to have and take to his own use the said turnips, grass, herbage, and underwood, so growing and being thereon, and the said straw and chaff arising from the threshing and dressing of the said corn and grain, and would sell and deliver to him the said defendant, the said hay, muck, fixtures, chattels and effects so lying and being upon and about the said farm, with the appurtenances, he the said defendant undertook, and then and there faithfully promised the said plaintiff to make all due and customary allowances to the said plaintiff, as between in-coming and out-going tenants, for and in respect of the said muck, so laid on the said farm as aforesaid, and of the said turnips, grass, herbage, and underwood, so growing and being thereon; and also for and in respect of the threshing, dressing, and carting of the said corn and grain, and likewise to pay to the said plaintiff for *the said hay, muck, fixtures, chattels, and effects, so lying and being upon and about the said farm, with the appurtenances, so much money as he the said plaintiff should therefore reasonably deserve to have of the said defendant when he the said defendant should be thereunto afterwards requested. And the said plaintiff avers, that he, confiding in the said last-mentioned promise and undertaking of the said defendant did afterwards, to wit, on the day and year first aforesaid, at, &c. (*venue*) relinquish and give up the possession of the said farm, with the appurtenances, to the said defendant, in order that the said defendant might hold and enjoy, and that he the said defendant accordingly held and enjoyed the same as tenant thereof, in lieu and stead of the said plaintiff, and did suffer and permit the said defendant to have, and that the said defendant accordingly had the benefit of the said muck, so laid on the said farm as aforesaid; and did also suffer and permit the said defendant to receive and take, and that he the said defendant did accordingly receive and take to his own use the said turnips, grass, herbage, and underwood, so growing and being on the said farm, and also the straw and chaff arising from the threshing and dressing of the said corn and grain, and did sell and deliver to the said defendant the said hay, muck, fixtures, chattels and effects so lying and being upon and about the said farm, with the appurtenances; and the said plaintiff further saith, that all due and customary allowances, as between in-coming and out-going tenants, for and in respect of the said muck, so laid on the said farm as aforesaid, and of the said turnips, grass, herbage, and underwood, so growing and being thereon, and also for and in respect of the threshing, dressing, and carting of the said corn and grain amounted to a large sum of money, to wit, the sum of —*l.* of lawful, &c.; and that he the said plaintiff therefore reasonably deserved to have of the said defendant for the said hay, muck, fixtures, chattels and effects, so lying and being in and about the said farm, with the appurtenances, another large sum of money, to wit, the sum of —*l.* of like lawful money, to wit, at, &c. (*venue*) of all which premises the said defendant afterwards, to wit, on the day and year first aforesaid, there had notice; and by reason thereof, and according to the tenor and effect of the said last-mentioned promise and undertaking, he the said defendant then and there became

liable to pay to the said plaintiff the said sums of money, when he the said defendant should be thereunto afterwards requested.

*And whereas also the said defendant afterwards, to wit, on, &c. (*any day before title of declaration*) at, &c. (*venue*) was indebted to the said plaintiff in the sum of—*l.* of like lawful money, for so much money, before that time, and then due and payable from the said defendant to the said plaintiff, upon, for, and in respect of the said plaintiff's relinquishing and giving up of a certain farm and premises, with the appurtenances, together with the use and benefit of divers large quantities of muck and dung, and other materials before then laid, and expended and bestowed thereon by the said plaintiff, and together also with divers large quantities of turnips, grass, herbage, and underwood, chattels, and effects, growing and being thereon, to and in favor of the said defendant, and at his special instance and request, and by the said plaintiff before then accordingly relinquished and given up to, and in favor of the said defendant; and being so indebted, he, the said defendant, &c.—[*Conclude this count as usual, ante, 37; add counts for crops and goods and chattels sold, work and labor, money paid, had and received, account stated, and breach.*]

BY OUT-
GOING
AGAINST
IN-COMING
TENANT.
Third
count, in-
debitatus
assumpsit,
for the
crops, &c.

For that whereas the said plaintiff, before and at the time of the making of the promise and undertaking of the said defendant, hereinafter next mentioned, was lawfully possessed of a certain farm, lands, and premises, with the appurtenances, situate in the county of — and held the same as tenant thereof to E. F. and on which said farm, lands, and premises, he the said plaintiff, had before that time laid divers large quantities of manure, and expended divers large sums of money, and done, performed, and bestowed work and labor by himself and his servants, and otherwise, in ploughing, harrowing, manuring, sowing, and otherwise cultivating and improving divers parts thereof, and the said plaintiff was also possessed of divers large quantities of manure and effects thereon, to wit, at, &c. (*venue*); and thereupon, heretofore, to wit, on, &c. (*day of agreement, or about it*) at, &c. (*venue*) aforesaid, in consideration of the premises, and that the said plaintiff, at the like special instance and request of the said defendant, would relinquish and give up to the said defendant, the possession of the said farm, lands, and premises, with the appurtenances, and the benefit of the said manure, and of the said monies so expended, and the said work and labor so done, performed, and bestowed as aforesaid, at [Lady Day] then next, and would leave the said manure in and upon the said farm, lands, and premises, with the appurtenances, for the use of the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to pay him so much money as A. B. and C. R. should ascertain and determine to be a due and proper sum of money to be therefore paid to the said plaintiff; and the said plaintiff avers, that he, confiding in the said promise and undertaking of the said plaintiff, did afterwards, to wit, at Lady Day aforesaid, relinquish and give up to the said defendant the possession of the said farm, lands, and premises, with the appurtenances, and the benefit of the said manure, and of the said monies so expended, and the said work and labor so done, performed, and

The like
in another
form, by
an out-go-
ing
against an
in-coming
tenant, for
amount of
a valuation
made by third
persons,
of manur-
ing and
cultivat-
ing the
farm, and
of fix-
tures, &c.
(c).

[*306]

(t) See notes to form, ante, 301.

BY OUT-
GOING
AGAINST
IN-COMING
TENANT.

bestowed as aforesaid, and did then and there leave the said manure in and upon the said farm, lands, and premises, with the appurtenances, for the use of the said defendant; and the said plaintiff further saith, that the said A. B. and the said C. R. after the making of the said promises, &c. to wit, on, &c. at, &c. (*venue*) aforesaid, in pursuance of the said reference of the said plaintiff, and the said defendant did ascertain and determine that the said defendant should therefore pay to the said plaintiff, for and in consideration of the premises, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of —*l.* as and for the due and proper sum of money to be therefore paid to the said plaintiff, to wit, at, &c. (*venue*) aforesaid; of all which, &c.—[*Notice to defendant, and liability to pay on request.*—][*The second count similar to the first, but more general. In the third count the manure was not mentioned. In the fourth nothing was said of the reference and award, but merely that defendant promised to pay what plaintiff reasonably deserved to have.—Add common counts for work and labour, and materials, crops sold, goods sold, money paid, had and received, and breach.*]

[*307]
The like
by out-go-
ing
against
in-coming
tenant, for
fixtures
left by
plaintiff
on the
premises
(u).

*For that whereas the said plaintiff, before and at the time of the making the promise and undertaking of the said defendant, hereinafter next mentioned, was lawfully possessed of a certain farm, lands, and premises, situate in the county of S. and on which said farm, lands, and premises, he the said plaintiff had erected and made divers erections and buildings, to wit, of great value, to wit, of the value of —*l.*; and which, at the time of the making of the said promise and undertaking of the said defendant, hereinafter mentioned, remained and continued on the said farm, lands, and premises, to wit, at, &c. (*venue*); and the said plaintiff was about to quit and give up possession of the said farm, lands, and premises, and the said defendant was about to become tenant thereof, and thereupon, heretofore, to wit, on, &c. at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would relinquish and give up the said buildings and erections to the said defendant, and would leave the same to the said defendant in and upon the said farm, lands, and premises, and would suffer and permit the said defendant to have and take the same to his own use, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to pay him for the said buildings and erections so much money as he the said plaintiff should therefore reasonably deserve to have of the said defendant, when he the said defendant should be thereunto afterwards requested. And the said plaintiff avers, that he confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, relinquish and give up the said buildings and erections to the said defendant, and did leave the same in and upon the said farms, lands, and premises, with the appurtenances, and did suffer the said defendant to have and take the same to his own use, to wit, at &c. (*venue*) aforesaid. And the said plaintiff in fact saith, that he therefore reasonably deserved to have of the said defendant the sum of —*l.*; whereof the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, there had notice.—[*Add indebitatus counts, as ante, 40, and counts for goods sold and delivered, and account stated, and breach.*]

(u) See note to form, ante, 301.

For that whereas heretofore, to wit, on, &c. (*any day about the time of the breach complained of*;) at, &c. (*venue*) the said defendant had become, and was tenant to the said plaintiff, of a certain messuage, farm, and premises, with the appurtenances, in the county of ——— on certain terms, that is to say, that [*Here set out such parts of the agreement between the parties which have reference to the breach complained of, and which may be thus:*] the said defendant should and would spend, use and employ on the said farm and premises, 'the hay, straw, dung, and compost, which should grow, arise, or be made thereon, during the continuance of the said tenancy.—[*So stating any other stipulation broken and complained of.*] And in consideration thereof, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would spend, &c.—[*So again stating the stipulation broken.*] And the said plaintiff avers, that the said defendant was and continued tenant to the said plaintiff, of the said messuage, farm, and premises, with the appurtenances, under and by virtue of the said tenancy, and upon the terms aforesaid, for a long time, to wit, until and upon the — day of, &c. (*or "from thence hitherto," as the case is*), to wit, at, &c. (*venue*). Yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff, in this behalf, did [*here state the breach of the stipulation complained of, which may be thus*] did not nor would spend, use and employ, on the said farm and premises, the hay, straw, dung, and compost, which grew, arose, and was made thereon, during the said tenancy; but on the contrary thereof, afterwards, to wit, on the day and year first aforesaid, and on divers other days and times afterwards, and before the commencement of this suit, at, &c. (*venue*) took and carried away, off and from the said farm and premises divers large quantities, to wit, — loads of hay, — loads of straw, — loads of dung, and — loads of compost, which had grown, arisen, and been made, on the said farm and premises, during the said tenancy, and spent, used, employed, and consumed the same elsewhere and off the said farm and premises, to wit, at, &c. (*venue*) aforesaid.

BY LAND-
LORD
AGAINST
TENANT.
Landlord
against
tenant, for
the breach
of an ex-
press
agree-
ment to
consume
straw on
premises,
&c. (w).

For that whereas before the making of the promise and undertaking hereafter next mentioned, to wit, on the 29th day of September, in the

Against a
tenant
who held

(w) When there is a written agreement not under seal, containing a stipulation, for the breach of which the action is brought, one count may be on the agreement, stating mutual promises and the breaches, according to the terms of the agreement, see 2 Bla. Rep. 840, and the other as above. The law implies a contract on the part of a tenant, that he will occupy a farm, &c. in a tenant-like manner, and assumpsit may be supported for the breach of such implied contract in the form, post, 307, 312.—5 T. R. 373. 4 East, 154. But as the law will not imply a contract on the part of a tenant from year to year to repair generally, or do any particular act, but merely to conduct the farm in a tenant-like manner, a declaration stating that the defendant *had become* and was tenant to the plaintiff of a farm, and that in *consideration thereof*, the defendant undertook to keep the premises in

repair, or to do any other particular act not implied by law, is bad on general demurrer, 1 Marsh. 567.—6 Taunt. 300, S. C.—Holt C. N. P. 7. *sed vide* 2 B. & C. 273.—3 D. & R. 522, S. C.

When a tenant holds the possession of premises after the expiration of a lease, by the permission of his landlord, he impliedly engages to observe such of the covenants contained in the lease, as are applicable to a tenancy from year to year, though the remedy must be assumpsit, or case, 1 Hen. Bla. 99.—1 T. R. 162.—5 T. R. 471.—1 Esp. Rep. 57.—6 East, 530; and in such case it may be advisable, in one count, to state the covenants in the lease that such lease was determined, that the defendant had become tenant, subject to, and on the terms of the lease, and his assumpsit to perform the covenants. 1 Hen. Bla. 99; as in form, post.

BY LAND-
LORD
AGAINST
TENANT.

the pre-
mises in
question
after the
end of a
lease, on
the terms
of such
lease, for
not re-
pairing,
&c. (z).

year of our Lord 1823, to wit, at, [London] (*venue*) the said defendant was possessed of and in a certain messuage and premises, with the appurtenances, situate in the county of M. by virtue of a certain indenture before that time, to wit, on the 31st day of August, A. D. 1823, at [London] aforesaid, made between the said plaintiff of the first part, and the said defendant of the other part [*let this and the rest correspond with the indenture*] whereby, for the considerations therein mentioned, the said plaintiff did demise, lease, and set unto the said defendant, the said messuage and premises, with the appurtenances, to have and to hold the same unto the said defendant, from the 29th day of September then next ensuing the said 31st day of August, A. D. 1823, for and during unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended, at and under the rent thereby made payable from the said defendant; in which said indenture amongst other things, it was covenanted, promised, and agreed, by the said defendant, to and with the said plaintiff, that the said defendant should and would, at all times during the said term, at his own costs and charges, well and sufficiently repair, uphold, &c. [*here set forth the covenants, the subject-matter of which were not performed by defendant after the lease had expired*] as by the said indenture, reference being thereunto had, will more fully appear. And the said plaintiff in fact says, that the said defendant remained and continued possessed of the said messuage and premises, with the appurtenances, until the expiration of the said term, as tenant thereof to the said plaintiffs; and thereupon afterwards, and at and upon the expiration of the said term, to wit, on the 30th day of September, 1830, to wit, at [London] aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, would permit and suffer the said defendant to continue to occupy the said messuage and premises, with the appurtenances, and to become tenant thereof to the said plaintiff for and during the term of one year then next ensuing, and so on from year to year as long as the said plaintiff and the said defendant should respectively please, and in consideration that the said plaintiff, at the like instance and request of the said defendant, had undertaken and faithfully promised the said defendant to perform and fulfill all things during the time the said defendant should so continue such tenant from year to year to the said plaintiff as aforesaid, as had been covenanted, promised, and agreed on, and to observe and fulfill all such covenants, promises, and agreements, as had been made and concluded upon, in and under the aforesaid indenture, to be done, performed, and fulfilled, during the continuance of the said term of seven years thereby granted on the part and behalf of the said plaintiff, he the said defendant undertook, and then and

(z) See a form, 2 B. & C. 273. 3 D. & R. 522. S. C. A tenant holding over after the expiration of a lease, without any express understanding to the contrary, holds under the terms contained in such lease, so far as such terms can possibly be applicable to a tenancy from year to year, see 6 Esp. Rep. 106.—16 East, 74.—3 Taunt. 410.—4 Campb. 275. 3 Bing. 363.—5 T. R. 472.—3 B. & C. 483.—5 D. & R. 213, S. C. (*Toriano v. Young*, 6 Car. & P. 8; *aliter*, if party come in as an *under-tenant*. *id.* *ibid.*

And *quere* if a tenant holding over after a lease, impliedly stipulates to *keep in repair*, see 1 Marsh. 567. 6 Taunt. 300. S. C.; and *quere*, therefore, as to this form.) So where a party takes possession under an agreement for a lease, he may be treated as impliedly agreeing to become tenant from year to year on the terms of the agreement. *id.*—R. & M. C. N. P. 355.—3 B. & C. 478. 1 M. & P. 183. (And see *Buckworth v. Simpson*, 2 Tyr. 344.)

BY LAND-
LORD
AGAINST
TENANT.

there faithfully promised the said plaintiff to do, perform, and fulfill, during the time he should so continue tenant of the said messuage and premises to the said plaintiff, from year to year as aforesaid, all such agreements and covenants as had been made and agreed upon in and by the aforesaid indenture to be done, performed, and fulfilled on the part and behalf of the said defendant, during the continuance of the said term of seven years thereby granted; and the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the said 30th day of September, A. D. 1830, to wit, at London aforesaid, did permit and suffer the said defendant to continue to occupy the said messuage and premises with the appurtenances, and to become tenant thereof to the said plaintiff, for and during the term of one year, and so on from year to year, so long as the said plaintiff and the said defendant should respectively please, upon the terms aforesaid. And the said plaintiff in fact says, that the said defendant, by virtue of that permission, did continue such tenant for a year, and from year to year as aforesaid, of the said messuage and premises, with the appurtenance, to the said plaintiff, from thence hitherto to wit, at, [London] aforesaid; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, during the time he so continued such tenant from year to year as aforesaid, of the said messuage and premises, with the appurtenances as aforesaid, did not nor would, at all times during the continuance of the said defendant's said tenancy, at his own proper costs and charges, well and sufficiently repair, uphold, &c. [*here negative the performance of the repairs, according to the words used in the indenture of lease.—See form, post, 552, in covenant,*] according to his said promise and undertaking, but, on the contrary thereof, the said defendant, after the making of his said promise and undertaking, and during the continuance of the said defendant's said tenancy for a year, to wit, on the 30th day of September, A. D. 1830, and from thence hitherto suffered and permitted the said messuage and premises, together with all party and other walls, &c. [*as in indenture*] to be and continue, and the same were, for and during all that time, ruinous, dilapidated, fallen down, and in great decay, out of repair, and in bad order and condition, for want of well and sufficiently repairing, upholding, maintaining, glazing, paving, purging, scouring, cleansing, emptying, amending, and keeping the same in good order and tenant-like repair, and not from any damage happening thereto by fire [*according to the covenant in the indenture,*] contrary to his said promise and undertaking, to wit, at [London] aforesaid.—[*Add the following counts.*]

And whereas also before and at the time of the making of the promise and undertaking of the said defendant as hereafter next mentioned, the said defendant had become and was tenant to the said plaintiff of a certain other messuage and premises, with the appurtenances, on certain, amongst other terms and conditions, that is to say, that the said defendant should and would, at all times during the continuance of his said last-mentioned tenancy [*here set out the substance of the covenant broken, after the lease, which may be as follows:*] at his own costs and charges, well and sufficiently repair, maintain, amend, and in good order and tenantable repair keep the said last-mentioned messuage and premises,

Second
count,
more gen-
eral.

BY LAND-
LORD
AGAINST
TENANT.

and all party and other walls, fences, and drains thereto belonging, and all erections and buildings erected and built, or thereafter to be erected and built, upon the said premises or any part thereof, (damages happening thereto by fire only excepted.) And thereupon heretofore, to wit, on the 30th day of September, A. D. 1830, to wit, at [London] aforesaid in consideration of the premises, the said defendant undertook, and then and there faithfully promised the said plaintiff that he the said defendant should and would at all times during the continuance of the said last-mentioned tenancy, [*here again set out the substance of the covenant broken, as before*] at his own costs and charges, and well sufficiently repair, maintain, amend, and in good order and tenantable repair keep the said last-mentioned messuage and premises, and all party and other walls, fences, and drains thereto belonging, and all erections and buildings erected and built, or thereafter to be erected and built, upon the said premises or any part thereof (damages by fire only excepted.) And the said plaintiff in fact says, that the said defendant did continue such tenant of the said last-mentioned messuage and premises, with the appurtenances, to the said plaintiff, under the said last-mentioned tenancy, from the making of his said last-mentioned promise and undertaking, hitherto, to wit, at, [London] aforesaid; yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, during the time he so continued such tenant of the said last-mentioned messuage and premises, with the appurtenances, under the said tenancy as aforesaid, did not nor would, at all times during the continuance of the said defendant's said last-mentioned tenancy as aforesaid, [*here negative the performance of the covenant, which may be thus :*] at his own proper costs and charges, well and sufficiently repair, maintain, amend, and in good order and tenantable repair keep the said last-mentioned messuage and premises, and all party and other walls, fences, and drains thereto belonging, and all erections and buildings erected and built upon the said premises during the said term, (damages happening thereto by fire only excepted,) according to the said last-mentioned promise and undertaking, but on the contrary thereof, he the said defendant after the making of his said last-mentioned promise and undertaking, and during the continuance of the said defendant's said last-mentioned tenancy, to wit, on the 30th day of September, A. D. 1830, and from thence hitherto, suffered and permitted the said last-mentioned messuage and premises, together with all party and other walls, fences, and drains, thereto belonging, and all erections and buildings erected and built upon the said premises, to be and continue, and the same were, for and during all that time, ruinous, dilapidated, fallen down and in great decay, out of repair, and in bad order and condition for want of well and sufficiently repairing, maintaining, amending, and keeping the same in good order and tenantable repair, and not from any damage happening thereto by fire, contrary to his said last-mentioned promise and undertaking, to wit, at [London] aforesaid, and thereby the said plaintiff has been and is greatly injured and damnified, to wit, at, [London] aforesaid.—[*Add a general count for not keeping the premises in tenantable repair, as post, 312.*]

[*308]
Landlord

For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. was tenant to the said plaintiff, of a certain *farm, lands and premises,

with the appurtenances, situate in the parish of — in the county of —, and in consideration thereof, he the said defendant then and there undertook, and faithfully promised the said plaintiff to manage, use, and cultivate the said farm, lands, and premises, with the appurtenances, during the said tenancy, in a good and husbandlike manner (z) and according to the custom of the country where the said farm, lands, and premises were so situate as aforesaid. And the said plaintiff in fact saith, that the said defendant was and continued tenant to the said plaintiff of the said farm, lands, and premises, with the appurtenances, for a long space of time, to wit, from the time of the making his said promise and undertaking, until the — day of — A. D. 1811, (or, "hitherto") to wit, at, &c. (*venue*) aforesaid; yet the said defendant, not regarding his said promise and undertaking, but contriving, and wrongfully and unjustly intending to injure the said plaintiff in this behalf, did not nor would, during the continuance of the said tenancy as aforesaid, manage, use, or cultivate the said farm, lands and premises, with the appurtenances, in a good and husbandlike manner, and according to the custom of the country, where the said farm, lands, and premises were so situate as aforesaid, but on the contrary thereof, after the making of the said promise and undertaking, and during the continuance of the said tenancy, to wit,* in the successive years of our Lord — and — wrongfully and injuriously overcropped the said land, and cropped, planted, and sowed divers, to wit, — acres of the said farm, lands, and premises, with divers, to wit, two successive crops of wheat, barley, peas, beans, tares, and oats, that is to say, — acres, part thereof with wheat, — acres, other part thereof *with barley, — acres, other part thereof with

BY LAND-
LORD
AGAINST
TENANT.

—
against a
tenant
from year
to year, on
implied
contract
to use the
premises
in a hus-
band-like
manner,
and ac-
cording to
the cus-
tom of the
country
(y).
Breaches,
over-crop-
ping and
carrying
off ma-
nure, &c.

[*309]

(y) See Forms, Morg. 70 to 96. (3 Term Rep. 307. 4 East, 155; 1 Gale, 8: and Earl of Falmouth v. Thomas, 3 Tyr. 31. In that case the court held, that a count like this precedent, by assigning the breach generally, in *using the farm in a bad, improper, and unhusbandlike manner, without stating the particular acts of bad husbandry*, was sufficient, even on special demurrer, but at the same time recommended the plaintiff to amend, rather than incur the risk of a writ of error.) The law implies a promise on the part of a yearly tenant, that he will use the farm in a husbandlike manner, and according to the custom of the country where they are situate, 5 T. R. 373.—Holt, C. N. P. 7.—1 Marsh. 569; and an action against a tenant upon promises that he would occupy the farm "in a good and husbandlike manner, according to the custom of the country" is sustainable by showing that he had treated it contrary to the prevalent course of husbandry in that "neighborhood," as by tilling half his farm at once, when no other farmer there tilled more than a third, though many tilled a fourth; and it is unnecessary to show any precise definite custom or usage in respect of the quantity tilled. 4 East, 154.

When the plaintiff may declare as on a demise, see 13 East, 18. If the tenancy be under a lease, containing a covenant to repair, &c. and the lessee executed the same, or a counterpart, (see 4 Esp. Rep. 42.) the

remedy is by covenant, 1 J. B. Moore, 100.—7 Taunt. 392; and from the observations of Abbott, C. J. 5 B. & C. 603, it should seem case would lie in such case for permissive waste, but see Dyer, 198, b. pl. 53; at all events, case would lie if there were wilful waste, 2 Bla. Rep. 1111, see ante, vol. i. 124. A written agreement will exclude evidence of the custom, 1 Meriv. 15.—16 East, 71. A tenant agreeing to manage, &c., a farm as the former tenant did, is not bound in equity without notice. 1 Meriv. 15.

(z) A count stating that the defendant was tenant to the plaintiffs, and in consideration had promised to *use* lands in a husbandlike manner, and the proof was of an agreement to *farm* lands in a husbandlike manner, to be kept constantly in grass, it was held a fatal variance, 5 B. & C. 909.

(It seems the safer course, in the absence of any precise express agreement, or proof of a precise custom, to declare only on the *implied* contract to cultivate and use the farm and land in a *tenant-like manner*, and at all events not to aver any precise custom; for if there be an averment of a custom, and the tenant *takes issue on the existence of the custom*, and it be found for the defendant, the plaintiff will fail, although it was proved that the defendant mismanaged and injured the farm. Augustien v. Handson, 1 Gale, 8. 1 Crom. M. & R. 789; 5 Tyr. 333. S. C.)

BY LAND-
LORD
AGAINST
TENANT.

Second
breach, for
not con-
suming
straw, &c.
on farm.

peas, — acres, other part thereof with tares, and the residue thereof with oats, the same, according to the course of good husbandry, then and there being excessive and unreasonable crops for the said land, and contrary to the course of good husbandry, and the custom of the country where the said farm, lands, and premises were so situate as aforesaid, and contrary to the said promise and undertaking of the said defendant, to wit, at, &c. (venue) aforesaid. And the said plaintiff in fact further saith, that the said defendant, further discharging his said promise and undertaking, and further contriving and intending to injure the said plaintiff in this behalf, after the making of his said promise and undertaking, and during the continuance of the said tenancy, did not nor would spend, use, and employ on the said farm, lands; and premises, the hay, straw, soil, dung, compost, and manure, which grew, arose, and were made thereon, during the continuance of the said tenancy, as he, the said defendant, according to the course of good husbandry, ought to have done, but on the contrary thereof, he the said defendant, during the continuance of the said tenancy, to wit, on, &c. aforesaid, and on divers other days and times between that day and the — day of — at, &c. (venue) aforesaid, took and carried away, off and from the said farm, lands, and premises, divers large quantities, to wit, two hundred cart-loads of soil, two hundred cart-loads of straw, two hundred cart-loads of dung, two hundred cart-loads of compost, and two hundred cart-loads of manure of great value, to wit, of the value of 200*l.* and which had arisen and been made on the said farm, lands, and premises, during the said tenancy, and spent and consumed the same elsewhere than on the said farm, lands, and premises, or any part thereof, contrary to the course of good husbandry, and the custom of the country where the said farm, lands, and premises were so situate as aforesaid; and also contrary to the said promise and undertaking of the said defendant. By means of which said several premises, the said farm, lands, and premises, with the appurtenances, became and were greatly impoverished, and rendered less productive than the same otherwise would have been, and greatly deteriorated in value, to wit, at, &c. (venue) aforesaid. [*It may in some cases, be advisable to add a second count, similar to the first, leaving out what relates to the custom of the country, lands, &c.; and also to insert a count, as in *4 East, 155, ante, 307, stating the promise as in the first count, and a general breach of good husbandry, without stating the particulars. see 3 T. R. 307.*]

Breach for
ploughing
up grass
land, and
cropping
the land
without
manuring
the same.

[*Same as the above precedent, to the asterisk, and then proceed as follows:*]—On, &c. ploughed up and converted into tillage, a certain piece or parcel of land then in grass, called, &c. and parcel of the said farm and lands, and cropped and sowed the same without manuring or dressing the same with sand and other manure, as he the said defendant ought to have done, according to the course of good husbandry, and the custom of the country where the same farm, &c. were so situate as aforesaid; contrary to the course of good husbandry, and the custom of the country aforesaid, and to the said promise, &c. of the said defendant, to wit, at &c. (venue) aforesaid.

For tak-
ing suc-
cessive

[*Same as the above precedent, to the asterisk.*]—In the successive years of our Lord 1828, 1829, and 1830, wrongfully and injuriously cropped.

planted, and sowed a certain other piece or parcel of land, called, &c. part and parcel of the said farm and lands, with divers, to wit, four successive crops of corn, potatoes, and turnips, to wit, wheat, potatoes, turnips, and wheat; and also without manuring or dressing the said last-mentioned lands with sand or manure, as, according to the course of good husbandry, he the said defendant ought to have done, contrary to the course, &c. and custom, &c. where the said farm, &c. were so situate as aforesaid, and contrary to his said promise, &c. to wit, at, &c. (*venue*) aforesaid.—[Add a count for not using the premises in a tenantable way, upon the principle of that, post, 312.]

BY LAND-
LORD
AGAINST
TENANT.

—
crops,
without
manuring
the land.

*For that whereas heretofore, to wit, on, &c. (*day of letting, or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would demise and let to the said defendant a certain messuage, garden, and premises, with the appurtenances, situate in the county of — to hold the same to the said defendant, as tenant thereof to the said plaintiff, to wit, from the — day of — then next, for one whole year, and so from year to year, so long as the said plaintiff and defendant should respectively please, he the said defendant undertook, and then and there faithfully promised the said plaintiff that he the said defendant would, during the continuance of the said tenancy, keep the said messuage, garden, and premises, with the appurtenances, in good and tenantable repair, order, and condition. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid *did demise and let the said messuage, garden, and premises, with the appurtenances, to the said defendant, for

[*311]
Against
tenant for
keeping
and leav-
ing the
premises
out of re-
pair (a).

[*312]

(a) In this case also, if there were a written agreement, it may be as well to declare upon it, as recommended in the note to the precedent, ante, 307, note. When plaintiff may declare as upon a demise, see 13 East, 18. If the action be for not taking care of furniture, &c. see a precedent, post, 339.

It has been supposed that the law implies a contract on the part of a tenant from year to year, to keep the premises in a *tenantable* repair and not to commit waste. 1 Saund. 323 b. n. 7.—Co. Lit. 57. a. 7.—1 J. B. Moore, 100. He is not bound to make substantial and lasting or general repairs, such as putting a new roof on an old house, putting in new main beams, &c. 2 Esp. 589.—Co. Lit. 57 a.—2 Saund. 352, n. 7.—Holt, C. N. P. 7, 8.—2 Bla. Rep. 840.—2 B. & C. 278.—Chit. jun. Contr. 101. He is only impliedly liable to make fair and substantial repairs, such as putting in windows, &c. broken by him, so as to prevent waste and decay. *Id.* And it should seem that the law only implies a contract to use the premises in a *tenant-like* manner, and not to contract to keep the premises in repair, and consequently, where a tenant from year to year is sued for not repairing, an express contract must be stated in the declaration, and proved on the trial. 1 Marsh. 567.—6 Taunt. 301.—Holt. Rep. 7.—*Sed vide* 2 B. & C. 273.—3 D. R. 522, S. C.

If a tenant refuse to repair contrary to agreement, and his landlord (the plaintiff) who is himself a lessee, and bound under pain of forfeiture to keep the premises in repair, enter and repair them without the defendant's assent, the measure of damages in *assumpsit* for not repairing, shall be the sum expended, 2 B. C. 273.—3 D. & R. 523, S. C.: and if the landlord (the plaintiff) do not enter and repair, and be sued by his lessor, and the tenant refuse to repair or defend the action, the damages and costs recovered by the ground landlord against the plaintiff may form the measure of damages against the tenant. 3 B. & C. 533.—5 D. & R. 542, S. C. and see 5 B. & C. 603.

As to what fixtures a tenant may remove, and at what time, see 2 East, 88.—3 East, 38.—and cases cited in note, ante, 301.

It has been considered that *Case* may be supported against a tenant from year to year, for permissive as well as voluntary waste, see 2 Saund. 252 c., and the forms there given; and see 5 B. & C. 603.—*Sed vide* 7 Taunt. 392.—1 J. B. Moore, 100, S. C.—2 Bla. Rep. 1111.—*Case* cannot be supported for permissive waste against a mere tenant at will. 1 New Rep. 290.—1 Saund. 323 b. See more fully, ante, vol. i. Index, tit. "Waste."

BY LAND-
LORD
AGAINST
TENANT.

the time and upon the terms aforesaid, and that the said defendant was, and continued tenant to the said plaintiff of the said messuage, garden, and premises, with the appurtenances, under and by virtue of the said tenancy, for a long space of time, to wit., from the time of making his promise and undertaking aforesaid, until and upon the — day of, &c. Nevertheless the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would, after the making of his promise and undertaking, and during the continuance of the said tenancy, keep the said messuage, garden, and premises, with the appurtenances, in good and tenantable repair, order, and condition, according to his said promise and undertaking; but on the contrary thereof, he the said defendant, after the making of his said promise and undertaking, and during the continuance of his said tenancy, to wit, on the day and year first above mentioned, and from thence until and upon the said, &c. wrongfully and unjustly suffered and permitted the said messuage, garden, and premises, with the appurtenances, to be and continue, and the same were, for and during all that time, ruinous, prostrate, foul, and in bad and untenable repair, order, and condition, for want of good and needful and necessary repairing, cleansing, and amending thereof. And afterwards, to wit, on the day and year last aforesaid, he the said defendant wrongfully and unjustly yielded and delivered up to the said plaintiff the said premises so ruinous, prostrate, broken down, foul, and in bad and untenable order, repair, and condition as aforesaid, contrary to his said promise and undertaking to wit, at, &c. (*venue*) aforesaid.—[*Add the following count.*]

[*313]
Second
count, for
using the
premises
in an un-
tenant-
like man-
ner (b).

And whereas also heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the *said defendant had become, and then was, tenant to the said plaintiff of a certain other messuage, garden, and premises, with the appurtenances, he the said defendant undertook, and then and there faithfully promised the said plaintiff to use the said last-mentioned messuage, garden, and premises, with the appurtenances, in a tenant-like and proper manner, for, and during the continuance of the said last-mentioned tenancy. And although the said last-mentioned tenancy did continue and endure for a long space of time, to wit, from the day and year last aforesaid, until and upon, &c. (*or hitherto*) to wit, at, &c. (*venue*) aforesaid, yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and fraudulently intending to deceive and injure the said plaintiff, did not nor would, during the continuance of the said last-mentioned tenancy, use the said last-mentioned messuage, garden, and premise, with the appurtenances, in a tenant-like and proper manner; but on the contrary thereof, he the said defendant, during the continuance of the said last-mentioned tenancy, so improperly behaved and conducted himself in that behalf, and used the

(b) This count, founded on the implied contract, is sustainable against any tenant, however short his interest, Holt, C. N. P. 2—1 Marsh. Rep. 567.—4 East, 154.—4 T. R. 373; and though there be a special agreement (which is to be the basis of a future lease) containing several obligations, one of which is to keep the premises in

tenantable repair, this count will suffice, without setting out the agreement, which may be given in evidence to support this count. 2 Barn. & Cres. 273—3 Dow & Ry. 522. S. C. See a form for not taking care of furniture, post, 339. The action might be framed in *Case* for the breach of duty.

said last-mentioned messuage, garden, and premises, with the appurtenances, and the trees and chattels therein in so untenant-like and improper a manner, that by reason thereof the said last-mentioned messuage, garden, and premises, with the appurtenances, to wit, on the day and year first aforesaid, then and there became, and were, and still are, ruinous, broken down, destroyed, prostrated, foul, miry, and greatly dilapidated, and the trees of the said plaintiff growing in and upon the said last-mentioned premises, then and there became and were greatly damaged and spoiled, to wit, at, &c. (*venue*) aforesaid.—[*If plaintiff has expended any money in repairs, add an averment of damage to that effect, and counts for money paid and account stated, and breach.*]

BY LAND-
LORD
AGAINST
TENANT.

For that whereas, before and at the several times hereinafter mentioned, the said defendant held certain premises, *with the appurtenances, as tenant thereof, to one E. F. at and under a certain yearly rent, to wit, &c. payable by the said defendant to the said E. F. to wit, at, &c. (*venue*); and thereupon heretofore, to wit, on, &c. at, &c. (*venue*) in consideration that the said plaintiff, at the special instance, &c. had become and was tenant to the said defendant of the said premises, with the appurtenances at and under a certain yearly rent to wit, &c. therefore payable by the said plaintiff, to the said defendant he the said defendant undertook, and then and there faithfully promised the said plaintiff, during the continuance of the said last-mentioned tenancy, to indemnify and save harmless the said plaintiff from and against the payment of the said yearly rent so payable to the said E. F. as aforesaid, and from and against any distress, or action, costs, charges, damages, or expenses, which should or might be made, brought, arise, or happen, for or by reason of the non-payment thereof. And although the said tenancy of the said plaintiff was and continued for a long time after the making of the said promise and undertaking of the said defendant, to wit, until and upon, &c. (*or thence hitherto*), yet the said plaintiff in fact saith, that the said defendant not regarding his said last-mentioned promise and undertaking, but contriving and intending to defraud the said plaintiff in this behalf, did not nor would, during the continuance of the said tenancy of the said plaintiff as aforesaid, indemnify, or save harmless, the said plaintiff according to his said promise and undertaking, but wholly neglected so to do, to wit, at, &c. (*venue*) aforesaid, and by reason thereof, after the making of the said promise and undertaking of the said defendant, and during the continuance of the said respective tenancies, and whilst the said plaintiff occupied and enjoyed the said premises as such tenant as aforesaid, to wit, on, &c. (*day of distress, or about it*) at, &c. (*venue*) a certain distress was made by and on behalf of the said E. F. on certain goods and chattels of the said plaintiff, then in and upon the said premises, for a certain sum of money,

By tenant
against
landlord
on implied
contract, to
indemnify
tenant
against
payment
of ground
rent (c).
[*314]

(c) As to declarations for not indemnifying, see post, 316. A stranger, whose goods have been distrained, and who has paid the rent in money, may recover the amount of the rent so paid in assumpsit, on the common count for money paid. 8 T. R. 308. But to recover *damages* he must declare specially, see 11 East, 52. Assumpsit is not the remedy for the breach of a promise of this nature, if the demise to the tenant

be by deed. 5 B. & C. 789. But *Case* will, it seems, lie in all cases, and in some respects is the most preferable form of action. See *Id.* 589, where see a form in *Case* by a lessee against his assignee, for not indemnifying against repairs, whereby lessor recovered against lessee; and see a form in *Case*, post, 784. See also a form in *Covenant*, for breach of quiet enjoyment, post, 559.

BY LAND-
LORD
AGAINST
TENANT.

to wit, the sum of —*l.* then due and in arrear to the said E. F. for and in respect of the said yearly rent so payable to him as aforesaid, and by means of the premises he the said plaintiff was not only put to and suffered great trouble and inconvenience, but was forced and obliged to and did necessarily pay the said sum of —*l.*, together with the charges of the said distress, in the whole amounting to a large sum of money, to wit, the sum of —*l.*, and was and is, by means of the premises otherwise greatly injured and damnified, to wit, &c. (*venue*) aforesaid.—[*If the goods were sold under the distress, then state that fact accordingly.—Add the count for money paid—account stated—and breach.*]

ON GUAR-
ANTIES.

XXIV. ON GUARANTIES.

On a promise to be accountable for goods sold to a third person
(*d.*)

[*315]

For that whereas heretofore, to wit, on, &c. (*day of guarantee or about it*) at, &c. (*venue*) in consideration (2) that the said plaintiff, at the special instance and request of the said defendant, would (*here set out the terms of the guarantee as relates to the consideration for it. In the case upon which this form was framed it was thus*) [sell and deliver to one E. F. on credit, all such goods as he the said E. F. should have occasion for and require of the said plaintiff in *the way of his trade and business of a hemp merchant] he the said defendant undertook, and then and there faithfully promised the said plaintiff (*here set out the defendant's promise, which in the case upon which this form was drawn, was thus*) [to be accountable to the said plaintiff for whatsoever goods he the said plaintiff should sell and deliver to the said E. F. as aforesaid.] And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid (*here aver plaintiff's performance of the consid-*

(*d.*) See a form, 1 Rich. C. P. 471.—2 Lord Raym. 1085. Whenever the defendant is *collaterally* liable to pay for goods, &c. furnished to a third person (for the criterion of which, see 2 T. R. 80, 81.—3 Chit. Com. Law, 318 to 322.—1 Chit. Col. Stat. tit. *Frauds.*) (Vide Leonard v. Vredenburg, 8 Johns. Rep. 29.) his undertaking must be in writing under the 29 Car. 2. c. 3. s. 4, and must state the consideration of the defendant's undertaking, 5 East, 10—4 B. & A. 595—6 J. B. Moore, 86—1 Saund. 211 a; (Vide Simpson v. Patton, 4 Johns. Rep. 422. Jackson v. Rayner, 12 Johns. Rep. 291.—4 Cranch. 235.—5 Mass. Rep. 301 (1) (and the declaration must be special as above, and not merely for goods sold and delivered to the defendant, or bargained

and sold to him, and delivered to a third person at his request, 1 Saund. 211 a. b.—2 Campb. 215.—Ventr. 268, 293; but the declaration need not state that the contract was in writing. 1 Saund. 276, n. 1.—6 Bing. 259. (Vide Rogers v. Warner, 8 Johns. Rep. 119.) When the guarantee continues, see 12 East, 237.—2 Campb. 413, 436.—6 Bingh. 244, 276.—Chit. jun. Cont. 205.—3 Chit. Com. Law, 323; and for construction of guarantees, see *id.* 322. When party guaranteeing is discharged or released. 3 Chit. Com. Law, 324 to 327.—2 D. & R. 61.—1 B. & C. 10, S. C. D. & R. 337.—2 Swanst. 190.—4 J. B. Moore, 153. How far a surety may be relieved, 3 Chit. Com. Law, 328 to 335.

(1) See the note to *Ex parte Garden*, 15 Ves. Jun. 286. Am. Ed. 1822. 3 Brod. & Bing. 14. Packard v. Richardson, 17 Mass. 122.

(2) Where the guaranty is simultaneous with the original undertaking, and they form but one transaction, it is unnecessary to state the consideration, in the memorandum; the consideration passing between the creditor, and the principal debtor, is alone sufficient to support the promise of the guaranty, and may be proved by parol, 8 Johns. 29. 11 Johns. 221.

eration, and which may be thus, *mutatis mutandis*) sell and deliver to the said E. F. on certain credit, then and there agreed upon between the said plaintiff and E. F. certain goods of great value, which he the said E. F. then and there had occasion for and required of the said plaintiff, in the way of his trade and business, and at and for certain reasonable prices then and there agreed upon by and between the said plaintiff and the said E. F. (or, if no stipulated price, say, "at and for certain reasonable sums of money, amounting, &c.") amounting in the whole to a large sum of money, to wit, the sum of—*l.* of lawful money of Great Britain, and that although the said credit and the time for payment of the price of the said goods, by the said E. F. to the said plaintiff, hath long since elapsed, yet the said E. F. hath not (although he was afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do) (*e*) as yet paid to him the said sum of—*l.*, or any part thereof, but hath hitherto (*f*) wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid, of all which said premises the said defendant afterwards, to wit, on the day and year last aforesaid, there had notice; yet the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not as yet accounted to the said plaintiff, or paid the said sum of money, or any part thereof, for the said goods, or any part thereof (although he the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, was requested by the said plaintiff so to do), and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and the said sum of—*l.* still remains wholly due and unpaid to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—
[Add such special counts as may be necessary, varying the statement of the promise, and of the averments, so as to meet the evidence, and if there be any doubt whether the defendant be collaterally liable, add counts for goods bargained and sold—and sold and delivered—money had and received—and an account stated—and breach.]

ON GUAR-
ANTIES.

[*316]

See a form of Declaration, ante, 252.

On a guarantee to pay the debt of a third person, in consideration of forbearance.

ON PRO-
MISES TO
INDEMNIFY.

BY.

By acceptor of a bill of exchange for the accommodation of defendant, for not indemnifying plaintiff, &c.

(g).

XXV. ON PROMISES TO INDEMNIFY.

For that whereas heretofore, to wit, on, &c. (*date of bill*) at, &c. (*venue*) in consideration that the said plaintiff, for the accommodation, and at the special instance and request of the said defendant, would accept a certain bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and made and

(e) Cro. Jac. 500. 1—Cro. Eliz. 85, 91. 2 Hen. Bla. 131.—1 Stra. 88. *Sed quære*, if it be the necessary averment.

(f) It seems not necessary to deny a payment by the third person. 1 Sid. 178.—2 Rol. 738, 1. 15.

(g) See other forms for not indemnifying, post, 318 to 321. — 1 Wentw. 288.

Plead. A. 38. See a similar action and the pleadings, 3 Wils. 346.

A contract to indemnify is generally implied, as on the part of a defendant to indemnify a person who becomes bail for him, 3 Wils. 262; or a surety for him at his request, 2 T. R. 105.—7 T. R. 568.—2 B. & P. 268; or a broker on making a distress,

ON PRO-
MISES TO
INDEMNIFY.

drawn by the said defendant on the said plaintiff, *and whereby the said defendant required the said plaintiff [two] months after the date thereof, to pay to the order of the said defendant the sum of [50*l.*] as for value received (*h*), and would deliver the same so accepted to the said defendant, in order that he the said defendant might negotiate the same for his own proper use and benefit, he the said defendant undertook, and then and there faithfully promised the said plaintiff [to provide money for the payment of the said bill of exchange when the same should become due and payable, and] to indemnify and save harmless the said plaintiff from any loss or damage, for or by reason of his acceptance of the said bill of exchange as aforesaid. And the said plaintiff avers, that he confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on, &c. the day and year aforesaid, at, &c. (*venue*) aforesaid, accept the said bill of exchange, and deliver the same so accepted to the said defendant for the purpose aforesaid; and although the said bill of exchange, so accepted as aforesaid, was afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, negotiated by the said defendant for his own proper use and benefit, and the same hath long since become due and payable, to wit, at, &c. (*venue*) aforesaid; yet the said defendant not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this behalf, did not nor would [provide money for the payment of the said bill of exchange when the same became due and payable, nor] indemnify or save harmless the said plaintiff from any loss or damage, for or by reason of his acceptance of the said bill of exchange as aforesaid, but wholly neglected and refused so to do; by means and in consequence whereof, the said plaintiff as such acceptor of the said bill of exchange as aforesaid, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, was called upon, and forced and obliged to pay, and did then and there pay to one — the holder thereof, the said sum of money in the said bill of exchange specified, together with certain interest thereon, and the costs of a certain action before then brought in the court of our lord the king, before the king himself (*i*) on the *said bill of exchange, by the said — against the said plaintiff, in the whole amounting to a large sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, and thereby also the said plaintiff sustained and incurred divers

[*318]

though not regular. 4 Bingham. 74. If the thing to be done be obviously illegal, no contract to indemnify can be implied, but otherwise where the act is not apparently illegal. 8 T. R. 186, and see in general as to contracts of indemnity, 4 Bingham. 74.

When the debt of the principal has been paid by the surety, a common count for money paid is sufficient; but when a surety has not actually paid the debt in money, but has only given security for it, or he has sustained any costs or damage, the declaration should be special. 3 East, 169. 8 T. R. 610.—7 T. R. 204.—11 East, 52—6 Bingham. 299. By declaring specially, a set-off may sometimes be avoided. 5 B. & A. 95.

What is a legal damnification, so as to

enable a surety to sue, see 8 East, 593.—3 Wils. 13.—1 Atk. 262; and as to how far a surety has his remedy against the principal, 3 Chit. Com. Law, 330; of the remedies by one surety against another. 3 Chit. Com. Law, 335.—3 D. & R. 112. 2 Swanst. 185.

(A) The bill of exchange may be described concisely, according to its legal effect.

(i) If the defendant was arrested state the fact accordingly, and let the averment of damage be according to the fact. All these costs, &c. are recoverable. 1 Atk. 262.—3 Wils. 13.—8 East, 593. But it seems the plaintiff cannot recover more than taxed costs, see 4 Taunt. 7.—Ry. & Moo. C. N. P. 419.—*Sed vide* 1 Stark. 306.

costs and expenses, amounting, to wit, to the sum of —*l.* in and about the settling and putting an end to the said action; and by means of the said several premises the said plaintiff hath been and is damaged to the amount thereof, to wit, at, &c. (*venue*) aforesaid.—[*Add another count, omitting the words between brackets, relative to the defendant's providing money for the payment of the bill, and if only one count be desired, then it may as well be framed omitting those words.—Add all the money counts, and account stated, and common breach, applicable to those counts.*]

ON PROMISES TO INDEMNIFY.

For that whereas, heretofore, to wit, on, &c. (*date of note or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, and for his accommodation, would make and deliver to one T. H. his certain promissory note in writing, and thereby promise to pay to the said T. H. or order, on demand, the sum of —*l.* as for value received by the said plaintiff, of the said T. H. he the said defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would save harmless and indemnify the said plaintiff against the payment of the said sum of —*l.* in the said note mentioned, and all charges and expenses he should bear, sustain, or be put unto, by reason of his making and delivering of his said note to the said T. H.; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, did make his certain promissory note in writing, bearing date the same day and year aforesaid, and did thereby promise to pay to the said T. H. or order, on demand, the said sum of —*l.* as for value received by the said plaintiff of the said defendant, and that he the said plaintiff did deliver the said *note, so made by him as aforesaid, to the said T. H.; and the said plaintiff further saith, that the said defendant, not having saved harmless, and indemnified the said plaintiff against the payment of the said sum of —*l.* in the said note specified by the payment thereof, or of any part thereof, to the said T. H.; and the said sum of money being wholly unpaid, he the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) was compelled and obliged to pay, and did then and there pay to the said T. H. the said sum of —*l.* in the said note mentioned and contained, being then and there due and payable by virtue of the said note, whereof the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid had notice; nevertheless the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not yet repaid to the said plaintiff the said sum of —*l.* or any part thereof, nor in any manner indemnified him on account of his having paid the same, (although so to do he the said defendant afterwards, to wit, on the day and year aforesaid, and oftentimes since hath been requested by the said plaintiff, to wit, at, &c. (*venue*) aforesaid,) but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to wit, at, &c. (*venue*) aforesaid (*l.*)—[*Add the money counts, account stated, and breach.*]

By the maker of a promissory note made for the accommodation of defendant, for not indemnifying, &c. (k).

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(k) There is an implied promise to indemnify in this case. Ante, 316, n. (g).

(l) If a plaintiff has sustained any special damage, it should be here inserted, see ante, 316.

ON PRO-
MISES TO
INDEMNIFY.

For not
indemnifying bail
to the
sheriff
(m).

For that whereas heretofore, to wit, on, &c. (*teste of writ*) a certain writ of our said lord the king, called a [*non omittas *capias ad respondendum,*] directed to the sheriff of —, was issued out of the court of our said lord the king of the bench at Westminster, in the county of Middlesex, by which said writ our said lord the king commanded, &c. [*set out the writ, the indorsement for bail, the delivery to the sheriff, and the arrest, as post, 445, Declarations in Debt on Bail-bonds.*] And thereupon, afterwards, and before the return of the said writ, on, &c. (*date of bail-bond*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant would, together with one J. T. become bail and surety for him the said defendant, and would, as such bail and surety, seal, and as his act and deed deliver to the said R. B. as such sheriff as aforesaid, his certain writing obligatory, commonly called a bail-bond, in the penal sum of —*l.* of good and lawful money of Great Britain, to be paid to the said sheriff, with a condition to the said writing obligatory subscribed, that if, &c. [*here set out the condition verbatim*] he the said defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would perform the said condition of the said writing obligatory, and save harmless and indemnify the said plaintiff from all payments, damages, costs, and expenses, which he the said plaintiff should or might incur, bear, pay, sustain, or be put unto, by reason or by means of his so becoming bail and surety for the said defendant as aforesaid; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the said, &c. at, &c. (*venue*) aforesaid, seal, and as his act and deed deliver to the said R. B. as such sheriff as aforesaid; the said writing obligatory, called a bail-bond, conditioned as aforesaid, yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would appear before the said justices of the bench of our said lord the king at Westminster aforesaid, in eight days of the Purification aforesaid, in the said condition mentioned, to answer to the said I. L. and W. E. in the said plea in the said condition mentioned: according to the form of the said condition, by reason whereof the said writing obligatory became forfeited, and the said plaintiff thereby became liable to the said sheriff in the said penal sum of —*l.*; and thereupon the said R. B. as such sheriff as aforesaid, afterwards, to wit, on, &c. at, &c. at the request, costs, and charges of the said I. L. and W. E. the plaintiffs in the said suit, by an indorsement on the back of the said writing obligatory, duly assigned the said writing obligatory to the said I. L. and W. E. And

(m) See 3 Wils. 262.—2 Bl. Rep. 794. Bail may recover against the principal any expenses they may have incurred in taking him into custody for the purpose of surrendering him. 5 Esp. N. P. C. 171.—*Sed vide* 1 C. & P. 434. But it is a general rule, that to support the common count for money paid, the defendant must have been originally liable to the debt, or money paid by the plaintiff. 1 M'Clel. 48, 25. Therefore it is proper to declare specially on the implied contract to indemnify, as above. Where the surety has paid expenses or incurred a loss beyond the amount of the

debt, or money for which he became bound for the defendant: and where a surety takes a bond or other specific security from his principal, he cannot resort to the count for money paid on the implied assumpsit. 2 T. R. 100, 104.—8 Taunt. 365.—2 J. B. Moore, 411, S. C.—Chitty jun. Cont. 180. See a form, for not indemnifying bail below, 4 B. & A. 435. In assumpsit for not indemnifying bail an averment that judgment was recovered against plaintiff, in Michaelmas Term, and evidence that the judgment was in Hilary Term, is no variance. 4 B. & A. 435: and see 3 B. & C. 2.

the said plaintiff further saith, that thereupon, afterwards, to wit, in — Term, in the year of, &c. a certain action was commenced and prosecuted on the said bail-bond, in the said court of our said lord the king of the bench aforesaid, at Westminster, aforesaid, by and at the suit of the said I. L. and W. E. as such assignees of the said R. B. so being such sheriff as aforesaid, against him the said plaintiff, and such proceedings were thereupon had in the said last-mentioned action in the said court, that afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, he the said plaintiff, as such bail or surety for the said defendant as aforesaid, in order to prevent any further proceedings in the said action so commenced and prosecuted against him, was called upon, and forced and obliged to pay a large sum of money, to wit, the sum of —*l.* as and for the debt for which the said action was so commenced and prosecuted as aforesaid, and also another sum of —*l.* as and for the costs of the said action, so commenced and prosecuted as aforesaid, against the said plaintiff, by the said I. L. and W. E.; and also he the said plaintiff, by means of the premises, was forced and obliged to incur and sustain great costs, charges, and expenses, amounting, in the whole, to a large sum of money, to wit, &c. in and about the defense of the said action, so commenced and prosecuted against him as aforesaid, and in and about the setting and putting an end to the said action as aforesaid, to wit, at, &c. aforesaid, of all which said premises the said defendant afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, had notice; yet the said defendant, disregarding his said promise and undertaking, so by him made as aforesaid, and contriving and intending to injure the said plaintiff, did not nor would save harmless or indemnify the said plaintiff from the said payments, damages, costs, charges, and expenses, so by the said plaintiff incurred as aforesaid, but hath hitherto wholly refused and neglected, and still neglects and refuses, to wit, at &c. (*venue*) aforesaid.—[*Second count more general than the first, stating, that in consideration that the plaintiff *would seal, and as his act and deed deliver a certain bail-bond, conditioned for the appearance of the said defendant, on, &c. he the said defendant undertook, &c. to indemnify, &c. and then proceed as in first count.*]

See a form of declaration, ante, 313.

ON PROMISES TO INDEMNIFY.

[*321] By tenant against landlord, for not indemnifying him against payment of ground-rent.

XXVI. ON PROMISES TO MARRY.

For that whereas heretofore, to wit, on, &c. (*any day about the time of the promise, or before title of declaration*) *at &c. (*venue*) in consideration

ON PROMISES TO MARRY.

(*) See other forms in Pl. A. 47, 99.—2 Rich. C. P. 128.—2 Wentw. 487 to 492, and index to vol. ii. This action is sustainable only where the contract to marry is mutual, 1 Roll. Ab. 22. 1. 5.—1 Sid. 180.—1 Lev. 147.—Carth. 467.—Freem. 95. But though one of the parties be an infant, yet the contract to marry will be obligatory on the other side, 2 Stra. 937.—Bac. Ab. Infant.—(Willard v. Stone, 7 Cow. Rep. 22.)—The action is sustainable by a man against a

woman, Carth. 467.—1 Salk. 24.—5 Mod. 511. But an executor cannot sue, 2 M. & S. 408. It is not necessary that the time of marriage should be specified. Carth. 467. A promise to marry is not within the Statute of Frauds, 1 Stra. 34.—1 Ld. Raym. 316.—Bul. N. P. 230, acc.—3 Lev. 65. *semb. cont.* Nor need it be stamped, 2 Stark. 351. It is necessary to show mutual promises in the declaration. If the promise were to marry on a particular day, it should

For not marrying (n). First count to marry upon request.

[*322]

ON THE
MATTER TO
WARRANT.

that the said plaintiff being then and there sole and unmarried, at the special instance and request of the said defendant, had then and there undertaken, and faithfully promised the said defendant to marry him the said defendant, when she the said plaintiff should be thereunto afterwards requested, he the said defendant undertook, and then and there faithfully promised to marry the said plaintiff, when he the said defendant should be thereunto afterwards requested. And the said plaintiff avers, that she, confiding in the said promise and undertaking of the said defendant, hath always from thence hitherto remained and continued, and still is, sole and unmarried, and hath been, for and during all the time aforesaid, and still is (o), ready and willing to marry him the said defendant, to wit, at, &c. (venue) aforesaid, whereof the said defendant hath always there had notice*. And although the said plaintiff after the making of the said promise and undertaking of the said defendant, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, requested the said defendant to marry the said plaintiff, yet the said defendant not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and injure the said plaintiff in this respect, did not nor would, at the said time when he was so requested as aforesaid, or at any time before or afterwards, marry the said plaintiff, but hath hitherto wholly neglected and refused and still doth neglect and refuse so to do, to wit, at, &c. (venue) aforesaid.

Second
count, for
marrying
another
woman
(p).

*If the defendant have married another woman, no request need be averred, but the count is as the last as far as the asterisk, except in omitting the statement that the plaintiff "still is ready to marry defendant," and then concludes with the following allegation:—*Yet the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and injure the said plaintiff in this behalf, after the making of his said promise and undertaking, to wit, on, &c. at, &c. (venue) afore-

be so described in one count, as post, 334.—What request is sufficient, see 1 Ld. Raym. 387.

As to the evidence where the promise of the man was proved, and no actual promise of the woman, evidence of her carrying herself as consenting and improving his promise, was held sufficient, 3 Salk. 16.—1 Salk. 24, n. b.—2 Car. & P. 553.—And where A. stated to the father of the plaintiff that he had pledged himself to marry his daughter in six months, or in a month after Christmas, although that proof varied from the promises laid in the special counts, it was considered evidence from which a jury might infer a promise to marry generally, 1 Stark. 82.

In an action for breach of promise of marriage, the promises declared on were, first, to marry on request; second, the like, assigning for breach that the defendant had married another; thirdly, to marry within a reasonable time, and lastly, to marry generally. The proof was that defendant had said he would marry the plaintiff in July—held, that, notwithstanding this variance, the jury were warranted by the evidence in

inferring a promise to marry generally, and that the plaintiff was entitled to recover on the last count of the declaration, 1 M. & P. 239.

To support the action, if the defendant has not married another, there must be evidence of an offer to marry on the part of the plaintiff, and a refusal by the defendant, but if the plaintiff's father go to the defendant and ask him if he means to fulfil his engagements to his daughter, and he reply "certainly not," this will suffice.—2 Car. & P. 634.—See 2 D. & R. 55. A bill in equity lies to compel the defendant to disclose whether he promised to marry. For. Exch. Rep. 42.

If the intended husband or wife turn out on enquiry to be of bad character, that is a legal defense for the other party, Holt, C. N. P. 151.—4 Esp. Rep. 256.—1 Car. & P. 350. And as to what may be shown in mitigation of damages, Id. and see as to damages, 1 Yo. & Jerv. 477.

(o) As to this allegation, see 2 Keb. 265. 283.

(p) See form, Morg. 142.

said, wrongfully and injuriously married a certain other person, to wit, one — contrary to his said last-mentioned promise and undertaking so by him made as aforesaid, to wit, at, &c. (*venue*) aforesaid.

ON PROMISES TO MARRY.

And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff being then and there unmarried, at the like special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant, to marry him the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to marry her the said plaintiff in a reasonable time then next following. And the said plaintiff avers, that she confiding in the said last-mentioned promise and undertaking *of the said defendant, hath always hitherto remained and continued, and still is sole and unmarried, and hath been, for and during all the time last aforesaid, and still is, ready and willing to marry the said defendant, to wit, at, &c. (*venue*) aforesaid, whereof the said defendant hath always had notice (q); and although a reasonable time for the said defendant to marry her the said plaintiff hath elapsed since the making of the said last-mentioned promise and undertaking of the said defendant, and although the said plaintiff, after such reasonable time had elapsed, to wit, on, &c. (*day of request, or about it*) at, &c. (*venue*) aforesaid, requested the said defendant to marry the said plaintiff. Yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and injure the said plaintiff in this behalf, did not nor would, within such reasonable time as aforesaid, or when so requested as aforesaid, or at any other time, marry the said plaintiff, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid.—[If defendant has made a special refusal to marry, insert a count stating the fact, see 2 D. & R. 55.]

Third count, to marry in a reasonable time.

[*323]

And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff being then and there sole and unmarried, at the like special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to marry the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to marry the said plaintiff. And the said plaintiff avers, that she, confiding in the said last-mentioned promise and undertaking of the said defendant, hath always from thence hitherto remained and continued, and still is, sole and unmarried, and hath been, for and during all the time last aforesaid, and still is, ready and willing to marry the said defendant, to wit, at, &c. (*venue*) aforesaid; and although a reasonable time for the said defendant to marry the said plaintiff hath elapsed since the making of the said last-mentioned promise and undertaking of the said defendant, and al-

Fourth count, to marry generally (r).

(q) This count has been held good after verdict where it omitted the statement of the defendant's having had this notice, but it should seem that it ought to state it, or else a request to marry, or, a special refusal to marry, otherwise it would be bad on spe-

cial demurrer, 2 D. & R. 55.

(r) A promise to marry generally, is in point of law, a promise to marry within a reasonable time, 1 Stark. 82.—M. & R. C. N. P. 239.—Ante, 326, note (n).

ON PROMISES TO MARRY.

though the said plaintiff, after the making of the said last-mentioned *promise and undertaking of the said defendant, to wit, on, &c. (*day of request, or about it*) at, &c. (*venue*) aforesaid, requested the said defendant to marry her the said plaintiff, yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and injure the said plaintiff in this respect, did not nor would, at the said time when he was so requested as last aforesaid, or at any time before or afterwards, marry the said plaintiff, but, on the contrary thereof, he the said defendant, at the said time when he was so requested as last aforesaid, wholly refused then and there to marry her the said plaintiff, to wit, at, &c. (*venue*) aforesaid. —[If there has been any promise to marry at a particular time or place, add a count to meet same, and see next precedent.] To the damage, &c.

To marry at a particular time (1).

For that whereas heretofore, to wit, on, &c. (*day of promise, or about it*) to wit, at, &c. (*venue*) in consideration that the said plaintiff being then and there sole and unmarried, at the special instance and request of the said defendant, had then and there undertaken, and faithfully promised the said defendant to marry the said defendant, in [the latter part of February then next,] (*stating the time agreed on, according to the fact*), he the said defendant undertook, and then and there faithfully promised the said plaintiff to marry the said plaintiff, in [the latter part of February then next,] And the said plaintiff avers, that she, confiding in the said promise and undertaking of the said defendant in [the latter part of February next,] after making of the said promise and undertaking of the said defendant, and before and ever since, to wit, at, &c. (*venue*) aforesaid, was and hath been ready and willing to marry the said defendant, whereof the said defendant then and there had notice. Yet the said defendant, not regarding his said promise and undertaking, but contriving, and fraudulently intending craftily and subtly to deceive and injure the said plaintiff in this respect, did not nor would, in [the said latter part of February next,] after the making of his said promise and undertaking, or at any time before or afterwards, marry the said plaintiff, but hath hitherto wholly neglected, and still doth neglect so to do, and afterwards, to wit, on, &c. (*day of refusal, or about it*), at, &c. (*venue*) aforesaid, wholly declined and refused to marry the said plaintiff, and wholly discharged her from performing her said promise and undertaking, to wit, at, &c. (*venue*) aforesaid.

XXVII. ON PROMISES TO SERVE AND EMPLOY.

TO SERVE AND EMPLOY.

For not receiving a hired servant into defendant's service (a).

For that whereas heretofore, to wit, on, &c. (*day of promise, or about*

(a) See notes, ante, 74 : see other precedents, 2 Wentw. 505 to 531.—Index to vol. ii. Where the service has been actually

performed, the declaration may be for work and labor generally, Fitz. 302.—But where the defendant has refused to employ the

(1) Whether the promise to marry is *special*, as “after the death of the defendant's father,” it should in general be declared on with proper averments, *Atchinson v. Baker*, 2 Peake, 103; *Chit. jun. on Contr.* 2d edit. 426.

it,) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there agreed with the said defendant to enter into the service of the said defendant as a [lady's maid,] and to serve the said defendant in that capacity, *at certain wages, after the rate of—l. a year, to be therefore paid by the said defendant to the said plaintiff, during her continuance in such service, she the said defendant undertook, and then and there faithfully promised the said plaintiff to receive her into the service of the said defendant in the capacity aforesaid, and to retain and employ her in such service at the wages aforesaid. And the said plaintiff avers, that she, confiding in the said promise and undertaking of the said defendant, hath always been ready and willing to enter into the service of the said defendant, in the capacity aforesaid, and to serve her the said defendant in that capacity for the wages aforesaid. And although the said plaintiff, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, requested the said defendant to receive the said plaintiff into the service of the said defendant, in the capacity aforesaid, and to retain and employ her in such service at the wages aforesaid; yet the said defendant, not regarding her said promise and undertaking, but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this behalf, did not nor would, at the said time when she was so requested as aforesaid, or at any time afterwards, receive the said plaintiff into the service of the said defendant, or retain or employ her in such service, at the wages aforesaid, or otherwise howsoever, but wholly neglected and refused so to do: whereby the said plaintiff not only lost and was deprived of all the profits and emoluments which might and would otherwise have arisen and accrued to her from entering into the service of the said defendant, but also lost and was deprived of the means and opportunity of being retained and employed by and in the service of divers other persons, and remained and continued wholly out of service and unemployed for a long space of time, to wit, for the space of three months then next following, and was and is otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid, &c.—[*Add counts for work and labor, account stated, and breach.*]

BY SERV-
VANT FOR
NOT EM-
PLOYING.
[*325]

For that whereas the said defendant, before and at the time of making his promise and undertaking hereinafter next mentioned, was master and commander of a certain ship or vessel called the — which said ship or vessel was then lying and being at — in the West Indies, and bound on a voyage from thence to the port of London, to wit, at, &c. (*venue*). *And whereas also the said defendant, so being master and commander of the said ship or vessel as aforesaid, heretofore, to wit, on the — day of — in the year of our Lord — at — in the West Indies, that is to say, at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would enter into and on board of the said ship or vessel, and would go the said voyage as boatswain therein, he the said defendant undertook, and then and there faithfully promised the said plaintiff to suffer and permit him so to do, and to pay

By a mar-
iner for
not suffer-
ing him to
go as boat-
swain on
board de-
fendant's
ship, and
paying
him his
wages.
[*326]

plaintiff, the declaration must in general be
special, 2 East, 145.—Cowp. 437.—4 Esp. M. & Ros. 54. S. C.; 1 Crom. M. & Ros.
Rep. 77.— (See precedents for turning
away, or ceasing to employ, after com-
mencement of service. 1 Gale, 72. 2 Crom.
20; 6 Car. & P. 15)

BY SAILOR
FOR NOT
EMPLOY-
ING.

him the sum of —*l.* three days after the arrival of the said ship or vessel in the said port of London. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the same day and year aforesaid, at — aforesaid, to wit, at, &c. (*venue*) aforesaid, enter into and on board of the said ship or vessel, and did go and proceed a part of the said voyage as boatswain therein, and was ready and willing to go and proceed therein the remainder of the said voyage, to wit, at, &c. (*venue*) aforesaid, whereof the said defendant then and there had notice; yet the said defendant not regarding his said promise and undertaking, in manner aforesaid made but contriving and fraudulently intending, craftily and subtly to deceive and injure the said plaintiff in this behalf, did not nor would suffer or permit the said plaintiff to go or proceed the remainder of the said voyage as boatswain in and on board of the said ship or vessel as aforesaid, but wholly neglected and refused so to do; and on the contrary thereof, he the said defendant, after the making of his said promise and undertaking aforesaid, and whilst the said ship or vessel was proceeding on her said voyage from — aforesaid, to wit, on the — day of — in the year aforesaid, on the high seas, to wit, at, &c. (*venue*) aforesaid, wrongfully and unjustly, without the license and consent, and against the will of the said plaintiff, caused and compelled the said plaintiff to go from and out of the said ship or vessel called the — in and on board a certain other ship or vessel in his majesty's service, and there left the said plaintiff, and caused him to be detained and prevented from returning to the ship or vessel called the — whereby the said plaintiff was hindered and prevented from going or proceeding the remainder of the said voyage in and on board of the said last-mentioned ship or vessel; nor did the said defendant, within three days after the arrival of the said last-mentioned ship or vessel in the port of London aforesaid, or at any time afterwards (although often requested so to do) pay the said sum of —*l.* or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, whereby the said plaintiff not only lost and was deprived of all the profit, benefit, and advantage which might and would have arisen and accrued to him from going and proceeding the remainder of the said voyage, in and on board of the said last-mentioned ship or vessel, but also suffered great hardship and inconvenience, and was put to great charge and expense of his monies, amounting to a large sum of money, to wit, the sum of 100*l.* in and about the procuring of a passage home to the port of London aforesaid, to wit, at, &c. (*venue*), aforesaid.—[*Add a count upon an executed consideration, common count for seamen's wages, as ante, 66, work and labor, money paid, account stated, and breach.*]

By a domestic
servant,
for turning
him away
without a
month's
notice (p).

For that whereas heretofore, to wit, on, &c. (*day of entering into*

(p) As to the necessity of declaring specially, see 2 East. 145. and the cases cited in the note, ante, 259. It should seem, that in general the common count would suffice, *Id.* 1 Stark. 198.—4 Camp. 375.—4 Bingham. 309. As to the right to turn away a servant at a month's notice, or without it, see ante, 65, 74. (1 Gale, 72. 2 Crom. M. & Ros. 54.) What is not a sufficient ex-

cuse for turning away a servant, see Burn, J. tit. "Servants." (1 Chit. Gen. Pract. 75 to 78, 81, 82. See a form of declaration for turning away before the expiration of a year, contrary to agreement. Snelling v. Huntingfield, 1 Crom. M. & Ros. 26; and a form of declaration and plea, Nowlan v. Ablett, 1 Gale, 72; and see a declaration by a warehouseman, hired for a year, or on

service, or about it) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would become and be the servant of the said defendant, to wit, in the capacity of a [footman] at and for certain wages, to wit, the wages of —*l. per annum*, he the said defendant undertook, and then and there faithfully promised the said plaintiff to retain and employ the said plaintiff in the said defendant's service, and in the capacity aforesaid, and at and for the wages aforesaid, and to continue him in such service and employ until the expiration of a month from and after notice or warning given by the said plaintiff, or the said defendant to the other of them, of his intention to determine and put an end to such service and employ, or else to pay him a proportionate part of the said wages for a month (*q*). And although the said *plaintiff, confiding in the said promise and undertaking of the said defendant, did, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, become and was the servant of the said defendant, to wit, in the capacity and on the terms aforesaid, and did continue in such service and employ of the said defendant for a long space of time, to wit, until, &c. (*day of discharge, or about it*) to wit, at, &c. (*venue*) aforesaid. And although the said plaintiff hath always been ready and willing, and then and there offered to continue in the said service and employ of the said defendant in the capacity aforesaid, and on the terms aforesaid, until the expiration of a month from and after notice or warning given by the said defendant to the said plaintiff, of his intention to determine and put an end to such service and employ as aforesaid; yet the said defendant not regarding his said promise and undertaking, did not nor would continue the said plaintiff in his said service and employ until the expiration of a month from and after notice or warning given by the said defendant of his intention to determine and put an end to such service and employ, but, on the contrary thereof, wholly neglected and omitted to give the said plaintiff notice or warning of his intention to determine and put an end to such service and employ, and then and there refused to suffer or permit the said plaintiff to continue in his said service and employ, and then and there discharged him the said plaintiff therefrom, without any notice or warning whatever, and hath from that time hitherto wholly neglected and refused to retain or employ the said plaintiff in his said service and employ, or pay him a proportionate part of the said plaintiff's wages for a month, to wit, at, &c. (*venue*) aforesaid; and by means thereof, he the said plaintiff hath lost and been deprived of all the wages, profits, and advantages, meat, drink, lodging, and necessities, which he otherwise might and would have derived and acquired from being continued in the said service of the said defendant; and the said plaintiff hath been, and is, by means of the premises, still wholly unemployed, to *wit, at, &c. (*venue*) aforesaid.— [Add counts on an executed consideration, common counts for wages, and work and labor, and account stated, and breach.]

BY SERV-
VANT FOR
DISCHARG-
ING HIM.

[*327]

[*328]

a general hiring, for turning him away before expiration of time and without any reasonable notice, several counts, *Fawcett v. Cash*, 3 Nev. & Man. 177; 5 Barn. & Adol. 904. S. C.)

(*q*) *Query* if the implied contract is not, that the servant shall at all events conduct

himself properly as a servant, (and the master as a master, otherwise that the servant may be turned away immediately; and at all events, that either party may put an end to the contract by a month's notice; and *query*, if the contract ought not to be so stated. See 1 Chit. Gen. Pract. 80.)

BY SER-
VANT FOR
DISCHARGE
HIM.
For pre-
venting
plaintiff
from com-
pleting a
work
which he
had un-
dertaken
on a writ-
ten agree-
ment.

For that whereas heretofore, to wit, on, &c. (*date of agreement*) to wit, at, &c. (*venue*) by a certain agreement then and there made between the said plaintiff and the said defendant, the said plaintiff agreed to [*here set out the agreement in the past tense (r)*] perform and complete the mason work, at the Regent's Circus, north end of Portland Place, in the New Road, at the following prices, finding all materials and labor, and to do the same to the satisfaction of the architect appointed to survey the same; that is to say, strait Portland kirb, twelve inches by ten inches, with rail holes, plugs and lead, including the stone for the brace bar, at seven shillings and five pence per foot, run circular ditto at eight shillings per foot, run bases for the lamp irons, two feet four inches and three quarters, by two feet four inches and three quarters, and twelve inches high, at two pounds each, including rail-holes, and to do the whole complete in all respects according to the drawings, and within the time specified in the specification delivered; and it was also then and there agreed between the said plaintiff and the said defendant, that he the said defendant should advance 12*l.*, in cash, for every hundred feet set complete, and the balance by bill at two months, after the accounts were adjusted; the whole of the Portland stone, kirb and gate basis on the south side of the whole line of the new road, from east to west, to be fixed and made complete, in all respects, on or before the 25th day of November, in the year aforesaid, and the half-circular area to be made complete on or before the 25th day of December in the same year; and part of the work having then already been done by G. H. it was thereby further understood, that the same should be ascertained by L. M. of, &c. surveyor, on the part of the said defendant, and E. F. of, &c. on the part of the said plaintiff; and in case any dispute should arise, the same to be decided by their umpire, and the balance paid to the said G. H. as well as the money then already advanced to him by the said defendant, was to be accounted for by the said plaintiff, and deducted from the balance due to him, when completed but at present to draw only for the setting the same; and the said agreement being so made, afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant, had then and there undertaken, and faithfully promised the said defendant to perform and fulfill the said agreement, in all things on the said plaintiff's part *and behalf to be performed and fulfilled, he the said defendant undertook, and then and there faithfully promised the said plaintiff to perform and fulfill the said agreement in all things on the said defendant's part and behalf to be performed and fulfilled; and although the said plaintiff hath always, from the time of the making of the said agreement, performed and fulfilled all things on his part and behalf in the said agreement to be performed and fulfilled, and did afterwards, to wit, on the day and year first aforesaid, at, &c. (*venue*) enter upon and commence the said work, and for that purpose did procure and find all materials and labor necessary for performing the same, and did the same in part, to wit, one thousand two hundred feet thereof, to the satisfaction of the architect appointed to survey the said

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(r) It is sufficient to show so much of the contract only, as is necessary to show clearly the defendant's failure, 4 Taunt. 286.—6

East, 564. This cause was tried, and plaintiff obtained a verdict.

FOR PRE-
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PLAINTIFF
COMPLET-
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WORK.

work, and hath always been ready and willing to perform and complete the whole of the said work, in pursuance of the said agreement, of all which said premises the said defendant hath had notice, to wit, at, &c. (*venue*) aforesaid; yet the said plaintiff in fact saith, that the said defendant, contriving and wrongfully intending to injure the said plaintiff, did not nor would perform the said agreement, nor his said promise and undertaking, but thereby craftily and subtly deceived the said plaintiff in this, to wit, that the said defendant did not nor would advance the said sum of 12*l.*, in cash, for each of the said one hundred feet, set complete, but on the contrary thereof, hath hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid; and the said defendant further disregarding the said agreement, and his said promise and undertaking, afterwards, to wit, on, &c. to wit, &c. (*venue*) aforesaid, did not nor would permit or suffer the said plaintiff to proceed to complete the said work, and then and there wholly hindered and prevented him from so doing, and then and there wrongfully discharged the said plaintiff from any further performance or completion of his said agreement and promise and undertaking, whereby the said plaintiff hath lost and been deprived of the profits and advantages which he otherwise might and would have derived and acquired from the completion of the said works, to wit, at, &c. (*venue*) aforesaid. [*Add a count to the same effect, not as on an agreement, but as upon an executory consideration, and other counts for work and labor, goods sold, money paid, and account stated and breach.*]

*For that whereas heretofore, to wit, on, &c. (*date of agreement*) at, &c. (*venue*) by a certain agreement then and there made by and between the said plaintiff and the said defendant, it was agreed, that the said defendant should take down a certain messuage or dwelling-house, situate at, &c. and should build two other messuages or dwelling-houses for the said plaintiff, agreeably to certain plans thereof, then in the possession of the said defendant, and according to the particulars and in manner following; that is to say, that the said old house should be taken down and the bricks cleaned and worked up, &c.—[*Set out the agreement in the past tense.*] And the said agreement being so made afterwards, to wit, on, &c. at, &c.—[*Mutual promises, as ante, 528 (t).*] And although the said plaintiff hath always, &c.—[*State plaintiff's general performance of the agreement, and special performance of any precedent condition.*] Yet the said plaintiff in fact, saith that said defendant contriving, and wrongfully and unjustly intending to injure the said plaintiff, did not nor would perform the said agreement, nor his said promise and undertaking, but thereby craftily and subtly deceived the said plaintiff in this, to wit, that the said defendant wholly neglected and omitted to do and perform certain works which were requisite and necessary to be done and performed under and by virtue of the said agreement, and according to the tenor and effect, true

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On a building agreement for not performing part of the work, and for performing the residue inartificially (s).

(s) See next form, also Morgan, 188. The terms of the agreement are to be stated as in the agreement. The precedents which may be classed under this head are very numerous, see the Index to 2 Wentw.—When the action is founded on a written agreement, it is usual to set the same out, as to which, see 6 East, 569. If the declaration

be framed as in the second count of the above precedent, it must either be shown that the defendant was to have a reward for the work to be performed, or that he actually performed it, and unskilfully, 5 T. R. 142. 4 B. & Cress. 345.

(t) But this statement is not absolutely necessary, see 2 New Rep. 62.

FOR NOT
PERFORM-
ING
WORKS.

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intent, and meaning thereof, that is to say, to pull down, &c.—[*Here specify the breach, according to the fact.*] And the said defendant also thereby craftily and subtly deceived the said plaintiff in this, to wit, that the said defendant afterwards, to wit, on, &c. and on divers other, &c. did and performed certain other works which were requisite and necessary to be done and performed under and by virtue of the said agreement, in a bad, inartificial, and unworkmanlike manner, contrary to the form and effect of the said agreement, *and of his said promise and undertaking, to wit, at, &c. (*venue*) aforesaid.

Second
count
more gen-
eral.

And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there retained and employed the said defendant to take down a certain other messuage and dwelling-house, with the appurtenances, and to erect and build divers, to wit, two other messuages or dwelling-houses, with the appurtenances, in lieu thereof, for the said plaintiff, agreeable to certain plans and particulars then and there made and agreed upon by and between the said plaintiff and defendant, for certain reasonable reward to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to erect and build the said last-mentioned messuage or dwelling-house, with the appurtenances, agreeable to the said last-mentioned plans and particulars, with good and proper materials, and in a sound, substantial, and workmanlike manner; and although the said defendant did afterwards, and before the commencement of this suit, erect and build the said last-mentioned messuages or dwelling-houses, with the appurtenances, for the said plaintiff, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would erect or build the said last-mentioned messuages or dwelling-house, with the appurtenances, for the said plaintiff, agreeable to the said last-mentioned plans and particulars, with good and proper materials, and in a sound, substantial, and workmanlike manner, but wholly neglected and refused so to do, and on the contrary thereof, he the said defendant erected and built the said last-mentioned messuages or dwelling-houses, with the appurtenances, different from and contrary to the said last-mentioned plans and particulars and with bad and improper materials, and in a slight, weak, inartificial, and unworkmanlike manner, contrary to the form and effect of the said last-mentioned promise and undertaking to wit, at, &c. (*venue*) aforesaid.—[*Add another count similar to the last, omitting the words in italics, and such other counts as may be applicable to the case, and money had and received, account stated, and breach.*]

On an a-
greement
to fix a
steam en-
gine, in a
complete
working
condition.

For that whereas the said plaintiff, before and at the time of the making of the agreement, and the promise and undertaking of the said defendant hereinafter next mentioned, was, and from thence hitherto hath been, and still is, a miller and mealman, and the trade and business of a miller and mealman hath, for and during all that time used and exercised, and carried on, and still doth use, and exercise, and carry on, to wit, at, &c. (*venue*) and thereupon heretofore, to wit, on, &c. (*date of agreement*) at, &c. (*venue*) aforesaid, by a certain agreement then and there made between the said plaintiff and the said defendant, he the said defendant, for

and in consideration of the sum of —*l.* agreed by the said plaintiff to be paid, at the days and time thereafter mentioned, did agree to and with the said plaintiff, in manner following :—[*Here set out the agreement, and afterwards mutual promises, as ante, 228.*—]—And although the said plaintiff hath always from the time of making the said agreement, hitherto well and truly performed and fulfilled the same in all things, on his part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof, and hath furnished the necessary brickwork for the framing and setting-up of the said boiler, together with the fire-bars, plumbers, painters, and stonemason's work, of and for the said engine, and fixing and setting up the same, and hath always been ready and willing to pay for the said engine as aforesaid, yet the said defendant, not regarding the said agreement, nor his said promise and undertaking so by him made, in manner and form aforesaid, but contriving, and fraudulently intending to injure the said plaintiff in this respect, has not, (although often requested so to do,) at his own costs and charges, made, fixed, and set up, or caused to be made, fixed, and set up, in complete working condition, of good materials and workmanship, on the premises of the said plaintiff, in the said agreement above alluded to, one steam-engine, of seven-horse power, &c. together with all necessary utensils and implements for working the same, excepting as in the said agreement is excepted, but on the contrary thereof, after the making of the said agreement, and his said promise and undertaking, to wit, on, &c. aforesaid, fixed and set up, in the said premises above alluded to, a steam-engine not in complete working condition, and of much less power than a seven-horse power engine, to wit, a two-horse power engine, and with a boiler and pump of insufficient size, and not set *together with requisite and necessary utensils and implements, according to the said agreement, to be furnished by the said defendant, by him so made as aforesaid, to wit, at, &c. (*venue*) aforesaid ; by reason whereof the said engine hath been and is of very little use to the said plaintiff and the said plaintiff hath not, since the said engine was so fixed and set up as aforesaid, been able to grind such *large quantities* of corn and grain as he might and would have ground, had the said defendant made, fixed, and set up an engine, according to the terms, true intent, and meaning of the said agreement, and his said promise and undertaking, and the said plaintiff hath thereby also lost and been deprived of divers great gains and profits, which would have accrued to him, from grinding such quantities of corn and grain, in the whole, amounting to a large sum of money, to wit, the sum of —*l.* and also by means whereof, a certain large quantity, to wit, 1000 bushels of corn, which he, the said plaintiff, confiding in the said agreement, had purchased, in order that the same might be ground by means of the said engine, remains wholly unground, and has been, and is greatly damaged and spoiled, and reduced in value ; by means whereof, and also on account of the said engine, with the appurtenances, having been and being so incomplete as aforesaid, and of divers attempts and endeavors having been made since the said engine was so fixed and set up as aforesaid, and before the exhibiting of the said bill of the said plaintiff, in this suit, by the said plaintiff, for and on the behalf of the said defendant, to amend and render the said engine, and the said insufficient implements for working the same complete, according to the said agreement, he the said plaintiff, on the several days and times since

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ING
WORKS.

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Special damage, that plaintiff was prevented from grinding so much corn as he otherwise would, and that a quantity which he had purchased for the purpose, became of no use to him, &c.

FOR NOT
PERFORM-
ING
WORKS.

the said engine was so fixed and set up as aforesaid, was wholly deprived of the use of the same, and thereby has also been forced and obliged to lay out and expend, and hath laid out and expended divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —l. in and about the providing lead-work, brick-work, and other necessary materials and labor, in and about the putting, setting up, and fixing a certain other boiler and pump in lieu and stead of the said insufficient boiler and pump, to wit, at, &c. (*venue*) aforesaid.—[*Add another count more general.*]

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*XXIX. AGAINST BAILEES.

AGAINST
BAILEES.
General
observa-
tions (u).

In *Coggs v. Bernard*, 2 Ld. Raym. 912, 13, Holt, C. J. states, that there are six sorts of bailments: but Sir Wm. Jones, in his *Work on Bailments*, 35, 6, arranges them under five heads: 1. *Depositum*, or the delivery of goods to the bailee to be kept for the bailor without reward. 2. *Mandatum*, or commission when the bailee undertakes without reward to do some act about the thing bailed, or to carry it. 3. *Commodatum*, or loan for bailee's use, without reward to *bailor. 4. *Pignori acceptum*, where goods are pawned to bailee. 5. *Locatum*, or hireling, which is always for reward; and which is either; 1st, *Locatio rei*, or use of the thing by bailee paying reward to the bailor; 2dly, *Locatio operis faciendi*, when work and labor, or care and pains, and to be performed or bestowed on the thing delivered; 3dly, *Locatio operis mercium vehendarum*, when goods are delivered to a public carrier, or a private person to be carried.—The respective liability of these several bailees are considered in the authorities above referred to, and in 1 Hen. Bla. 158. 1 Saund. 312, n. 2. 3 Chit. Com. Law, 354, &c. Chit. jun. Contr. 142, &c. See also the observations of Sir Wm. Scott on *Bailments*, 6 Rol. Rep. 316.—In the following pages a precedent is given under each of the heads that usually occur in Practice, except that of *Mandatum*, as to which see a declaration, 1 Hen. Bla. 158. 4 T. R. 143. Ld. Raym. 909.

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*Depositi-
tum.*
Against
bailee
without
reward for
not taking
care of,
and re-de-
livering
goods in-
trusted to
his care
(w).

For that whereas heretofore, to wit, on, &c. (any day when defendant had the goods and before title of declaration,) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had caused to be delivered to the said defendant certain

(u) See precedents in case, post, 669; and 2 Campb. 291.

(w) See form, Morg. 191.—This description of bailment is called a *depositum*, or a bailment of goods to be kept by the bailee for the bailor, without reward to the bailee, 2 Ld. Raym. 912—Sir W. Jones, 35, 6.—2 Stra. 1099, and the bailee is not liable for loss or damage unless it be attributable to the want of that care which every man of common sense, how inattentive soever, takes of his own property, that is, he is

only liable for gross neglect. 1d. *ibid.* 1 Esp. Rep. 316.—Willes, 121; see also 1 B. & A. 62.—1 Campb. 138. Indeed any bailee is liable for gross negligence, 2 Stra. 1099. The bare leaving goods in custody, and accepting such trust, raise a promise not grossly to neglect the care of the goods, 2 Stra. 1099. But such a bailee is not liable if he be robbed of the goods, Willes, 121. He is liable for ordinary neglect if he spontaneously and officiously offers to keep the goods, Jones, 48, 54; or when he

goods and chattels, to wit, &c. (*set them out as in trover*), of great value, to wit, of the value—*l.* to be taken care of, and safely and securely kept by the said defendant for the said plaintiff, and to be re-delivered by the said defendant to the said plaintiff, he the said defendant undertook, and then and there faithfully promised the said plaintiff to take due and proper care of, and safely and securely keep the said goods and chattels for the said plaintiff, and to re-deliver the same to the said plaintiff, when he the said defendant should be thereunto afterwards requested: and although the said defendant then and there had and received the said goods and chattels of and from the said plaintiff for the purpose aforesaid; and although the said defendant was afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff to re-deliver the said goods and chattels to the said plaintiff; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would take due and proper care of, and safely or securely keep the said goods and chattels, or any part thereof for the said plaintiff, nor did nor would, at the said time when he was so requested as aforesaid, or at any time afterwards, re-deliver the same to the said plaintiff, but on the contrary thereof he the said defendant so negligently and carelessly conducted himself, with respect to the said goods and chattels, and took so little care thereof, that by and through the mere carelessness, negligence, and improper conduct of the said defendant and his servants in that behalf, the said goods and chattels being of *the value aforesaid, afterwards, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Add a count on defendant's implied undertaking to re-deliver on request, like the above, omitting the statement for want of care; and at all events add a general count for not taking care of the goods, as post, 342.—If the defendant has been guilty of a conversion, or it be doubtful whether others also may be liable, it may be advisable to declare in case, adding a count in trover. 3 East, 62, 70; add counts for money had and received, account stated, and breach.*]

AGAINST
BAILEES.

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For that whereas heretofore, to wit, on, &c. (*day of delivery or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would from time to time sell

Commo-
datum,
ants, 333.
For not
returning
casks, or
paying for
them (x).

changes the description of his character, by taking the charge of the goods, in consequence of any reward or lucrative contract, *Id.* A bailee, to take care of goods is liable for negligence, though his employer might have resorted to a third person, 1 Stark. 104. A bailee of this description is always bound to be ready to re-deliver the thing bailed upon request, Jones, 52.—15 East, 42, 3.—2 Bla. Com. 452.

Where the bailee has a reward for his care of the goods, he is bound to use exertions to secure the property, 1 Campb. 138. Where A. hired a room in the house of B. at 2s. per week, for the purpose of depositing goods for safety, and kept the key of a padlock, by which the room-door was fastened, and the goods were stolen by one of

B.'s family: it was held, that B. could not be sued as bailee for the value of the goods stolen, 4 D. & Ry. 636.

(x) See a form, 1 Wils. 115. More care is required in this species of bailment than the former, and the bailee will, generally speaking, be liable for any loss arising from any thing short of absolute impossibility to prevent it. Jones, 64, 69, but in some cases the bailee will only be liable for ordinary neglect. Jones, 65. This bailee cannot lend or let the bailment to another. 1 Mod. 210; he must at all times be ready to re-deliver it to bailor. 2 Stark. 539.—2 T. R. 376.—As to who may sue for not returning sacks where vendor sends malt in a third person's sacks, see 2 Stark. 172.

AGAINST
BAILLEES.

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and deliver to the said defendant ale, and would send and deliver the same to the said defendant in hogsheads and casks of the said plaintiff, he the said defendant undertook, and then and there faithfully promised the said plaintiff to return the said hogsheads and casks to the said plaintiff at the expiration of a reasonable time to be allowed for emptying the same, or to pay him for the said hogsheads and casks, at the rate and price of 1*l.* for each of the said hogsheads and casks. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, and on divers other days and times between that day and the commencement of this suit, to wit, at, &c. (*venue*) sell and deliver divers large quantities, to wit, — hogsheads, and — casks of ale, to the said defendant, and did then and there send and deliver the same to the said defendant in divers, to wit, — hogsheads, and — casks, of the said plaintiff, of great value, to wit, to the value of —*l.* and although a reasonable time for emptying the said hogsheads and casks, and returning *the same to the said plaintiff, hath long since elapsed; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would, at the expiration of such reasonable time as aforesaid, or at any time before or since, although often requested so to do, return the said hogsheads and casks, or any of them, to the said plaintiff, nor did nor would pay the said plaintiff for the same, or any of them at the rates and prices aforesaid. But to return the said hogsheads and casks, or any of them, to the said plaintiff, or pay for the same as aforesaid, he the said defendant hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at, &c. (*venue*) aforesaid.—[*Second count like the first, for not returning the casks, omitting what relates to the payment of money—third count for not taking care of the casks generally, as post 342, and add one count for casks, goods, &c. sold and delivered—money had and received, and the account stated.*]

Pignori acceptum, ante, 333.
Against a pawnbroker, for losing a pledge (y).

For that whereas, before and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, the said defendant was a pawnbroker, to wit, at, &c. (*venue*); and thereupon heretofore, to wit, on, &c. (*day of delivery, or about it*) at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant had then and there pawned and delivered to the said defendant certain goods and chattels, to wit, &c. (*enumerate them, as in trover*), of the said plaintiff of great value, to wit, of the value of —*l.* as and by way of pledge to the said defendant, for a certain sum of money, to wit, the sum of —*l.* then and there advanced by the

(y) Jones, 74, 75, 76.—Lord Raym. 917. c. 24, 39 & 40 Geo. 3, c. 99; see also 1
—Bul. Ni. Pri. 72. The pawnee in this Jac. 1, c. 21, concerning pawnbrokers in
case is liable for ordinary neglect, and he London. A pawnbroker has no right to
will be liable for any loss arising from any sell unredeemed pledges after the expira-
thing except unavoidable force, Jones, 75, tion of a year from the time the goods were
79.—Bul. Ni. Pri. 72 a.—Lord Raym. 917. pledged if the original owner tender him
How far a pawnee may use or dispose of the principal and interest due, 5 B. & A.
• goods, Ld. Raym. 917.—Owen, 123.—80, 81, 439.—1 D. & R. 1, S. C.—1 Stark. 672.—
82.—Bract. 99.—Holt, C. N. P. 383. The Burn, J. tit. "*Pawnbrokers.*"
acts relating to pawnbrokers are 30 Geo. 2,

said defendant to the said plaintiff thereon, he the said *defendant undertook, and then and there faithfully promised the said plaintiff to take due and proper care of the said goods and chattels, until the same should be redeemed by the said plaintiff, and re-delivered by the said defendant to the said plaintiff, or sold by the said defendant according to the form of the Statute relative to pawnbrokers in such case made and provided. And although the said defendant then and there had and received the said goods and chattels for the purpose, and on the terms aforesaid; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not take due and proper care of the said goods and chattels until the same were redeemed by the said plaintiff, and re-delivered by the said defendant to the said plaintiff, or sold by the said defendant according to the form of the said Statute; but on the contrary thereof, he the said defendant afterwards, and whilst he so had the custody of the said goods and chattels as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, took so little care of, and so negligently kept the said goods and chattels, that the same, while they were in the possession of the said defendant for the purpose aforesaid, by and through the mere carelessness and negligence of the said defendant in that behalf, became and were wholly lost to the said plaintiff (or greatly damaged and spoiled), to wit, at, &c. (*venue*) aforesaid.—[*Add a count as for a depositum, ante, 334; and a general count like that, post, 342; money had and received, and account stated, and breach; and see Lord Raym. 912.*]

AGAINST
BANKERS.

For that whereas heretofore, to wit, on, &c. (*day of hiring or about it*) at, &c. (*venue*) in consideration that the *said plaintiff, at the special instance and request of the said defendant, would let to hire and deliver to the said defendant, a certain horse (*a*) of the said plaintiff of great value, to wit, of the value of —*l.* for the said defendant to go and perform a certain journey therewith, to wit, (*b*), from, &c. to, &c. and from thence back again to, &c. aforesaid for certain reasonable reward to the said plaintiff in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would not go or perform another or different journey with the said horse than the said journey, and that he would ride and use the said horse in a moderate, careful, and proper manner. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did, afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*ve-*

Locatio rei, ante, 334.
Against the hirer of a horse, for riding it improperly, and a different journey from that for which it was hired (*z*).

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(2) See a form, 1 Mall. 127. A hirer is not bound to exercise more than ordinary diligence and care over the thing let to hire. *Ld. Raym. 916.*—*Bul. N. P. 72.*—*Jones, 89.* A hirer may let another ride, but a borrower cannot. 1 Mod. 210. The hirer of goods is not even at common law answerable for their loss by fire. *Longman and Gallini, Sittings at Nisi Prius, K. B. 1809.* The hirer of a horse is not liable to make compensation for his death, occasioned by error of a farrier called in, but he is liable if he imprudently give medicine himself; nor is a hirer liable for the horse falling, &c. without his default. 3 Campb. 5.

The hirer of a horse is liable for its feed. 2 B. & B. 359.—5 J. B. Moore, 74. He must not ride a horse after it is exhausted and refuses its feed. 1 Gow, C. N. P. 1. The hirer of a chaise and horses to go a journey, is not liable for any injury occasioned by the negligence or misconduct of the post-boy, 5 Esp. Rep. 35.

(a) This is usual, though, to avoid any doubt, it may perhaps be advisable, when applicable to the facts, to insert the words, "and bridle and saddle."

(b) Let this agree with the real facts of the hiring.

AGAINST
BAILERS.

Second
count.

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Third
count.

venue) aforesaid, let to hire, and deliver the said horse to the said defendant, and the said defendant then and there hired and received the same of and from the said plaintiff, for the purpose and upon the terms aforesaid. Yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure the said plaintiff in this behalf, afterwards, to wit, on the day and year aforesaid, went and performed with the said horse another and different journey than the said journey from, &c. aforesaid, to, &c. aforesaid, and from thence back again to, &c. aforesaid, that is to say, a certain journey from, &c. aforesaid, to, &c. aforesaid, and from thence to a certain place called — in the county — and thence back again to — aforesaid, and in going and performing the said last-mentioned journey as aforesaid, he the said defendant so immoderately, violently, carelessly and improperly rode and used the said horse, that by means of the several premises aforesaid, the said horse became and was greatly lamed and hurt, and so remained and continued for a long space of time, to wit, hitherto and during all which time he the said plaintiff lost, and was deprived of the use and benefit of his said horse, and also thereby the said horse then and there became and was greatly damaged, lessened in value, and spoiled, to wit, at, &c. (*venue*) aforesaid.—[*The second count is usually for riding the horse immoderately, and is as follows:*—And, whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had let to hire and delivered to the said defendant, a certain other horse of the said plaintiff, of great value, to wit, of the value of —, to be ridden and used by the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to ride and *use the said last-mentioned horse in a moderate, careful, and proper manner. And although the said defendant, then and there had and received the said last-mentioned horse of and from the said plaintiff, for the purpose last aforesaid; yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to injure the said plaintiff in this behalf, did not nor would ride or use the said last-mentioned horse in a moderate, careful, or proper manner, but wholly neglected and refused so to do. And on the contrary thereof, he the said defendant, after the making of his said last-mentioned promise and undertaking, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, so carelessly and improperly rode and used, the said last-mentioned horse, that by means thereof, the said last-mentioned horse became and was greatly lamed and hurt, and so remained and continued for a long space of time, to wit, hitherto, during all which time he the said plaintiff thereby lost and was deprived of the use and benefit of the said last-mentioned horse, and also thereby the said last-mentioned horse, being of the value aforesaid, became and was greatly damaged, lessened in value, and spoiled, to wit, at, &c. (*venue*) aforesaid.—[*If there be any doubt whether the injury were occasioned by improper riding, it is advisable to add a count nearly similar to the last, but stating the defendant's promise to have been, "that whilst he should so have the use of the said last-mentioned horse as aforesaid, he would take due and proper care thereof," and averring "that the defendant had the use, &c. and that whilst he so had the use, &c. he did not take due and proper care thereof. but*

wholly neglected so to do. And by reason thereof, the said last-mentioned horse, on, &c. became and was greatly damaged, to wit, at, &c. aforesaid." — [*It may also be advisable to add another count, stating "that whereas heretofore, to wit, on, &c. at, &c. in consideration that the plaintiff, at the special, &c. had delivered to the defendant a certain other horse, &c. to be had and used by the defendant, (omitting the statement for hire;) defendant undertook," &c. stating the promise, as in the count last suggested.—If there be any demand for horse-hire, add the common counts, as ante, 59, and the account stated, and breach.*]

AGAINST
BAILEES.

Fourth
count.

That whereas heretofore, to wit, on, &c. (*day of letting or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had let to hire and delivered to the said defendant, certain household furniture, goods, and chattels, to wit, &c. (*enumerate them*) of the said plaintiff, of great value, to wit, of the value of —*l.* to be had and used by the said defendant, for a certain time in that behalf agreed upon by and between the said plaintiff and the said defendant, to wit, from — to — and to be re-delivered by the said defendant to the said plaintiff after that time, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to take due and proper care of the said household furniture, goods and chattels, and to re-deliver the same to the said plaintiff, at the expiration of the time for which the same were so let to hire as aforesaid, and although the said defendant, then and there had and received the said household furniture, goods, and chattels, of and from the said plaintiff for the purpose aforesaid, and although the time for which the same were so let to hire as aforesaid, hath long since elapsed; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure the said plaintiff in this behalf, did not nor would take due and proper care of the said household furniture, goods and chattels, or at the expiration of the time for which the same were so let to hire as aforesaid, or at any time afterwards, re-deliver the same or any part thereof to the said plaintiff, (although he was afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do,) but on *the contrary thereof, he, the said defendant took so little care of the said household furniture, goods and chattels, that by and through the mere negligence and carelessness of the said defendant in this behalf, the said household furniture, goods and chattels, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*The second or other special counts in a case of this nature frequently vary, it may be advisable in general to add a count stating a delivery to the defendant to be used generally, and not stating that he had the use of them for any particular purpose or time, and confining the promise and breach merely to the care of the goods, as post, 342.—If there be any demand for the use of the furniture, add the common counts, as ante, 60, and the account stated, and breach.*]

For not
taking
care of
furniture
let to hire
to defend-
ant (c).

[*340]

For that whereas the said defendant, before and at the time of the making of his promise and undertaking hereinafter next mentioned, was

Locatio
operis fa-

(c) 2 Wentw. Index, 21.—See notes to the last precedent, as to the liability of a bailee of this nature. If the guests or ser-

vants of this bailee damage the furniture, he will be liable, 4 T. R. 319.—5 T. R. 373.

AGAINST NEGLIGENCE.
ciendi, ante, 334.
 Against a watch-maker for losing a watch delivered to him to repair (d).

a watch-maker, and the trade and business of a watch-maker then followed and carried on, to wit, at, &c. (*venue*). And thereupon heretofore, to wit, on, &c. (*day of delivery or about it*) at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there delivered to the said defendant a certain watch of the said plaintiff, of great value, to wit, of the value of —*l.* to be repaired by the said defendant, in the way of his said trade or business of a watch-maker, for reasonable reward (e), to be therefore paid by the said plaintiff, to the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to repair the said watch, and to take due and proper care thereof, until the same should be returned by the said defendant to the said plaintiff. Yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure the said plaintiff in this behalf, did not nor would take due and proper care of the said watch, until the same was returned by the said defendant to the said plaintiff, but, on the contrary thereof, he the said defendant, after the *making his said promise and undertaking, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, so carelessly and negligently behaved and conducted himself with respect to the said watch, that by and through the mere carelessness, negligence, and improper conduct of the said defendant in that behalf, the said watch being of the value aforesaid, became and was, and still is, wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And whereas also afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there delivered (f) to the said defendant, a certain other watch of the said plaintiff, of great value, to wit, of the value of —*l.* to be rectified by the said defendant, and to be re-delivered by him to the said plaintiff, for reward, to be therefore paid to him, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to endeavor to rectify the said last-mentioned watch within a reasonable time then next following, and to deliver the same to the said plaintiff, whenever after such reasonable time had elapsed, he the said defendant should be thereunto requested. And although the said defendant then and there had and received the said last-mentioned watch for the purpose last aforesaid; yet he, not regarding his said last-mentioned promise and undertaking, hath not, although a reasonable time for rectifying the said last-mentioned watch hath long since elapsed, and the said defendant was, after such reasonable time had elapsed, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do, as yet delivered to the said plaintiff, *the said last mentioned watch, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid.—[*Add a general count, as in next form.—Add count for money had and received, account stated, and breach.—If there be reason to apprehend that the defendant has been*

[*341]

Second count, for not re-delivering the watch.

[*342]

(d) 2 Wentw. Index. 20. This species of bailment requires more than ordinary care to be exercised over it. See 1 Gow, C. N. P. 30.—1 Campb. 138. How far the proprietor of a dry dock is liable for burst-

ing of flood gates.—1 Campb. 138. How far agister of cattle liable, Holt, C. N. P. 547.—8 Rep. 32.

(e) 2 New Rep. 458.

(f) See 1 Bingh. 34.

guilty of a conversion, it may be advisable to declare in case, with a count in trover, 3 East, 62, 70.] AGAINST
BAILEES.

And whereas also, heretofore, to wit, on, &c. (*any day while the defendant had the goods, and before title of declaration*) at, &c. (*venue*) in consideration that the said defendant at his special instance and request, then had the care and custody of divers goods and chattels of the said plaintiff, to wit, goods and chattels of the like number, quantity, quality, description and value, as those in the said first count mentioned, [*or if this be the first count on the subject, set out the goods, and value,*] he the said defendant undertook, and then and there faithfully promised the said plaintiff to take due and proper care thereof, whilst the said defendant so had the care and custody of the same; yet the said defendant not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this behalf, whilst the said defendant so had the care and custody of the said goods and chattels, took so little, and such bad and improper care thereof, that the same, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, became and were greatly damaged and injured, and wholly lost to the said plaintiff.

General
count,
against a
bailee, for
not taking
care of
goods.

XXX. AGAINST AGENTS, FACTORS, &c.

For that whereas heretofore, to wit, on, &c. [*day of delivery of goods, or about it*] at, &c. (*venue*) in consideration *that the said plaintiff at the special instance and request of the said defendant, would deliver to the said defendant divers goods and chattels, to wit, (*here specify them as in trover*) of great value, to wit, of the value of —*l.* of lawful money of

AGAINST
AGENTS,
FACTORS,
&c.

Against
an agent
employed
to sell, for
not duly
accounting
for the
goods (*g*).

[*343]

(*g*) See Forms, 2 Rich. C. P. 174.—Pl. A. 59.—1 Taunt. 572, and other modern forms and notes, post, 345. See a form against a sworn broker of the city of London for charging his principal more than the cost price of articles purchased for him in addition to his commission, 2 Moore & P. 284. As to this action and declaration, see Bul. Ni. Pri. 147, 8. Carth. 89.—2 Bos. & Pul. 136.—1 Saund. 50.—1 Taunt. 572.—The term “accounting,” is a large signification; any non-payment is a non-accounting. The word “accounting” may mean “satisfy,” see 9 B. & Cres. 330.—This count is sustainable against an auctioneer who delivers the goods without receiving the price from the purchaser.—2 Chit. Rep. 353. An agent is always bound to be prepared to render a clear and faithful account of all his transactions relating to the commission, 1 Jac. & Walk. 135.—14 Ves. 500, 510.—8 Ves. 49.—13 Ves. 47, 53. 4 Madd. Rep. 373.—(1 Chit. Gen. Pract. 509. 868, 869.) But in general the principal cannot compel his agent to deliver over the proceeds of a contract, till the latter has actually received them; and if an agent employed to sell, receives part only of the

price, the principal cannot sue him till the transaction be closed, unless indeed it is the agent's fault that the rest of the price is not paid, 2 Esp. Rep. 710. but as soon as the agent is in cash, by any sale or contract, he must account and take care of the produce, and keep or dispose of it according to the principal's orders. 1 Stark. 392.—4 Madd. 3.—5 Madd. 47. If goods are consigned to a factor for sale, it is presumed that he contracts to account for such as are sold, to pay over the proceeds and re-deliver the residue unsold, on demand, 1 Taunt. 572.—The receipt of money by an agent may in many cases be presumed, as if he refuse, after a reasonable time has elapsed, to account for them, 1 Stark. 224. Peake, 56. An agent is responsible for the price of a commission sold by him for an officer on foreign service, 1 Esp. Rep. 450.—An agent under a *del credere* commission, is liable though he never received the proceeds; and on this ground he may be sued for goods sold, 1 T. R. 112, 285.—2 Campb. 587; (though by the statute against frauds, 29 Car. ch. 3. sect. 4. a verbal guarantee would be invalid.) It is, however, usual to declare specially, stating the consideration, &c. See 1

AGAINST
AGENTS,
FACTORS,
&c.

Great Britain, to be sold and disposed of by the said defendant, for and on account of the said plaintiff for a reasonable reward to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to endeavor to sell and dispose of the said goods and chattels for the said plaintiff, and to render a true and just account of the sale thereof to the said plaintiff, and of the monies arising from such sale, whenever after the sale thereof he the said defendant should be thereunto requested. And although the said plaintiff confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) deliver the said goods and chattels to the said defendant for the purpose aforesaid, and although the said defendant did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, sell and dispose (*h*) of the said goods and chattels, for and on account of the said plaintiff, for divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* (*state enough*) of like lawful money, (*i*); and although the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, requested the said defendant so to do (*k*); yet the said defendant not regarding his said promise and undertaking, but contriving and craftily and subtly intending to deceive and defraud the said plaintiff in this behalf, hath not rendered to the said plaintiff a just and true, or other account of the sale of the said goods and chattels, or any part thereof (*kk*), or of the monies arising from such sale, or any part thereof, but the said defendant hath hitherto wholly refused, and still refuses so to do.—[*Add the following counts.*]

Second
count,
more gen-
eral.

And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had delivered to the said defendant divers other goods and chattels of great value, to wit, of the value of —*l.* to be sold and disposed of by the said defendant for the said plaintiff, he the said defendant undertook, and then and there faithfully promised the said plaintiff to render a just and reasonable account of the said last-mentioned goods and chattels to the said plaintiff, whenever afterwards he the said defendant should be thereunto requested; yet the said defendant not regarding his said last-mentioned promise and undertaking, but contriving and intending to injure and defraud the said plain-

J. B. Moore, 279. As to the agent's liabilities and rights in other respects, see notes, post; also 3 Chit. Com. Law, 193 to 224.—It has been supposed, that when there is a long complicated account, this action is not sustainable, 2 Campb. 238. Tidd's Prac. 9th edit. 2; but it seems that the difficulty of trying the cause constitutes no legal objection. See 5 Taunt. 431.—1 Marsh. 115; though, indeed, if the accounts are very intricate and difficult, a bill in equity is the most preferable remedy, 2 Campb. 238. Eq. Ca. Abr. 5.—7 Ves. 588. When not, see 2 Young & Jerv. 33. When the defendant cannot set up illegality on the sale, see 4 Camp. 183.—3 M. & S. 117.—Holt, 105, 107.

(*k*) This averment of the sale must be proved, 1 C. & P. 522. The sale may in

some cases be presumed, as if the agent, after a reasonable time, refuse to account for the goods, 1 Stark. 224.—Peak, 56.

(*i*) Where the promise was to account for monies to be received, it should seem that the declaration ought to aver the receipt of money, 6 Taunt. 45. *Sed vide*, 1 Price, 109. But if money has been received, it may be recovered under the common count for money had and received.

(*k*) When a request is necessary, see 1 Taunt. 572.

(*kk*) (If the defendant has in part accounted for or paid over some of the money received, the best course is to admit such part performance on the face of the declaration. See Bosanquet's Rules on Pleading, 85, 87.)

tiff in this respect, hath not rendered to the said plaintiff a just and reasonable or other account of the said last-mentioned goods and chattels, or any part thereof (although the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, was requested by the said plaintiff so to do), but the said defendant hath hitherto wholly refused and still wholly refuses so to do.—[*Add counts for money had and received, the account stated, and breach, if there be any reason to suppose the goods have been lost or injured by carelessness, add the general count as ante, 341.*]

AGAINST
AGENTS,
FACTORS,
&c.

[*344]

For that whereas heretofore, to wit, on, &c. (*day of first consignment, or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant had sent and consigned to the said defendant divers goods and chattels of the said plaintiff of great value, to wit, of the value, of —*l.* in order that the said defendant might sell and dispose of the same for the said plaintiff, for commission and reward to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to endeavor to sell and dispose of the said goods and chattels for and on the account of the said plaintiff, and to render a just and reasonable account of the said sales thereof to the said plaintiff in a reasonable time then next following, and to pay over the proceeds of such sales to the said plaintiff, when he the said defendant should be thereunto reasonably requested by the said plaintiff; and although the said defendant then and there had and received the said goods and chattels, for the purpose aforesaid, and afterwards, to wit, on the day and year aforesaid, and on divers other days and times afterwards, and before the commencement of the suit, sold the same, for and on account of the said plaintiff, for a large sum of money, to wit, the sum of —*l.* to wit, at, &c. (*venue*) aforesaid, (*m*); and although a reasonable time for the said defendant to render such account as aforesaid, and paying over the produce of the said sales to the said plaintiff, hath long since elapsed; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not, (although he was afterwards, to wit, on, &c. (*any day before the title of declaration*), at, &c. (*venue*) requested by the said plaintiff so to do,) as yet rendered to the said plaintiff a just and reasonable account of the said sale, or paid over the proceeds thereof to the said plaintiff, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid.—[*Add a count like the last preceding form, and the counts there directed.*]

Against
agent for
not ac-
counting
for goods
consigned
at differ-
ent times
for sale
(*l.*)

*For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had authorized and empowered the said defendant to settle the amount of a certain debt then due and owing from one E. F. to the said plaintiff, and to obtain payment and satisfaction of the said debt from the said E. F. he, the said defendant, undertook, and then and there faithfully promised the said plaintiff to render a just account to the said plain-

[*345]
Against a
person
employed
to settle
the a-
mount of
a certain
debt due
to plain-
tiff,

(*l*) See ante, 342, note.

(*m*) *Quere*, If this should not aver the receipt of the money. 6 Taunt. 45.—2

Esp. Rep. 710. It should seem not, for the promise is merely to account for the sale, and not for the proceeds only.

AGAINST
AGENTS,
FACTORS,
&c.

—
from a
third per-
son, for
not ac-
counting
for monies
received
by him.

tiff of all monies, and securities for money, which he the said defendant should receive for and on account of the said debt, and to pay and deliver all such monies and securities to the said plaintiff when he the said defendant should be thereunto afterwards requested; and although the said defendant did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, receive (*n*) divers large sums of money, and also divers securities for money, under and by virtue of the said power and authority, for and on account of the said debt; yet the said defendant not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff, in this behalf, hath not rendered a just and reasonable or other account, to the said plaintiff of the said monies or securities for money so received by the said defendant as aforesaid, or any part thereof (although to do this, he the said defendant was requested by the said plaintiff afterwards, to wit, on the day and year aforesaid, and oftentimes, afterwards, to wit, at, &c. (*venue*) aforesaid,) but he, to do this, hath hitherto wholly refused, and still refuses so to do. [*Add money chunts and accounts stated.*]

Against
an agent
for selling
goods on
credit,
and other-
wise than
for cash or
a good
bill, con-
trary to
orders (*o*).
[*346]

For that whereas heretofore, to wit, on, &c. (*day of retainer or about* *it*), at, &c. (*venue*) in consideration that the *said plaintiff, at the special instance and request of the said defendant had retained and employed the said defendant to sell and dispose of, for cash, or any approved bill (*p*), at a short date, certain goods and merchandizes, to wit, [fifty hides, and twenty-six —,] of the said plaintiff, of great value, to wit, of the value of —*l.* of lawful money of Great Britain, for commission and reward to the said defendant in that behalf; he the said defendant undertook, and then and there faithfully promised the said plaintiff to endeavor to sell and dispose of the same, but not otherwise than for cash, or an approved bill, at a short date; yet the said defendant, not regarding his said promise and undertaking so by him made as aforesaid, but contriving, and fraudulently intending, craftily and subtly, to deceive and defraud the said plaintiff in this behalf, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) sold and disposed of the said goods and merchandizes of the said plaintiff for a large sum of money, to wit, the sum of —*l.* otherwise than for cash, or an approved bill, at a short date, to wit, for a disapproved and bad and insufficient bill of exchange, which hath become and is of no use or value to the said plaintiff, and which said sum of money is wholly unpaid to the said plaintiff; and by reason of the premises, he, the said plaintiff, is likely to lose the same, to wit, at, &c. (*venue*) aforesaid. And whereas also, heretofore, to wit, on the day and year

Second
count for
not sell-
ing for
ready
money, or
a good
bill of ex-
change
(*pp*).

(*n*) This seems a necessary averment, see 6 Taunt. 45.—2 Esp. Rep. 710.

(*o*) A factor or broker may in general, sell on credit, unless prohibited by the express or implied terms of his employment, or by usage of trade. Willes, 406. 3 B. & P. 489.—6 Bro. P. C. 287.—Cowp. 395. He cannot sell stock on credit, as that is contrary to the usual course of business. 1 Campb. 258.—An auctioneer is liable if he sells otherwise than for ready money. 2 Chit. Rep. 353. See also 12 Mod. 5, 14.—Winch. 53.—5 Taunt. 749.—If the vendee

be not in reputed good circumstances the agent would be liable. See 6 Bro. P. C. 287.—Beawes, 43.—Moll. 239.—The time of credit must in all cases be reasonable and customary.—Bulst. 103—Moll. 328; and the security also.—Bulst. 104.—Yelv. 202.—Winch. 53.

(*p*) As to what is an approved bill, see 2 Campb. 532—2 H. Bla. 573.—3 Mod. 273.—3 Stark. Evid. 1636.—1 M. & P. 656.

(*pp*) See a form, *Ferrers v. Robins*, 1 Gale Rep. 70.

aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had retained and employed the said defendant to sell and dispose of certain other goods and merchandizes of the said plaintiff, to wit, goods and merchandizes of the like number, quantity, quality, description, and value, as those in the said first count mentioned, the said defendant undertook, and then and there faithfully promised the said plaintiff that he would not sell or dispose of the said last-mentioned goods and merchandizes otherwise than for ready money, or a good bill of exchange; yet the said defendant contriving and fraudulently intending to deceive and defraud the said plaintiff in this behalf, did not perform or regard his said last-mentioned promise and undertaking, but craftily and subtly deceived and defrauded the said plaintiff in this, to wit, that the said defendant did not sell or dispose of the said goods and merchandizes for ready money, or for a good bill of exchange, but, on the contrary thereof, afterwards, to wit, on the day and year aforesaid, sold and disposed of the same, for a bad bill of exchange, and which became, and was of no use or value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) the said defendant, under and by virtue of the retainer and authority of the said plaintiff, had, for commission and reward to him in that behalf, sold and disposed of certain other goods and merchandizes of the said plaintiff, of the like quantity, number, quality, description, and value, as those in the said first count mentioned, for and on the behalf of the said plaintiff, for a certain sum of money, to wit, the sum of—*l.* and in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendant, would accept and receive for and on account of the said goods and merchandizes, of and from the said defendant a certain bill of exchange, to wit, a bill dated, &c. and made and drawn by one G. H. upon one I. K. and whereby the said G. H. requested the said I. K. — after the date thereof, to pay to the said plaintiff or order 156*l.*, the said defendant undertook, and then and there faithfully promised the said plaintiff that the said bill of exchange was a good bill of exchange; and the said plaintiff avers that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) did accept and receive, for and on account of the said last-mentioned goods and merchandizes, the said last-mentioned bill of exchange of and from the said defendant; yet the said defendant, contriving and fraudulently intending to deceive and injure the said plaintiff in this behalf, did not perform or regard his said last-mentioned promise and undertaking, but craftily and subtly deceived and defrauded the said plaintiff in this, to wit, that the said last-mentioned bill of exchange was not a good bill of exchange, but on the contrary thereof, then was and still is a bill of exchange of no use or value; and although the time for payment of the said sum of money therein specified, according to the tenor and effect of the said last-mentioned bill of exchange, hath long since elapsed, and the said plaintiff hath endeavored to obtain payment thereof, yet the said plaintiff hath been and is wholly unable to procure payment of the same or any part thereof, and the *same remains wholly due and unpaid to the

AGAINST
AGENTS,
FACTORS,
&c.

Third
count, for
not ob-
taining a
good bill
of ex-
change in
payment
according
to prom-
ise.

[*347]

AGENTS,
FACTORS,
&c.

Fourth
count, for
not using
due care
in the sale
of goods.

[*348]

said plaintiff, to wit, at, &c. (*venue*). And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) in consideration that the said plaintiff, at the like special instance and request of the said defendant, had retained and employed him for commission and reward, to him in that behalf, to sell and dispose of certain other goods and merchandizes, of the said plaintiff, of the like number, quantity, quality, description, and value, as those in the said first count mentioned, the said defendant undertook, and then and there faithfully promised the said plaintiff to use due care in and about the sale of the said last-mentioned goods and merchandizes; and although the said defendant afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) sold the said last-mentioned goods and merchandizes for and on account of the said plaintiff, for a large sum of money, to wit, the sum of —£. yet the said defendant, not regarding his said last-mentioned promise and undertaking, did not use due care in and about the sale of the said last-mentioned goods and merchandizes, but wholly neglected and refused so to do, and wrongfully and unjustly took, accepted, and received, in payment of the said last-mentioned goods and merchandizes, a certain bill of exchange of no use or value to the said plaintiff, and by reason of the premises, he the said plaintiff, is likely to lose the price of the said last-mentioned goods and merchandizes, to wit, at, &c. (*venue*) aforesaid.—[*It would be as well to insert another count like this, merely stating that defendant undertook to sell the goods at the best price he could get for the same, but that he sold them under the best price he could have gotten.*]

Fifth
count on
promise to
be respon-
sible ac-
cording to
del credere
commis-
sion (g).

And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had retained and employed the said defendant for commission and reward to him in that behalf, to sell and dispose of certain other goods and merchandizes of the like number, quantity, quality, description, and value, as the said goods and merchandizes in the said first count mentioned, the said defendant undertook, and then and there faithfully promised the said plaintiff to be responsible to him for the prices of the said last-mentioned goods and merchandizes; and although the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) sold and disposed of the said last-mentioned goods and merchandizes for a large sum of money, to wit, the sum of —£., and although a reasonable time for the payment thereof has long since elapsed, to wit, at, &c. (*venue*) yet the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff, in this respect, hath not as yet paid, or caused and procured to be paid, the said last-mentioned sum of money, or any part thereof, to the said plaintiff, although he afterwards, to wit, on the day and year aforesaid, had notice of the premises, and was requested by the said plaintiff so to do, to wit, &c. (*venue*) aforesaid.—[*Add counts for not rendering a just account, as ante, 342, 4, also counts for goods sold, money counts, account stated, and breach.*]

(g) See ante, 342, note,—1 J. B. Moore, count, 14 East, 578.—8 Taunt. 371.—2 J. 279, and a form there, and the common B. Moore, 420, S. C. ante, 78, note.

For that whereas heretofore, to wit, on, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had caused to be delivered to the said defendant certain goods and chattels, to wit, one hogshead of tallow of the said plaintiff, of great value, to wit, of the value of —*l.* of lawful money of Great Britain, to be sold and disposed of for ready money, by the said defendant, for certain commission and reward, to be therefore paid by the said plaintiff to the said defendant, he the said defendant undertook and then and there faithfully promised the said plaintiff not to sell or dispose of the said goods and chattels to any person or persons whatsoever, otherwise than for ready money; yet the said defendant not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this respect, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, sell and dispose of the said goods and chattels upon credit, and otherwise than for ready money, that is to say, to one R. H. at and for a certain sum of money, to wit, the sum of —*l.* and which said sum of —*l.* is still wholly unpaid to the said plaintiff, and the said R. H. having since become insolvent, he the said plaintiff is likely to lose the same, to wit, at, &c. (*venue*) aforesaid.—[*Add counts as directed in the last form.*]

AGAINST
AGENTS,
FACTORS,
&c.

Against a factor instructed to sell for ready money, for selling upon credit to a person who afterwards became insolvent (r).

*For that whereas the said plaintiff, before the making of the promises and undertakings of the said defendant in this and the two next succeeding counts, was, and from thence hitherto hath been, and still is, a linen draper, and the trade and business of a [linen draper], during all that time exercised and carried on, to wit, at, &c. (*venue*): and thereupon, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, so being such linen draper as aforesaid, at the special instance and request of the said defendant, had then and there retained and hired the said defendant to serve the said plaintiff as a servant and shopman in his said trade and business, for certain wages and reward, to be therefore paid by the said plaintiff to the said defendant, and also in consideration that the said plaintiff, at the like request of the said defendant, had then and there agreed to find and provide board and lodging for the said defendant, whilst he the said defendant should continue to serve the said plaintiff as aforesaid, the said defendant then and there undertook and promised the said plaintiff that he the said defendant would not, whilst he should continue to be the servant and shopman of the said plaintiff as aforesaid, sell or deliver any goods or merchandizes of the said plaintiff on credit, or otherwise than for ready money, to any person or persons, without the consent or approbation of the said plaintiff, and that in case he the said defendant should sell and deliver any goods or merchandizes on credit, or otherwise than for ready money, without the said plaintiff's consent and approbation, and the same should not be duly paid for by the purchasers thereof, he the said defendant would pay to the said plaintiff the prices for which he should so sell such goods and merchandizes on credit, or otherwise than for ready money; (rr) yet the said defendant .

[*349]
Against a shopman for selling on credit, contrary to express orders.

(r) See note to last precedent, (and the form in *Ferrers v. Robins*, 1 Gale's Rep. 70)

(rr) (The promise should not be stated

thus specially as to the defendant's promise to pay the price of the goods, unless there were an express contract to that extent, but limited to the first part of the statement, to

AGAINST
AGENTS,
FACTORS,
&c.

[*350]

Second
breach of
same con-
tract.

not regarding his said promise and undertaking, but contriving and fraudulently intending to injure the said plaintiff in this behalf after the making of the said promise and undertaking, and whilst he continued to be the servant and shopman of the said plaintiff as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, without the consent and approbation of the said plaintiff, sold and delivered certain goods and merchandizes, to wit, &c. the property of the said plaintiff, of a large value, to wit, of the value of —*l.* lawful money of Great Britain, for a certain sum of money, the sum of —*l.* to certain persons, to the said plaintiff unknown, on the credit of a certain *draft on certain bankers trading under the style and firm of Messrs. Robson and Co. which said draft the said Messrs. R. and Co. afterwards, to wit, on the day and year aforesaid, wholly refused to pay, and which said last-mentioned sum of money still remains wholly due and unpaid to the said plaintiff, and the said plaintiff, is in great danger of losing the same, nor have the said persons who so purchased the said goods and merchandizes, duly paid the said sum of —*l.* or any part thereof, for the same, to wit, at, &c. (*venue*) aforesaid. And the said plaintiff further says that the said defendant further disregarding his said promise, &c. afterwards, and whilst he continued to be the servant and shopman of the said plaintiff as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, without the consent and approbation of the said plaintiff, and against his will, sold and delivered certain other goods and merchandizes, to wit, on, &c. at, &c. (*venue*) the property of the said plaintiff, of a large value, to wit, of the value of —*l.* of like lawful money, on credit, otherwise than for ready money, to one E. F. for a certain other sum of money to wit, the sum of —*l.* of like lawful money, and which said last-mentioned sum of money still remains wholly due and unpaid to the said plaintiff, and the said plaintiff is in great danger of losing the same, to wit, at, &c. (*venue*) aforesaid.—[*Add other counts for monies had and received, account stated, and breach.*]

For not
account-
ing for the
produce of
a bill of
exchange
delivered
to defend-
ant to get
discount-
ed (s).

[*351]

For that whereas heretofore, to wit, on, &c. (*day of delivery, or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there delivered to the said defendant a certain bill of exchange in writing of the said plaintiff, bearing date a certain *day and year therein mentioned, to wit, &c. (*the date*) for the payment of the sum of —*l.* (two) months after the date thereof to one E. F. or his order, for the purpose of the said defendant's procuring from the said E. F. money, or goods on the security thereof, for the said plaintiff, for a certain commission and reward to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to deliver *to the said plaintiff such sum or sums of money, and such goods, (*ss*) as he the said defendant should procure on the security of the said bill, or to return the said bill to the

which extent, the law would, perhaps, even infer a contract on the part of the shopman, or it might be safer to declare on the certainly implied promise to observe his duty, and then aver that it was his duty not to give credit without permission.)

(s) See precedent, ante, 277, for not getting it discounted. The plaintiff may, it

seems, recover on the count for money had and received, 1 M. & P. 438. He need not produce the bill in evidence, but may give parol evidence of its contents.

(ss) (If the defendant was only authorized to obtain money, and not to receive goods even in part, omit what relates to goods.)

AGAINST
AGENTS,
FACTORS,
&c.

said plaintiff, before the same became due and payable; and although the said defendant did afterwards, and before the said bill became due and payable, to wit, on the day and year aforesaid, procure from the said E. F. upon the security of the said bill a large sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, and divers goods and merchandize of great value, to wit, of the value of —*l.* to wit, at, &c. (*venue*) aforesaid; yet the said defendant not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this behalf, did not nor would, although he was afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) requested by the said plaintiff so to do, deliver to the said plaintiff the said sum of —*l.* and the said goods and merchandize, so procured by the said defendant on the security of the said bill as aforesaid, or any or either of them, or any part thereof, or return the said bill to him the said plaintiff before the same became due and payable, but hath wholly refused and neglected so to do; and the said plaintiff further says, that after the said bill became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. (*venue*) aforesaid, he the said plaintiff was arrested and held to bail by the said E. F. then and there being the holder of the said bill, and was then and there called upon, and forced, and obliged to pay, and did then and there pay, to the said E. F. the said sum of money in the said bill specified, together with certain interest thereof, and the costs of a certain action before then brought on the said bill by the said E. F. against the said plaintiff, in the whole amounting to a large sum of money, to wit, the sum of —*l.* and thereby also the said plaintiff was put to and incurred great trouble and costs, to wit, costs amounting to the sum of —*l.* in and about the settling and putting an end to the said action, to wit, at, &c. (*venue*) aforesaid.—[*Add the following count.*]

And whereas also heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had delivered to the said defendant, and that the said defendant then had a certain bill of exchange of the said plaintiff, bearing date, to wit, &c. (*the date*) and drawn by E. F. upon C. D. and whereby the said C. D. was requested to pay the sum of —*l.* to the said E. F.'s order, two months after the date thereof, for the purpose of the said defendant's discounting or getting the same discounted for the said plaintiff, he the said defendant undertook, and then and there faithfully promised the said plaintiff to discount, or get the said bill discounted for the said plaintiff, or else return the same to him when he the said defendant should be thereunto afterwards requested; yet the said defendant not regarding his said promise and undertaking, but contriving and intending to defraud and injure the said plaintiff in this behalf, hath not yet discounted, or got the said bill of exchange discounted for the said plaintiff, or returned the same to him, although he was afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do; and the said plaintiff hath hitherto lost the use and benefit of the said bill of exchange, to wit, at, &c. (*venue*) aforesaid.—[*Add damage, as in last count, and common counts.*]

Second
count,
more gen-
eral, for
not re-de-
livering
the bill.

AGAINST
WHARFING-
ERS.

*XXXI. AGAINST WHARFINGERS.

Against a
wharfing-
er, for
losing
goods de-
livered to
him to be
shipped by
a particu-
lar vessel
(t).

For that whereas the said defendant, before and at the time of the making of his said promise and undertaking, hereinafter next mentioned, was a wharfinger, and the buisness of a wharfinger used, exercised, and carried on at and upon a certain wharf, situate in the city of London (or "county of S." *according to the fact*) to wit, at, &c. (*venue*.) And thereupon, heretofore, to wit, on, &c. (*day of delivery or about it*) at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had caused to be delivered to the said defendant, at and upon the said wharf, certain goods and chattels, to wit, &c. (*describe them minutely or as in trover*) of the said plaintiff, of great value, to wit, of the value of —*l.* to be by the said defendant safely and securely kept at and upon the said wharf, and from thence shipped in and on board of a *certain ship or vessel* (u), for the purpose of being carried and conveyed therein to a certain place, to wit, a place called — for reasonable (w) wharfage and reward to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would safely and securely keep the said goods and chattels at and upon the said wharf, and would ship the same in and on board of the said ship or vessel in manner and for the purpose aforesaid. And although the said defendant then and there had received the said goods and chattels, and could, and might and ought to have shipped the same in and on board of the said ship or vessel, in manner and for the purpose aforesaid, yet the said defendant not regarding his said promise and undertaking, but contriving and intending to deceive and injure the said plaintiff in this behalf, did not nor would safely and securely keep the said goods and chattels at and upon the said wharf, nor ship the same in and on board of the said ship or vessel, in manner and for the purpose aforesaid; but on the contrary thereof, he the said defendant so carelessly and negligently conducted himself in this behalf, that by and through the mere carelessness and negligence *of the said defendant and his servants in that behalf, the said goods and chattels being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff to wit, at, &c. (*venue*) aforesaid.

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Second
count for
not ship-
ping the
goods on
board any
vessel in a
reasona-
ble time.

And whereas also heretofore, to wit, on the day and year aforesaid, at &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had caused to be delivered to the said defendant certain other goods and chattels of the said

(t) See forms, 2 Wentw. Index.—7 T. R. 171.—3 Wentw. 21. A wharfinger is not, like a carrier, responsible at all events for the safe custody of goods intrusted to his care, he is liable only for ordinary neglect. See 4 T. R. 581.—Peake's N. P. 114.—1 Stark. 72.—1 Esp. Rep. 315.—Cowp. 480. When liable for loss by fire, see 2 Stark. 400. By statutes 6 Ann. c. 31—14 Geo. 3. c. 78, s. 86, they are not liable for loss by fire. In order to discharge a wharfinger who undertakes to ship goods, from re-

sponsibility for goods left with him to be sent coastwise, a delivery to the mate, or some other officer of the ship, by which they are to be conveyed, is necessary. 1 Ry. & Moo. 224. Leaving goods at a wharf piled amongst other goods, without any communication with any one there, is not a delivery to the wharfinger, 3 Campb. 414.

(u) If the vessel be named, say, "a *certain ship or vessel called the —*."

(w) 2 New Rep. 458.

AGAINST
WHARF-
INGERS.

plaintiff, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said first count mentioned, to be by the said defendant safely and securely kept and taken care of, and shipped within a reasonable time then next following, in and on board of some ship or vessel about to sail and proceed from [the river Thames aforesaid] to, &c. aforesaid, for certain reasonable reward to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff safely and securely to keep the said last-mentioned goods and chattels till the same should be so shipped as last aforesaid, and to ship the same within a reasonable time then next following, in and on board of some ship or vessel about to sail from, &c. aforesaid, to, &c. aforesaid; and although the said defendant then and there had and received the said last-mentioned goods and chattels for the purpose last aforesaid, and although a reasonable time for the said defendant to ship the last-mentioned goods and chattels in and on board of some ship or vessel about to sail from, &c. aforesaid, to, &c. aforesaid, hath long since elapsed, and although the said defendant could and might during that time have shipped the said last-mentioned goods and chattels as last aforesaid, yet the said defendant not regarding his said last-mentioned promise and undertaking, but contriving and intending to defraud and injure the said plaintiff in this behalf, did not nor would, within such reasonable time as aforesaid, or at any time since, ship the said last-mentioned goods and chattels in and on board of any ship or vessel about to sail from, &c. aforesaid, to, &c. aforesaid, but wholly neglected so to do, and the said defendant so carelessly and negligently conducted himself in that behalf, that by and through the mere carelessness and negligence of the said defendant, the said last-mentioned goods and chattels being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.

And whereas also the said defendant heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had caused to be delivered (x) to the said defendant certain other goods and chattels *of the said plaintiff, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said first count mentioned, *and which said last-mentioned goods and chattels were then and there intended to be shipped, for and on account of the said plaintiff, to be by the said defendant safely and securely kept at and upon the said wharf, until the same should be so shipped as aforesaid, for a reasonable wharfage and reward to and for the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would safely and securely keep the said last-mentioned goods and chattels at and upon the said wharf, until the same should be so shipped as last aforesaid. And although the said defendant had and received the said last-mentioned goods and chattels, hamper, and its contents aforesaid, for the purpose last aforesaid, yet the said defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to deceive and defraud the said

Third
count, for
not keep-
ing safely
till the
goods
were ship-
ped.
[*354]

(x) See 1 Bing. Rep. 34.

AGAINST
WHARF-
MANS.

plaintiff in this behalf, did not nor would safely or securely keep the said last-mentioned goods and chattels at or upon the said wharf, until the same were so shipped as last aforesaid; but on the contrary thereof, he the said defendant so carelessly and negligently conducted himself in this behalf, that by and through the mere carelessness and negligence of the said defendant and his servants, the said last-mentioned goods and chattels being of the value aforesaid, were afterwards and before the same were so shipped, to wit, on the day and year aforesaid, wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.

Fourth
count, for
not safely
keeping
goods
generally.

And whereas also, &c. [*same as third count as far as the asterisk, and then proceed as follows:*] to be by the said defendant safely and securely kept for the said plaintiff, he the said defendant undertook, and then and there faithfully promised the said plaintiff, that he the said defendant would safely and securely keep the said last-mentioned goods and chattels for the said plaintiff as aforesaid†. And although the said defendant then and there had and received the said last-mentioned goods and chattels for the purpose last aforesaid, yet the said defendant not regarding his said last-mentioned promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would safely and securely keep the said last-mentioned hamper and its contents aforesaid; but on the contrary thereof, he the said defendant so carelessly and negligently conducted himself in that behalf, that by and through the mere carelessness and negligence of the said defendant, the said last-mentioned goods and chattels being of the value aforesaid, to wit on the day and year aforesaid, became, and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.

Fifth
count, on
a promise
safely to
keep
goods and
re-deliver
them on
request.
[*355]

And whereas also heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) [*same as last count as far as†, and then proceed as follows:*] and to re-deliver the same to the said plaintiff when he the said defendant should be *thereto afterwards requested. And although the said defendant was afterwards, to wit, on the day and year aforesaid, requested by the said plaintiff to re-deliver the said last-mentioned goods and chattels, to the said plaintiff, to wit, at, &c. (*venue*) aforesaid, yet the said defendant not regarding his said promise and undertaking, did not nor would at the time when he was so requested as aforesaid, or at any time afterwards, re-deliver the said last-mentioned goods and chattels, or any of them or any part thereof to the said plaintiff, but he so to do hath hitherto, wholly neglected and refused, and still doth neglect and refuse, to wit, at, &c. (*venue*) aforesaid.—[*Add counts for money had and received, and the account stated, if there be any reason to apprehend that the defendant may have received the value of the goods.*]

AGAINST A
FARRIER.

XXXII. AGAINST A FARRIER.

Against a
farrier, for
badly

For that whereas the said plaintiff, heretofore, to wit, on, &c. (*day of retainer or about it*) at, &c. (*venue*) at the special instance and request

of the said defendant, retained and employed the said defendant (he the said defendant then and there being a farrier) in the way of his said business of a farrier, to shoe a certain horse of the said plaintiff, of great value, to wit, of the value of £—; and in consideration thereof, and also in consideration of certain reasonable reward to the said defendant in that behalf, he the said defendant then and there, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and then and there faithfully promised the said plaintiff to shoe the said horse in a skilful, careful, and proper manner; and although the said defendant then and there had and received the said horse for the purpose aforesaid, and shod the same, yet the said defendant not regarding his said promise and undertaking, but contriving and intending to injure the said plaintiff in this behalf, did not nor would shoe the said horse in a skilful, careful, and proper manner, but wholly neglected so to do; and on the contrary thereof, he the said defendant, after the making of his said promise and undertaking, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, so unskilfully, carelessly, negligently, and improperly shod the said horse, that by and through the mere unskilfulness, carelessness, and improper conduct of the said defendant in this behalf, the near foot before of the said horse was then and there pricked and wounded; and the said defendant then and there put and placed too narrow a shoe on the said horse, and thereby and otherwise so improperly shod the said horse, that by means of the said several premises the said horse then and there became and was lamed and hurt, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time the said plaintiff thereby lost and was deprived of the use and benefit of his said horse, and also thereby, he the said plaintiff was forced and obliged to and did necessarily lay out and expend a large sum of money, to wit, the sum of £—, in and about the endeavoring to heal and cure the said horse, and the said horse, was and is by means of the said premises greatly damaged and deteriorated in value, to wit, at, &c. (*venue*) aforesaid.—[*Add one or more special counts less particular, and adapted to the nature of the case, stating the injury more generally.*]

AGAINST A
FARRIER.

shoeing
plaintiff's
horse (y).

*XXXIII. AGAINST CARRIER BY LAND.

[*356]

AGAINST
CARRIERS
BY LAND.

For that whereas the said defendant, before and at the time of the making of his said promise and undertaking hereinafter next mentioned, was a common carrier of goods and chattels for hire, in and by a certain wagon, (or "coach") from a certain place, to wit, from — to a certain

Against a
carrier by
land, for
the loss of
goods (a).

(y) This action is founded on the implied contract, that every workman, &c. undertaking any work, will perform it properly. 1 Saund. 312, n. 2.—1 Hen. Bla. 158.—7 T. R. 171.—5 T. R. 150

(a) See other forms, Morg. 131. Pl. A. 67, 68, 248, and other modern forms, and notes, post, 359 to 365, and forms in *Case*, post, 651. (and the stat. 11 G. 4. and 1.

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W. 4. c. 68, and decisions, 1 Chit. Gen. Prac. 486 to 494; Owen v. Burnett, 2 Crom. & Mees. 353; 6 Car. & P. 58.)

The action should be brought in the name of the consignee of the goods, when they are sent at his risk, as is most usual, and not in the name of the consignor. 8 T. R. 330.—Bul. N. P. 36—3 P. Wms. 186.—3 B. & P. 582.—2 Saund. 47 h. Cowp. 295.—

AGAINST
CARRIERS
BY LAND.

other place, *to wit, to — (b), to wit, at, &c. (*venue*). And the said defendant being such carrier as aforesaid, the said plaintiff heretofore, to wit, on, &c. (*day of delivery or about it*) at, &c. (*venue*) aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant, so being such carrier as aforesaid, at, &c. (*venue*) aforesaid, certain goods and chattels, to wit, &c. [*describe them minutely or as in trover*] (c) of the said plaintiff, of great value, to wit, of — £ of lawful money of Great Britain, to be taken care of, and safely and securely carried and conveyed by the said defendant, as such carrier as aforesaid, in and by the said wagon or “coach”) from, &c. aforesaid, to, &c. aforesaid (or merely say to, aforesaid, omitting *the place from whence they were to be carried*) and there, to wit, at, &c. aforesaid, to be safely and securely delivered by the said defendant for the said plaintiff; and in consideration thereof, and of certain reward (d) to the said defendant in that behalf, he the said defendant being such carrier as aforesaid, then and there, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, undertook, and faithfully promised the said plaintiff to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by the said wagon, (or “coach”) from, &c. aforesaid, to, &c. aforesaid, or to, &c. aforesaid) and there, to wit, at, &c. aforesaid, safely and securely to deliver the same for the said plaintiff. And although the said defendant, as such carrier as aforesaid, then and

3 T. R. 469.—Morg. Prec. 131. But if the consignee had no property in the goods at the time of delivery to the carrier, the consignor should sue. Id.—3 B. & A. 277.

As to who are common carriers, and of their liabilities and rights in general, see Jeremy's Law of Carriers.—3 Chit. Com. Law. 369 to 384.—Selw. N. P. tit. Carrier.—Chit. jun. on Cont. (2d ed. 380 to 393; and see 1 Chit. Gen. Pract. 486 to 494; and see 1 W. 4, c. 68, and cases thereon, *id.*)

The action against a carrier may be either in *assumpsit* or *case*. 5 Mod. 92.—2 Salk. 440. (1). The latter form of action is preferable, if there be any doubt as to the defendant's having a partner, because in an action on the *case* the joinder of too many defendants will not prejudice, nor can the defendant plead in abatement, the non-joinder of his co-partners, 3 East, 62.—2 Chit. Rep. 1—3 B. & B. 54—6 J. B. Moore, 141—9 Price, 408; but in such case the defendants must be sued as if their liability was founded on the custom of the realm, and not on a contract. 6 J. B. Moore, 54.—2 New Rep. 345, 454.—12 East, 94.

With respect to the declaration, it does not appear to be necessary to commence with an inducement of the defendant's being a common carrier, or of the nature of the conveyance, but the declaration will suffice if it merely state the delivery to the defendant of the goods, &c. to be carried from, &c. to, &c. and his undertaking to carry accordingly, &c. 1 Wils. 281.—Bac.

Ab. tit. “Carrier,” A.—Com. Dig. Action on *Case* for Negligence. But as we have just seen, in an action on the *case* to avoid the plea of non-joinder, this doctrine does not hold. The declaration may be on an executed consideration, in consideration of plaintiff having delivered the goods. 7 J. B. Moore, 263. If the carrier excepts his liability from loss occasioned by fire or robbery, &c. it must be so stated in the declaration. 3 D. & R. 211.—2 B. & C. 20, S. C. So if the carrier gives a notice that he will not pay any thing for loss of goods which exceed 5*l.* in value, the exception must be set out in the declaration; but if the notice be that he will not pay more than 5*l.* for the loss of any goods, such exception need not be noticed. 3 D. & R. 212. See 6 East, 564, 569.

(b) Under an averment that the coach went “from — to —,” without the *vide licets*, laid as above, a variance in the description of either place would be bad. 2 Stark. 385.—5 Taunt. 709. London, in common parlance, means Westminster, &c. and what no variance on that account, see 1 M. & P. 735. It would, it should seem, suffice to state merely the place to which the goods were to be conveyed.

(c) An exact description is not material. 2 Saund. 74 a.

(d) This is sufficient without showing what reward. 13 East, 114, n. a.—2 New Rep. 458.—2 Ld. Raym. 115.

AGAINST
CARRIERS
BY LAND.

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there had and received the said goods and chattels for the purpose aforesaid, yet the said defendant not regarding his duty as such carrier, nor his said promise and undertaking so made as aforesaid, but contriving and fraudulently intending, craftily and subtly, to deceive and injure the said plaintiff in this behalf, hath not taken care of the said goods and chattels, or safely or securely carried or conveyed the *same from, &c. aforesaid, to, &c. aforesaid, (or to, &c. aforesaid) nor hath there, to wit, at, &c. aforesaid, safely or securely delivered the same for the said plaintiff; but on the contrary thereof, he the said defendant being such carrier as aforesaid, so carelessly and negligently behaved and conducted himself (e), with respect to the said goods and chattels aforesaid, that by and through the mere carelessness, negligence, and improper conduct of the said defendant and his servants in this behalf, the said goods and chattels being of the value aforesaid, afterwards, to wit, the day and year aforesaid, at, &c. (venue) aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (venue) aforesaid. And whereas also afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there caused to be delivered to the said defendant divers other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said first count mentioned of the said plaintiff, to be taken care of, and safely and securely carried and conveyed by the said defendant to, &c. aforesaid, and there, to wit, at, &c. aforesaid, to be delivered by the said defendant for the said plaintiff, for certain reward to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to take care of the said last-mentioned goods and chattels, and safely and securely to carry and convey the same to, &c. aforesaid, and there, to wit, at, &c. aforesaid, to deliver the same for the said plaintiff in a reasonable time then next following. And although the said defendant then and there had and received the said last-mentioned goods and chattels for the purpose aforesaid, and although a reasonable time for the carriage, conveyance, and delivery thereof as aforesaid, hath long since elapsed, yet the said defendant not regarding his said last-mentioned promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this respect, did not nor would, within such reasonable time as aforesaid, or at any time afterwards, although often requested so to do, safely and securely carry and convey the said last-mentioned goods and chattels to, &c. aforesaid, nor there, to wit, at, &c. *aforesaid, deliver the same for the said plaintiff, but hath hitherto wholly neglected and refused so to do, whereby the said last-mentioned goods and chattels, being of the value aforesaid, have been and are wholly lost to the said plaintiff, to wit, &c. (venue) aforesaid.—[Add a general count for not taking proper care of the goods, as ante, 342.—Add counts for money had and received, and upon an account stated.]

Second
count, for
not carry-
ing within
a reasona-
ble time.

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For that whereas the said defendant, before and at the time of the making of his promise and undertaking, hereinafter next mentioned, was the owner and proprietor of a certain coach or carriage, going

Against a
coach-
owner for
not carry-

(e) This is a sufficient averment to admit of proof of gross negligence. 2 J. B. Moore, 18.

AGAINST
CARRIERS
BY LAND.

—
ing a pas-
senger
(f).

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and passing from a certain place, to wit, from — to a certain other place, to wit, to — (g) for the carriage and conveyance therein of passengers, and their luggage, for certain reasonable hire and reward (h) to wit, at, &c. (*venue*). And thereupon, heretofore, to wit, on, &c. (*the day of journey or about it*), at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, would take and engage a place or seat in the coach or carriage of the said defendant, to be carried and conveyed therein, as a passenger, from a certain place, to wit, from — to a certain other place, to wit, to — aforesaid, together with his luggage, to be carried and conveyed by the said coach, from the said place called — to the said place called — at and for certain reasonable hire or reward, to be therefore paid by the said plaintiff to the said defendant in that behalf, he the said defendant then and there undertook and faithfully promised the said plaintiff to carry and convey the said plaintiff, together with his said *luggage, in and by the said coach or carriage, from — aforesaid to — aforesaid. And the said plaintiff in fact saith, that although he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, take and engage a place or seat in the said coach or carriage, to be carried and conveyed, together with his said luggage, in and by the said coach or carriage, from — aforesaid to — aforesaid. And although the said plaintiff, from the time of making the said promise and undertaking of the said defendant was ready and willing, and on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, was ready, to wit, at the said place called — to be carried and conveyed, together with his said luggage, in or by the said coach or carriage, from thence, to — aforesaid, and the said plaintiff then and there requested the said defendant to carry and convey the said plaintiff, together with his said luggage, in or by the said coach or carriage, from — aforesaid to — aforesaid; yet the said defendant not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this behalf, did not nor would, when he was so requested as aforesaid, or at any other time, carry or convey the said plaintiff, together with his said luggage, or otherwise, in or by the said coach or carriage from the said place called — to the said place called — but then and there wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid, whereby he the said plaintiff was then and there forced and obliged to procure another conveyance, to, &c. aforesaid, and was thereby also put to great trouble and inconvenience, and to great expense of his monies, amounting to a large sum of money, to wit, the sum of £— and was and is by means of the premises otherwise greatly injured and damnified, to wit, at, &c. (*ve-*

(f) This count is founded on the undertaking implied by the plaintiff's having taken a place. See a form in case, post, 654. Where a person engaging a place in a stage, pays merely the deposit, the proprietor may put in another person, if the party be not at the coach at the appointed time, 1 Esp. Rep. 27; but where the whole fare is paid, the seat must be kept open during the whole of the journey, id. ibid. —If no place have been taken, and the de-

fendant refuse to carry the plaintiff or his luggage, having room for that purpose, the declaration should be in case. Which action is sustainable, B. N. P. 70; 2 Show. 327; 1 Show. 105; Dyer, 158; 8 Co. 32; 1 Saund. 312, n. e.; 5 T. R. 149; Ld. Raym. 652. 654. See a form in case, post, 654, for the loss of a parcel, which defendant engaged to carry with a passenger.

(g) As to this averment, see ante, 357, n. (h) 2 New Rep. 458.

nue) aforesaid.—[State any special damage which the plaintiff may have sustained, and add a count or counts, omitting the inducement or statement, that the defendant was owner of the coach, and what relates to the luggage, and not stating where the plaintiff was to start from, also the money counts, and account stated, and breach.]

AGAINST
CARRIERS
BY LAND.

For that whereas the said defendant, before and at the time of the making of his promise and undertaking hereinafter next mentioned, was the owner and proprietor of a certain coach, going and traveling from a certain place, to wit, a place called — to a certain other place, to wit, a place called — for the carriage and conveyance of passengers therein, for hire and reward to the said defendant in that behalf, to wit, at, &c. (*venue*) and thereupon, heretofore, to wit, on, &c. at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would take and engage a place in the said coach, to be carried and conveyed therein from the said place called — to the said place called — at and for certain reasonable reward, to be therefore paid by the said plaintiff to the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to carry and convey the said plaintiff in and by the said coach, from the said place called — to the said place called — and not to put or suffer, or permit to be put into the said coach, more than [six] persons, including the said plaintiff, children in lap excepted. And the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant afterwards, to wit on the day and year aforesaid, at, &c. (*venue*) did take and engage the said place, as an inside passenger, in and by the said coach, to be carried and conveyed therein from — aforesaid to — aforesaid; and although the said plaintiff was then and there ready and willing to go and proceed as a passenger in and by the said coach from — aforesaid to — aforesaid, and afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) paid to the said defendant a large sum of money, to wit, the sum of £ — the same being (or part of) a reasonable reward to the said defendant for the carriage and conveyance of the said plaintiff as aforesaid, (and was then and there ready and willing to pay him the residue of such reward) whereof the said defendant then and there had notice; yet the said defendant not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, then and there wrongfully and unjustly put and suffered, and permitted to be put more than [six] to wit, seven persons, none thereof being children, into the said coach, contrary to his said promise and undertaking so by him in that behalf made as aforesaid, and by reason thereof there was not convenient and sufficient room in the inside of the said coach for the *said plaintiff to be carried and conveyed therein, from — aforesaid to — aforesaid, and thereby the said plaintiff was hindered and prevented from going and proceeding as such passenger as aforesaid, in and by the said coach, from — aforesaid to — aforesaid, and was thereby then and there forced and obliged, and did then and there necessarily pay, lay out, and expend a large sum of money, to wit, the sum of

Against the owner of a stage-coach (by a person who had engaged a place) for taking more passengers than lawful, whereby plaintiff was prevented from proceeding on his journey, and incurred sundry expenses (i).

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(i) See 46 Geo. 3. c. 136.—9 Geo. 4. c. 49.—4 Esp. Rep. 259; and post, 362.

AGAINST
CARRIERS
BY LAND.

Second
count, for
not provid-
ing suffi-
cient
room for
plaintiff.

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£— in and about his necessary maintenance and disbursements, until he the said plaintiff could procure another conveyance from — aforesaid to — aforesaid, and in and about the taking of the said journey from — to — aforesaid. And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) in consideration that the said plaintiff at the like special instance and request of the said defendant, had then and there taken and engaged an inside place in a certain other coach, to be conveyed as a passenger therein, to — aforesaid, at and for certain reasonable reward theretofore paid by the said plaintiff to the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff that he the said defendant would carry and convey the said plaintiff in and by the said last-mentioned coach to — aforesaid, and that he, the said defendant would provide the said plaintiff as such passenger *as aforesaid, convenient and sufficient room in the inside of the said last-mentioned coach, in and during the last-mentioned journey; and although the said plaintiff, confiding in the said last-mentioned promise and undertaking of the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, was ready and willing to be carried and conveyed as last aforesaid, whereof the said defendant then and there had notice; yet the said defendant not regarding his said last-mentioned promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, did not nor would provide the said plaintiff convenient and sufficient room in the inside of the last-mentioned coach, but then and there wholly refused and neglected so to do, to wit, at, &c. (*venue*) aforesaid.

Against
the pro-
prietors of
a stage-
coach, for
negli-
gence and
overturn-
ing it,
whereby
the plain-
tiff's arm
was broken
(k).

For that whereas the said defendants, before and at the time of the making of their promise and undertaking hereinafter next mentioned, were the owners and proprietors of a certain stage coach or carriage, going and

(k) See other forms, ante, 355. *Morg. Prec.* 131. *Pl. A.* 67, 68, 248.—2 *Wentw.* 240, 254. See form in *Case*, post, 647. Coach-owners liable for accidents occasioned by overloading coach. 46 *Geo. 3. c.* 136. 9 *Geo. 4. c.* 49.—4 *Esp. Rep.* 250. The proprietors of a mail coach are liable for injuries occasioned by the misconduct of their driver. *Peake. Rep.* 81. Coach-owners do not insure the persons of their passengers against accidental injuries not attributable to negligence, 2 *Campb.* 81.—2 *Esp.* 533.—5 *Esp.* 273.—2 *Esp.* 685.—2 *Bing.* 321.—11 *J. B. Moore*, 153, *S. C.* The breaking down or overturning of the coach, is *prima facie* evidence of negligence on the part of the owner, 2 *Campb.* 79. So where a coach which is overloaded breaks down, the excess in the number of passengers has been held to be conclusive evidence of the accident having arisen from overloading, 4 *Esp.* 259. As to the law of the road, see 2 *D. & R.* 255.—5 *Esp.* 273. The proprietor of a stage coach is answerable for the safety of his passengers, till the coach arrives at its usual place of destination; and if they are passing through any place that is dangerous, he is bound to warn them of the

full extent of their danger, 1 *Campb.* 167. If the driver may adopt either of the two courses, one of which is safe, and the other hazardous, and he selects the latter, he will be responsible for damage ensuing thereby. 1 *Stark.* 422.—The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made, also with lights by night. *Per Best*, *C. J.* 3 *Bingh.* 321.—11 *J. B. Moore*, 153, *S. C.* The coachman is always to blame if he has not exercised the best and soundest judgment on the subject; if he could have exercised a better judgment than he did, the owner is liable, *per Ellenborough*, *C. J.* 2 *Stark.* 29. If a passenger in consequence of the negligence of the defendant, is placed in such a situation as obliges him to adopt the alternative of leaping from the coach, or remaining at certain peril, and he leaps, and is hurt, the defendant is liable; but it must appear that the leaping was a prudent precaution for the purpose of self-preservation, 1 *Stark.* 493.

AGAINST
CARRIERS
BY LAND.

passing from a certain place, to wit, from [London], to a certain other place, to wit, to [Liverpool] for the carriage and conveyance thereby of passengers, for certain reasonable hire and reward, to the said defendants in that behalf, to wit, at, &c. (*venue*) and thereupon heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendants, would take and engage a place and seat in the said coach of the said defendants, to be carried and conveyed in and by the said coach from [London] aforesaid, to [Liverpool] aforesaid, at and for certain reasonable hire and reward, to wit, *the sum of £— to be therefore paid by the said plaintiff to the said defendants in that behalf, they the said defendants then and there undertook, and faithfully promised the said plaintiff, to carry and convey the said plaintiff in or by the said coach, from [London] aforesaid to [Liverpool] aforesaid and to use due care, and diligence in and about so carrying and conveying him as aforesaid. And the said plaintiff in fact saith, that he, confiding in the promise and undertaking, of the said defendants, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, take and engage a place and seat in the said coach, to be carried and conveyed in and by the said coach from [London] aforesaid, to [Liverpool] aforesaid, and did then and there pay to the said defendants the sum of £— the same being a reasonable hire or reward to the said defendant for the carriage and conveyance of the said plaintiff, as aforesaid. And although the said plaintiff, confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, become and was such passenger in and by the said coach, to be carried and conveyed in and by the same from [London] aforesaid to [Liverpool] aforesaid, yet the said defendants not regarding their said promise and undertaking, so by them made in manner and form aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would use due and proper care, skill and diligence, in and about the carrying and conveying the said plaintiff, in and by the said coach from [London] aforesaid to [Liverpool] aforesaid, but then and there wholly neglected and refused so to do; and on the contrary thereof, so carelessly, improperly, negligently, and unskilfully, drove and managed the said coach, that afterwards, and whilst the said coach was proceeding from [London] aforesaid to [Liverpool] aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, by and through the mere carelessness, negligence, unskilfulness, and misconduct of the said defendants, the said coach was overturned, by means of which said several premises the right arm (l) of the said plaintiff became and was fractured and broken, and he the said plaintiff, was then and there in other respects greatly hurt, bruised, and wounded, and *was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time he the said plaintiff suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business, by him during that time to be performed and transacted (m) and also thereby he the said plaintiff was forced and obliged to, and did

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(l) Let this agree generally with the facts.

(m) If any other special damage has arisen, here state it.

AGAINST
CARRIERS
BY LAND.

Second
count,
more
general.

necessarily pay, lay out, and expend a large sum of money, to wit, the sum of £100 of lawful money of Great Britain, in and about endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness, and disorder aforesaid, occasioned as aforesaid, to wit, at, (*venue*) aforesaid. And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendants, had then and there taken and engaged a seat and place by a certain other coach, to be carried and conveyed thereby, to, &c. aforesaid, for certain other reasonable hire and reward to the said defendants in that behalf, they the said defendants then and there undertook, and faithfully promised the said plaintiff, that due and proper care should be observed and taken in and about the carrying and conveying him the said plaintiff, as such passenger as aforesaid, to, &c. aforesaid, and although the said plaintiff, confiding in the said last-mentioned promise and undertaking of the said defendants, afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, did become such passenger by the last-mentioned coach as aforesaid; yet the said defendants not regarding their said last-mentioned promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud and injure the said plaintiff in this behalf, did not nor would cause and procure due and proper care to be observed and taken in and about the carrying and conveying the said plaintiff as such passenger aforesaid, to, &c. aforesaid, but wholly neglected so to do; and by reason of the careless and improper conduct of the said defendants and their servants in that behalf, in and about the driving, conducting and management of the said last-mentioned coach, one of the arms of the said plaintiff became and was broken and fractured, and the said plaintiff was, in other respects, greatly hurt, bruised, and wounded, and became and

[*365] was *sick, sore, and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time he the said plaintiff thereby suffered and underwent great pain, torment, and agony, and was hindered and prevented from performing and transacting his necessary affairs and business, by him during that time to be performed and transacted; and also thereby he the said plaintiff was forced and obliged to, and did necessarily pay, lay out, and expend another large sum of money, to wit, the sum of £100 of like lawful money, in and about the endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness, and disorder last aforesaid, so occasioned as aforesaid, to wit, at, &c. (*venue*) aforesaid.—[Counts for money paid, had, and received, account stated, and breach.]

AGAINST
CARRIERS
BY WA-
TER.

Against
the cap-
tain of a
ship, on
his bill of
lading, for
loss of
goods (n).

XXXIV. BY AND AGAINST CARRIERS BY WATER.

For that whereas the said defendant, before and at the time of the making of his promise and undertaking hereinafter next mentioned, was the

(n) See other forms.—2 Wentw. Index. Carth. 58.—Rep. Temp. Hardw. 196.—5 —Morg. 131, 134, 136.—Pl. A. 147. Lil. East, 428.—3 B. & A. 277.—See note, ante, Ent. 26, and other modern forms, post; 356.—See also 6 J. B. Moore, 158, 415.—7.

AGAINST
CARRIERS
BY WA-
TER.

master and commander of a certain ship or vessel called the —, then in [the river Thames,] and bound from thence to [Liverpool, in the county of Lancaster,] to wit, at, &c. (*venue*). And thereupon the said plaintiff heretofore, to wit, on, &c. (*the date of the bill of lading or about it*), in the river Thames aforesaid, to wit, at, &c. (*venue*) aforesaid, at the special instance and request of the said defendant (*let the following averment agree with the bill of lading*) caused to be shipped *loaded in and on board of the said ship or vessel, whereof the said defendant then was such master or commander as aforesaid, divers goods and merchandize, to wit, —, then in good order and well-conditioned, (*these latter words are to be omitted, if not in the bill of lading*) of great value, to wit, of the value of £— to be taken care of and safely and securely carried and conveyed by the said defendant as such master and commander as aforesaid, in and on board of the said ship or vessel, from [the river Thames] aforesaid, to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid to be safely and securely delivered in the like good order and well conditioned for the said plaintiff, (the dangers of the seas only excepted) (o): and in consideration thereof, and of certain freight and reward to the said defendant in that behalf, he the said defendant then and there undertook, and faithfully promised the said plaintiff, to take care of, and safely and securely carry and convey, and deliver the said goods and merchandize as aforesaid, (the dangers of the seas only excepted,) and although the said defendant so being such master of the said ship or vessel as aforesaid, then and there had and received the said goods and merchandize, to be carried, conveyed, and delivered as aforesaid, and although a reasonable time for the carrying, conveying, and delivering of the said goods and merchandize, as aforesaid, hath long since elapsed, and the said defendant hath delivered a part (*let this agree with the fact*) of the said goods and merchandize, to wit, — part thereof, for the said plaintiff, at [Liverpool] aforesaid; yet the said defendant, so being such master and commander of the said ship or vessel as aforesaid, not regarding his duty in that respect, nor his said promise and undertaking, but contriving and intending to deceive, injure, and defraud the said plaintiff in this behalf, did not nor would take care of, and safely and securely carry or convey the residue of the said goods and merchandizes so shipped in and on board of the said ship or vessel as aforesaid, from [the river Thames] aforesaid to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, safely or securely deliver the same for the said plaintiff, (although no danger of the seas did prevent him from so doing) but on the contrary thereof, he the said defendant, so being such master of the said ship or vessel as aforesaid, *so carelessly and negligently behaved and conducted himself, with respect to the said residue of the said goods and merchandize, that

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J. B. Moore, 253. Who to sue under, 3 B. & A. 277.—3 Campb. 320. The action may be brought either against the owner or the master of the ship, Carth. 58.—Abbott's Shipping, *per totum* and index, tit. "Master and Owners." If the action be against the owner, the above form will suffice, with very little alteration. In coasting voyages, frequently there is no bill of lading, in

which case a part of the description of the contract will be omitted. If there be a charter-party under seal, the action must in general be founded on the deed, 1 New Rep. 104. See ante, 221, note (c). See also form in assumpsit on a charter-party, ante, 221.

(o) This exception depends on the terms of the bill of lading. See ante, 356, note.

AGAINST
CARRIERS
BY WA-
TER.

Second
count
more
general.

by and through the mere carelessness, negligence and improper conduct of the said defendant, and his mariners and servants in that behalf, the said residue of the said goods and merchandize, being of great value, to wit, of the value of £— became and was wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there caused to be delivered to the said defendant, divers other goods and merchandize, to wit, goods and merchandizes, of the like number, quantity, quality, description, and value, as those in the said first count mentioned, to be taken care of, and safely and securely carried and conveyed by the said defendant, in and on board of a certain other ship or vessel, from [the river Thames] aforesaid to [Liverpool] aforesaid, and there, to wit, at [Liverpool] aforesaid, to be safely and securely delivered for the said plaintiff, for certain freight and reward, to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff, to take due and proper care of the said last-mentioned goods and merchandize, whilst he had the care and custody thereof, for the purpose aforesaid. And although the said defendant then and there had and received the said last-mentioned goods and merchandize, for the purpose aforesaid; yet the said defendant, not regarding his duty in that behalf, nor his said last-mentioned promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, whilst the said defendant had the care and custody of the said last-mentioned goods and merchandize, for the purpose last aforesaid, took so little and such bad care of the same, that by and through the mere carelessness and negligence of the said defendant in that behalf, the said last-mentioned goods and merchandize, being of the value aforesaid, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[Add a general count for not taking care of the goods, as ante, 342, and a count for money had and received, if it be supposed the defendant has received the proceeds of the goods.]

By the
master of
a ship
against a
person
who had
employed
him to
bring
goods, for
not un-
loading
the same
in ten
days after
notice of
the arri-
val,
whereby
plaintiff
lost
freight

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant, would receive and take, in and on board of a certain ship or vessel called —, then in the port of —, and bound to —, a large quantity of goods and chattels, to wit, [100 puncheons of whiskey,] to be carried and conveyed therein by the said plaintiff from — aforesaid to — aforesaid, for the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff that he the said defendant would cause the said goods and chattels, to be taken and unladen from and out of the said ship or vessel in ten working days after notice to him the said defendant of the arrival of the ship or vessel, with the said whiskey on board thereof, at — aforesaid. And the said plaintiff avers, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, receive and take, in and on board the said ship or vessel the said goods and chattels, and did carry and convey the same in and on board the said ship or vessel, from — aforesaid to — afore-

said, for the said defendant; and the said ship or vessel, with the said goods and chattels on board thereof, afterwards, to wit, on, &c. (*day of arrival, or about it*) did arrive at, &c. aforesaid, and although the said plaintiff was then and there, and from thence continually afterwards ready and willing, and offered to the said defendant to permit and suffer him, and did then and there require the said defendant to take and unload the said goods and chattels from and out of the said ship or vessel in ten working days then next following, to wit, at, &c. (*venue*) aforesaid, and the said defendant then and there had notice of the premises; yet the said defendant, well knowing the premises, but not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this behalf, did not nor would cause the said goods and chattels to be taken and unladen from and out of the said ship or vessel in ten working days next following after the notice of the said arrival of the said ship or vessel, with the said goods and chattels on board thereof as aforesaid; at, &c. (*venue*) aforesaid, but, on the contrary thereof, he the said defendant wrongfully and injuriously delayed, neglected, and omitted to take and unload the said goods and chattels from and out of the said ship or vessel for a great and unreasonable time after the expiration *of the said ten days, to wit, until and upon, &c. to wit, at, &c. (*venue*) aforesaid; whereby the said plaintiff, during the time aforesaid, was not only deprived of the use of the said ship or vessel, and of all the profits and emoluments which might and would have accrued therefrom, but was thereby also hindered and prevented from taking and receiving, in and on board the said ship or vessel, a certain large quantity of [timber*,] which he, the said plaintiff, had agreed to take and receive in and on board of the said ship or vessel, at — aforesaid, to be carried and conveyed from — aforesaid, to —, for certain reward to be therefore paid to the said plaintiff, and thereby the said plaintiff has lost and been deprived of divers great gains and profits which he might and would otherwise have made and acquired from the use of the said ship or vessel, to wit, at, &c. (*venue*) aforesaid. And whereas also, heretofore, to wit, on, &c. at, &c. (*venue*) in consideration that the said plaintiff, at the like special instance and request of the said defendant had received on board of a certain other ship or vessel, at — aforesaid, a certain other large quantity of goods and chattels, to wit, [100 puncheons of whiskey,] to be carried and conveyed therein by the said plaintiff to — aforesaid, for the said defendant he the said defendant undertook, and then and there faithfully promised the said plaintiff that he the said defendant would cause the said last-mentioned goods and chattels to be taken and unladen from and out of the said last-mentioned ship or vessel within a reasonable time next after he the said defendant should have had notice of the arrival of the said last-mentioned ship or vessel, with the said goods and chattels on board thereof, at, &c. aforesaid, and that the same goods and chattels were ready to be delivered to him from on board of the said ship or vessel; and although the said plaintiff, confiding in the said promise and undertaking of the said defendant, to wit, on the day and year aforesaid, did carry and convey the said last-mentioned goods and chattels to — aforesaid, for the said defendant, and although the said defendant, afterwards, to wit, on the day and year aforesaid, had notice of the arrival of the said last-mentioned ship or vessel, with the said last-mentioned goods and

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—
during
another
voyage.

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Second
count for
not un-
loading
within a
reasona-
ble time.

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BY WA-
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chattels on board thereof, at, &c. aforesaid, and that the same goods and chattels were ready to be delivered to him from on board of the said last-mentioned ship or vessel; and although a reasonable time since the said defendant had notice, as last aforesaid, for him to cause the said last-mentioned goods and chattels to *be taken and unladen from and out of the said last-mentioned ship or vessel hath long since elapsed; and the said plaintiff was, during all that time, ready and willing to deliver the said last-mentioned goods and chattels to the said defendant, to wit, at, &c. yet the said defendant, well knowing the premises, but not regarding his said promise and undertaking last-mentioned, and contriving and intending to injure and defraud the said plaintiff in this respect, did not nor would, within such reasonable time as aforesaid, cause the said last-mentioned goods and chattels to be taken or unladen from and out of the said last-mentioned ship or vessel, but, on the contrary thereof, he the said defendant wrongfully and injuriously delayed and neglected, and omitted so to do, for a great and unreasonable length of time, to wit, until, &c. to wit, at, &c. (*venue*) whereby the said plaintiff was, during all that time aforesaid, not only deprived of the use of the said last-mentioned ship or vessel, and of all the profits and emoluments which might and would otherwise have accrued therefrom, but was thereby also hindered and prevented from taking and receiving in and on board of the said last-mentioned ship or vessel, a large quantity of timber (*as in the last count from the asterisk* to the end.*)—[*Add two counts for demurrage, as ante, 64; and two counts for use of ship, ante, 60, and account stated and breach.*]

On a pro-
mise, that
if plaintiff
would
take on
board his
vessel cer-
tain masts
of the de-
fendant,
and con-
vey them
from
Oporto to
London,
defendant
undertook
they
might be
lawfully
imported.

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For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said plaintiff, at the special instance and request of the said defendant, would take and receive on board a certain ship or vessel of the said plaintiff, in parts beyond the seas, to wit, at —, divers, to wit, [six masts,] and carry and convey the same in and on board of the said ship or vessel from — aforesaid to —, and for the said defendant, for freight and reward to the said plaintiff in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff that the said [masts] might be lawfully imported from — aforesaid to Great Britain, and that he the said defendant would clear the same from the said ship or vessel within a reasonable time next after the arrival of the said ship or vessel at London aforesaid; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) take and receive the said [masts] on board the said ship or *vessel, and carried and conveyed the same from — aforesaid to London aforesaid, and on the terms aforesaid; and the said ship or vessel, with the said masts on board thereof, afterwards, to wit, on the day and year aforesaid, arrived at London aforesaid, and the said plaintiff was then and there ready and willing to deliver the same to the said defendant, whereof he then had notice, to wit, at, &c. (*venue*) aforesaid; yet the said defendant not regarding his said promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, did not nor would take and clear the said masts from the said ship or vessel within a reasonable time next after the arrival of the said ship or vessel at London aforesaid, but wholly neglected and refused so to do, for a great and un-

reasonable length of time, to wit, from, &c. until the — day of —, during all which time the said plaintiff lost and was deprived of the use of the said ship or vessel, and all the profits and advantages which he might and otherwise would have derived and acquired from the use of the said ship or vessel, to wit, at, &c. (*venue*) aforesaid; and the said plaintiff further saith, that the said defendant further disregarding his said promise and undertaking, craftily deceived and defrauded the said plaintiff in this, to wit, that the said masts could not be legally imported from — aforesaid to Great Britain aforesaid, and by reason thereof, after the arrival of the said ship or vessel with the said masts on board thereof, at — aforesaid, to wit, on, &c. to wit, at, &c. aforesaid, the said ship or vessel, and the said masts became and were liable to be seized as forfeited to our said lord the king, and being so liable, the same were thereupon lawfully seized (*p*) as being so forfeited as aforesaid; and the said ship or vessel was, by reason thereof, kept and detained from the said plaintiff for a long time, to wit, until the — day of —, during all which time the said plaintiff lost and was deprived of the use of the said ship or vessel, and of all the profits, gains, and advantages, which he might and would have derived and acquired therefrom; and also, by reason thereof, he the said plaintiff, in order to regain the possession of his said ship or vessel, afterwards, to wit, on the — day of —, was forced and obliged to pay, and did pay, a large sum of money, to wit, the sum of £—; and also, by reason of the premises, the said plaintiff otherwise sustained great trouble and expense, to wit, an expense of *£— in and about endeavoring to regain the possession of his said ship or vessel, at, &c. (*venue*) aforesaid.—[*Add a count for freight, as ante, 61; money counts, and account stated.*]

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XXXV. AGAINST ATTORNIES.

For that whereas heretofore, to wit on, &c. (*day of retainer, or about* it) at, &c. (*venue*) in consideration that the *said plaintiff, at the spe-

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NIES.
Against
an attor-
ney, for
negligent-
ly con-
ducting a
cause to
trial with-
out proper
evidence
(*g*).

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(*p*) As to this averment, see 7 T. R. 171. (*g*) See other forms, 2 Went. 290 to 307; also for forms against other agents, ante, 342 to 351. For the law relating to the liabilities of attornies, see Tidd, 9th edit. 85, &c.; (and the more recent decisions, 2 Chit. Gen. Pract. 32 to 35; and see a form against an attorney for not instructing counsel to defend an action, 3 Barn. & Adol. 350.)

In ordinary cases, if an attorney be deficient in skill or care, by which a loss arises to his client, he is liable to a special action of *assumpsit*, or action on the case for damages. 2 Wils. 325—4 Burr. 2061. 1 Saund. 312, n. 2.—3 J. B. Moore, 340. 1 Bingham. 347, S. C.—Tidd, 9th edit. 85. As for neglecting to have a material witness in court, whereby plaintiff was nonsuited (4 B. & A. 202); for neglecting to charge a defendant (a prisoner) in execution, whereby the defendant was superseded, or for not declaring in due time (2 Wils. 325.—4

Burr. 2061); or for not entering and docking a judgment in due time. (1 Stra. 639.—Sugd. Vend. & P. 311); and an attorney employed to invest money on a copyhold security is liable, if the security be invalid and insufficient (4 J. B. Moore, 508.) Post, 379; and an attorney, relying on a mere partial extract of a will, where his client advanced money on it, is liable, if the client did not take the responsibility on himself.—3 Stark. 154.—1 D. & R. C. N. P. 30. S. C. And a jury may find an attorney guilty of negligence, if he omit to notice conveyances and deeds, in laying an abstract before a conveyancer, and instead of leaving the whole case to counsel, choose to draw his own conclusions, which are incorrect, 3 B. & Cres. 799.—5 D. & R. 587, S. C.

But an attorney is not liable unless for gross negligence or ignorance, and if he acted to the best of his skill, and with a

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cial instance and request of the said defendant had then and there retained (r) and employed the said defendant as an attorney of the court of

bona fide and moderate degree of attention he would not be liable, 2 Wils. 325.—5 Burr. 2069.—3 B. & Cres. 738, 742.—5 D. & R. 635, 638, S. C.—1 Ry. & Mo. 317.—2 C. & P. 113, S. C. Therefore he is not liable for a mistake in a nice point of practice, arising on the doubtful meaning of a rule of court. 3 B. & Cres. 738.—5 D. & R. 635, S. C. And where an attorney took the advice of counsel, who advised him certain proofs were unnecessary, whereby for the non-production of them plaintiff was nonsuited, the attorney was held not liable. 6 Bingh. 460. He will not be liable to an action for not filing a plea of non-joinder in abatement when instructed so to do, merely for delay. (1 Campb. 176.—2 Salk. 515); nor is he liable for negligence in conducting a suit against excise officers for a seizure, if it appear that such seizure was lawful (Peake's Rep. 162); and though it is now fully settled (by 1 New Rep. 214.) that the grant or assignment of an annuity is void, unless the trusts in the annuity deeds are not stated in the memorial, yet the omission of such a recital before this doctrine was established is not such negligence as to render an attorney answerable. (3 Campb. 17, 19.)

An attorney retained to do a particular act, and also directed to do the needful, is authorized to take such steps as have immediate relation to the act for which he is specially retained. (4 Esp. 75.)

An attorney, in the exercise of his general authority, may defend, but not institute a suit. (3 Meriv. 12.)

The question of negligence is for the opinion of the jury. (4 B. & A. 202.)—If diligence would have been ineffectual, the defendant must prove it. (2 Chit. Rep. 311.)

As to the liability of attorneys, &c. without reward, see 5 T. R. 143.—7 T. R. 171.—1 H. Bla. 158.

The court will in some instances, order an attorney to pay costs to his own client for neglect (Say. Rep. 50, 172.—3 Taunt. 484.—Tidd, 9th edit. 85, 6), or to the opposite party for vexatious and improper conduct. (2 Burr. 654.—Hull, on Costs. 482. &c.—4 T. R. 371 b.—3 Taunt. 492.—1 Chit. Rep. 44, 80.—Tidd, 9th, edit. 86.—4 Taunt. 191.) It is not usual however for the court to interfere in a summary way for a mere breach of promise, where there is nothing criminal (2 Wils. 371), or on account of negligence or unskilfulness, (4 Burr. 2069.—2 Bla. Rep. 780.) except it be very gross (Say. 50, 169,) or for the misconduct of an attorney independent of his profession, (Tidd, 86,) as to when court will in a summary way compel an attorney to execute his trust, (4 B. & A. 47.—2 Chit. Rep. 68.—1 Bing. 91.—7 J. B. Moore, 424; and see further, Tidd, 9th edit. 87.)

Declaration.—The plaintiff may frame

his action in assumpsit or case for the breach of duty, see ante, vol. i. 90, 129. In some cases the latter form of action would be most preferable; and see forms in case, post, 669. To take the case out of the Statute of Limitations, it seems, according to the late case in 5 B. & Cres. 259—8 D. & R. 14, S. C. immaterial, whether the plaintiff declares in assumpsit, or case, for the breach of promise or breach of duty, arises when the defendant is guilty of the misconduct or negligence, and it is perfectly immaterial when the consequences of such misconduct are discovered; and see 3 B. & Ald. 626. The cases in 4 J. B. Moore, 508, 532—2 B. & B. 73. S. C.—4 Esp. 18, 20.—16 East, 215, are somewhat to the contrary, but the above case may be considered as maintaining the most correct doctrine.

Though usual, it is not necessary nor advisable to allege that the party against whom the action was depending, was indebted, &c. and if the plaintiff, though unnecessarily, set out the former proceedings in which the defendant was retained, he must state them with accuracy. Peake's Rep. 119; what a variance, see 2 Esp. Rep. 726, 7.—Peak. Rep. 119.

The declaration may be without any inducement, and may commence with the statement of the defendant's retainer, without stating any consideration. 2 Chit. Rep. 311.—5 T. R. 143.—Peake's Rep. 237.—4 J. B. Moore, 532. It is not necessary to show of what court the defendant was an attorney, Peake's Rep. 237; and if the plaintiff does state it, he must prove it. 2 Chit. Rep. 311. It is best merely to state that plaintiff retained defendant as an attorney, as above.

It is in general proper, at least in one count, to declare generally on the duty.—Rep. temp. Hardw. 309. In some cases it is advisable to state the particular act, which it was the duty of the defendant to perform, and which allegation may be introduced in the following way, "and although it was the duty of the said C. D. under and by virtue of the said retainer, and his said promise and undertaking, to, &c." (stating the particular duty,) and then proceed, "Nevertheless, &c."

As to the statement of the consideration for the retainer, see infra.

Where the proceedings in a former action form the ground work of the present one, such proceedings must be produced, though all the papers are in the hands of the defendant, who has had notice to produce them. 1 Esp. Rep. 399.

(r) This is sufficient without stating a consideration, the defendant being stated to have been retained as an attorney. 2 Chit. Rep. 311.—5 T. R. 143. In a late case, where a declaration in assumpsit alleged,

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our said lord the king, before the king himself, (*s*) to prosecute and conduct a *certain action of (trover) in the same court, by and at the suit of the said plaintiff, against one E. F. for taking away and converting to his own use certain goods and chattels, claimed by him the said plaintiff, to be his own proper goods and chattels (*t*), for certain reasonable fees and reward (*u*), to be therefore paid by the said plaintiff, to the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to prosecute and conduct the said action in a proper, skilful, and diligent manner. Nevertheless the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure and defraud the said plaintiff in this behalf, did not nor would prosecute or conduct the said action in a proper, skilful, or diligent manner, but on the contrary thereof, prosecuted and conducted the same action to trial in so improper, unskilful, and negligent a manner [in not having a certain instrument before then prepared by the said defendant, and purporting to be a sale and assignment of the said goods and chattels, by the said E. F. to the plaintiff, stamped, according to law, so that the same might have been given in evidence on the said trial of the said action,] that the said plaintiff, by the said neglect and default of the said defendant in that behalf, was hindered and prevented from giving the same instrument in evidence upon the trial of the said cause, and by reason thereof, was afterwards, to wit, on, &c. (*day of nonsuit, or about it*) at, &c. (*venue*) aforesaid, compelled to suffer himself, the said plaintiff, to be non-suited in the said action, whereby he the said plaintiff was not only hindered and prevented from recovering his damages from the said E. F. by reason of his taking away and converting the said goods and chattels as aforesaid, but hath also been forced and obliged to pay, and hath paid, to the said E. F. a large sum of money, to wit, the sum of £—for his costs and charges in and about his defense of the said action; and hath also paid to the said defendant another large sum of money, to wit, the sum of £—for his costs and charges for the prosecution and conduct of the said action, to wit, &c. (*venue*) aforesaid.—[*Add such other special counts as may be applicable to the case, and a general count, as in next form.*]

that in consideration the plaintiff would retain and employ defendants to lay out a sum of money in the purchase of an annuity, they undertook to do their duty in the premises; that plaintiff did retain and employ them, but defendants did not do their duty in the premises, but on the contrary, took insufficient security for the payment of the annuity, whereby plaintiff lost the money, it was held, on motion in arrest of judgment, that the count was bad, inasmuch as it did not state that any reward was to be paid to the defendants, or that they were employed in any particular character, so as to make them responsible for taking a bad security, although not guilty of negligence or dishonesty. 4 B. & C. 345.—6 D. R. 438, S. C. Other counts, in the same declaration, alleged, that the defendants, at the time when they lent the money, knew that the security was insufficient, but did not allege that the plaintiff

had sustained any damage—*semble*, on that ground those counts were held insufficient. Id. In a prior case, in 2 Bing. 464—10 J. B. Moore, 183, S. C. a count, stating that the plaintiff had retained defendant, at his request, to lay out 700*l.* in the purchase of an annuity, that defendant promised to lay it out securely, that plaintiff delivered the money to him for that purpose, and that defendant laid it out insecurely; it was held, after verdict, that the consideration for the defendant's promise was sufficiently stated.

(*s*) This need not be stated, Peak. Rep. 237, if it be stated it must be proved, 2 Chit. Rep. 311, though defendant plead as attorney of the court, Id. and a bill for business done is not evidence that the party was an attorney of that court. Peake's Rep. 236.—4 T. R. 366.

(*t*) See ante, 371, note.

(*u*) See ante, 372, note.

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NEYS.

General
count
against an
attorney,
for impro-
perly con-
ducting
an action,
whereby
plaintiff
did not re-
cover in it.

*And whereas also, heretofore, to wit, on, &c. (*day of retainer or about it*) at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there retained and employed the said defendant as an attorney of the court of our lord the king, before the king himself, [or, *if in C. P. instead of the words* "before the king himself," say, "of the bench,"] to prosecute, conduct, and manage, a certain action in the said court, by and at the suit of the said plaintiff, against one E. F. for the recovery of a certain sum of money, to wit, the sum £— (*state enough*) then alleged, and claimed by the said plaintiff to be due and owing to him from the said E. F. [or, *if not for a debt but for damages, say,* "for the recovery of certain damages amounting, to wit, to the sum of £— (*state enough*) then and there alleged and claimed by the said plaintiff to have been sustained by him by reason of certain acts and wrongs before then done and committed by the said E. F. to the said plaintiff's damage"] for fees and reward to the said defendant in that behalf (*w*), he the said defendant undertook, and then and there faithfully promised the said plaintiff to prosecute, conduct, and manage, the said action with due and proper care, skill, and diligence; yet the said defendant, not regarding his said promise and undertaking, did not nor would prosecute, conduct, and manage, the said action with due and proper care, skill, and diligence; and on the contrary, by reason of the said defendant's conducting and managing the said action in a careless, unskilful, undue, and improper manner, and for the want of due and proper care, skill, and diligence in that behalf, the said action afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, became and was rendered wholly abortive and of no avail, and the said plaintiff then and there was forced and obliged to be, and he then and there was nonsuited (*or if a verdict found against him or otherwise, state the fact shortly accordingly*), whereby the said plaintiff was, and hath been hitherto, not only hindered and prevented from recovering his said debt (*or damages*) from the said E. F. but is likely to lose the same, and also hath been forced and obliged to incur and pay and hath incurred and paid to the said E. F. a large sum, to wit, the sum of £— (*state enough*) for his costs and charges in and about his defense to the said action, and hath also incurred and paid to the said defendant another large sum, to wit the sum of £— for the said plaintiff's costs and charges in and about the prosecuting and conducting the said action, to wit, at, &c. (*venue*) aforesaid.

Against
an at-
torney,
for not ob-
taining
judgment
as soon as
he ought
to have
done (*x*).

For that whereas heretofore, to wit, on, &c. (*day of retainer, or about it*) at, &c. (*venue*) in consideration that the said plaintiff, at the special instance and request of the said defendant would retain and employ the said defendant as an attorney of the court of our said lord the king, before the king himself, [or, *if in C. P. instead of the words* "before the king himself," say "of the Bench,"] to prosecute and conduct an action in the same court, by and at the suit of the said plaintiff against one E. F. for the recovery of a large sum of money, which he the said plaintiff then and there claimed to be due and owing to him (*y*), from the said E.

(w) See 4 B. & C. 345; 6 D. & R. 438,
S. C. ante, 372, note (r).
(x) See note, ante, 371.

(y) See the propriety of this allegation,
instead of a positive averment of the debt
being due. Peake's Rep. 119.

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F. for certain reasonable fees and reward (x), to be therefore paid by the said plaintiff to the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to prosecute and conduct the said action in a proper, skilful, and diligent manner; and although the said plaintiff, confiding in the said promise and undertaking of the said defendant did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, retain and employ the said defendant as such attorney as aforesaid, to prosecute and conduct the said action on the terms aforesaid; and the said defendant then and there accepted the said retainer and employment, and under and by virtue thereof, afterwards, to wit, in — Term, in the — year of the reign of our said lord the king, as the attorney of and for the said plaintiff commenced an action for the recovery of the said sum of money at the suit of the said plaintiff against the said E. F. in the said court, and although the said defendant could and might, in case he had prosecuted the said action with due diligence and dispatch, have obtained final judgment there for the said plaintiff in — Terms, in the — year aforesaid, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, well knowing the premises, but not regarding his duty as such attorney, nor his said promise and undertaking, but contriving and craftily and subtly intending, wrongfully and unjustly, to delay and injure the said plaintiff and to deprive him of the means and opportunity of recovering the said sum of money, did not nor would (although often requested so to do), prosecute the said action with due diligence and dispatch, but, on the contrary thereof, he the said defendant so carelessly, negligently, and improperly behaved and conducted himself, in and about the prosecution of the said action, that by and through the carelessness, negligence, delay, and improper conduct of the said defendant in that behalf, the said defendant did not obtain final judgment in the said action for the said plaintiff until after the said — Term to wit, until — Term, in the — year of the reign of our said lord the king, whereby he the said plaintiff was greatly prejudiced and injured, and has lost and been deprived of the means and opportunity of recovering the said sum of money, to wit, at, &c. (*venue*) aforesaid.—[*Add count upon an executed consideration, and such other counts as the case may require.*]

For that whereas, before and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, a certain action had been commenced, and was depending in the court of our said lord the king, of the bench [or if in *K. B.* instead of the words "of the Bench," say "before the king himself,"] at Westminster, by and at the suit of one E. F. against the said plaintiff, and the said plaintiff had been and was arrested by the sheriff of the county of —, in the said action, under and by virtue of a certain writ of our said lord the king, to wit, a writ, called (*set out shortly the writ thus,*) a *capias ad respondendum*, returnable in the said court of the bench, in eight days of St. Hilary, to wit, at, &c. (*venue*). And thereupon heretofore, to wit, on, &c. (*day of retainer, or about it*) at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, would retain and employ the said defendant as his attorney, to defend the

Against an attorney for not putting in bail, whereby sheriff was fixed, and plaintiff (defendant in former action) was obliged to pay debt and costs (a).

(z) See note, ante, 371.

(a) See note, ante, 371.

AGAINST
ATTOR-
NIXA.

said action (b) for the said plaintiff, for certain reasonable fees and reward (c), to be therefore paid by the said plaintiff, to the said defendant, he the said defendant undertook, and then and there faithfully promised the said plaintiff to perform his duty as such attorney for the said plaintiff in and about the defense of the said action; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, retain and employ the said defendant as his attorney, to defend the said action for the said plaintiff, for certain reasonable fees and reward to be therefore paid to the said defendant; and although afterwards, to wit, at the return of the said writ, according to the course and practice of the said court, it became and was the duty of the said defendant, as such attorney as aforesaid; to put in bail in due time for the said defendant in the said action, with the [prothonotaries] of the said court, yet the said defendant not regarding his said duty in that behalf, nor his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would, according to the course and practice of the said court, in due time put in bail for the said defendant in the said action, with one of the [prothonotaries] of the said court, but wrongfully and injuriously wholly neglected so to do, by means whereof such proceedings were thereupon had, that afterwards, to wit, on, &c. (*any day before title of declaration*) at, &c. (*venue*) the said sheriff of —, as such sheriff, and as having so arrested the said defendant as aforesaid, was called upon, and forced and obliged to pay to the said E. F. a certain sum of money, to wit, the sum of £— as and for the amount of the debt and costs of the said action, and also by means of the premises, the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) was forced and obliged to pay, and did then and there pay to the said sheriff of [Middlesex] the said sum of £— in order to prevent proceedings being had by and on behalf of the said sheriff, upon a certain bail-bond before then made and given by the said plaintiff with two other persons as his sureties, to the said sheriff upon the said arrest, and also by reason of the said neglect and default of the said defendant he the said plaintiff was put to great costs and charges, amounting to a large sum of money, to wit, the sum of £— in and about the endeavoring to resist and avoid the payment of the said sum of £—; and also thereby he the said plaintiff was deprived of the means and opportunity of preventing the payment of the supposed debt claimed to be recovered in the said action, and also of the means and opportunity of recovering the costs of his *defense of the said action, amounting, to wit, to the sum of £—, and hath been and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.—[*Add one or more counts as the case may suggest, and a general count as in the form, post, 337.*]

[*375]

Against
an attor-
ney, for
not put-
ting in

For that whereas, at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, a certain action had been commenced and prosecuted, and was then depending, by and at the suit

(b) If the retainer was only to put in bail, then state it so accordingly. (c) See note, ante, 372.

of one E. F. against the said plaintiff, in the court of our said lord the king, of the bench (or, if in *K. B.* instead of the words "of the bench," say, "before the king himself,") at Westminster, in the county of Middlesex, for the recovery of a certain sum of money, to wit, the sum of £— at the time of his said promise and undertaking of the said defendant hereinafter next mentioned, claimed by the said E. F. to be due and owing to him from the said plaintiff, to wit, at, &c. (*venue*) aforesaid, and thereupon heretofore, to wit, on, &c. (*day of retainer or about it*) at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there retained and employed the said defendant (he then and there acting as an attorney of the said court, at Westminster aforesaid), as such attorney, to defend the said action for the said plaintiff he the said defendant undertook, and then and there faithfully promised the said plaintiff, to use due and proper care and diligence in and about the defending the said action for the said plaintiff, and although such proceedings were thereupon had in the said action, that afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, it became and was the duty of the said defendant, under and by virtue of his said retainer, and his said promise and undertaking, upon using due and proper care and diligence in that behalf, to file or deliver a proper and sufficient plea to a certain declaration, then and there delivered, in the said action on the behalf of the said E. F.; nevertheless the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure the said plaintiff in this behalf, did not nor would, when it was his duty so to do as aforesaid, file or deliver a proper or sufficient plea to the said declaration, but, on the contrary thereof, wholly omitted and neglected so to do, and by reason thereof, and by and through the want of the said defendant's using due and proper care and diligence in that behalf afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, judgment by default was signed in the said action against the said plaintiff, and such further proceedings were then had in the said action, that afterwards, to wit, on, &c. (*day of signing judgment*) it was considered and adjudged in and by the said court in the said action, that the said E. F. should recover against the said plaintiff a large sum of money, to wit, the sum of £—; and the said plaintiff was afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, forced and obliged to pay, and did then and there pay, to the said E. F. the said sum of money so recovered by him as aforesaid, and also by means of the premises, he the said plaintiff was put to divers costs and charges in and about his endeavoring to defend the said action, amounting in the whole to a large sum of money, to wit, the sum of £— and hath lost and been deprived of the means of recovering the same from the said E. F. to wit, at, &c. (*venue*) aforesaid.—[*Add the following count.*]

AGAINST
ATTOR-
NIES.

a suffi-
cient plea
to an ac-
tion
which he
defended
for plain-
tiff.

[*376]

And whereas also, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then and there retained and employed the said defendant as his attorney, to defend a certain other action then depending in the same court, by and at the suit of the said E. F. against the said plaintiff, for the recovery of a certain other sum of money, to wit, the sum of £— then claimed to be due and owing from the said

Second
count, for
not ap-
pearing,
and for
suffering
judgment.

AGAINST
ATTOR-
NEYS:

plaintiff to the said E. F. he the said defendant undertook, and then and there faithfully promised the said plaintiff to defend the said action in a proper, careful, and diligent manner, nevertheless the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, did not nor would appear to defend the said action in a proper, skilful, and diligent manner, but, on the contrary thereof, so carelessly and negligently conducted himself in that behalf, that afterwards, to wit, on, &c. judgment by default was signed against the said plaintiff in the said action, and by reason thereof, he the said plaintiff, afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, was forced and obliged to pay, and did then and there pay to the said E. F. a large sum of money, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid. [*It may be as well to add a count like the next.*]

[*377]
General
count
against an
attorney,
for impro-
perly con-
ducting a
defense to
an action,
whereby
defendant
failed in it.

*And whereas also, heretofore, to wit, on, &c. (*day of retainer or about it*) at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there retained and employed the said defendant as an attorney of the court of our lord the king, before the king himself, (*or, if in C. P. instead of the words "before the king himself," say "of the bench,"*) to defend, and manage and conduct the defense to a certain action, before then brought and pending in the said court, by and at the suit of one E. F. against the said plaintiff, for certain alleged claims of the said E. F. against the said plaintiff, for fees and reward (*d*) to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to conduct and manage the said plaintiff's defense to the said action, with due and proper care, skill, and diligence, yet said defendant, not regarding his said promise and undertaking, did not nor would conduct and manage the plaintiff's defense to the said action, with due and proper care, skill and diligence, but on the contrary, by reason of the said defendant's conducting and managing the said plaintiff's defense to the said action in a careless, unskilful, undue, and improper manner, and for want of due and proper care, skill, and diligence, in that behalf, the said E. F. afterwards, to wit, on, &c. (*day of judgment or about it*) at, &c. (*venue*) aforesaid, obtained a judgment in the said action against the said plaintiff, for the sum of £— (*full amount of judgment*) and which he would not otherwise have done; and the said plaintiff was, by means of the premises, deprived of the means of his defense to the said action, and the said plaintiff hath become liable to pay, and forced and obliged to pay to the said E. F. the amount of the said judgment, and hath also incurred and paid to the said defendant another large sum, to wit, the sum of £— for the said plaintiff's costs and charges in and about the defending the said action, to wit, at, &c. (*venue*).

[*378]
Against
an attor-
ney, for
not giving
a note to
defendant

*For that whereas, before and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, he the said plaintiff had, by the consideration and judgment of the court of our said lord the king, before the king himself, (*or, if in C. P. instead of the words "before the king himself," say, "of the bench,"*) recovered

against one E. F. a certain sum of money, to wit, the sum of \$—; and the said E. F. then was a prisoner, at the suit of the said plaintiff, for the said sum of \$— upon and by virtue of the said judgment, in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, (or if in C. P. say “of the warden of his majesty’s prison of the Fleet”); and the said E. F. was then endeavoring to obtain his discharge from the said imprisonment, in pursuance of a certain Statute made and passed in the — year of the reign of our lord the late King George the Third, intituled, &c. to wit, at, &c. (*venue*) and thereupon, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there retained and employed the said defendant as an attorney of the said court, to oppose the said endeavor of the said E. F. to be discharged as aforesaid, and to prevent such discharge, for certain reasonable fees and reward to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to perform his duty, as such attorney as aforesaid, in and about the premises; and the said plaintiff in fact saith, that the said E. F. afterwards, to wit, on, &c. duly appeared in and before the said court, in pursuance of the said Statute, and for the purpose of obtaining his discharge from the said imprisonment, under and by virtue thereof, as an insolvent debtor, and the said plaintiff was then and there ready, willing, and desirous thereupon to give a valid and sufficient note or undertaking to pay him the said E. F. the weekly sum of 3s. 6d. so as to prevent the said E. F. from obtaining his discharge from the said imprisonment, whereof the said defendant then and there had notice; and although it thereupon became and was the duty of the said defendant, under and by virtue of his said retainer, to cause and procure a good and sufficient note or undertaking to be given to the said E. F. for the payment of the said weekly sum of 3s. 6d. so as to hinder and prevent the said E. F. from being so discharged and released as aforesaid; yet the said defendant, not regarding his duty in that behalf, nor his said promise and undertaking, did not nor would cause or procure such a good and sufficient note or undertaking to be given to the said E. F. as aforesaid, but wholly neglected and omitted so to do; and by means thereof, afterwards, to wit, on, &c. the said E. F. being then in execution at the suit of the said plaintiff, in the said action as aforesaid, was duly discharged out of custody, and set at *large, and thereby the said plaintiff hath not only lost and been deprived of all the benefits which might and would otherwise have arisen to him from keeping and detaining the said E. F. in execution on the said judgment as aforesaid, but also lost and was deprived of the use and benefit of a large sum of money, to wit, &c. before then paid by the said plaintiff to the said defendant, for his costs and charges for prosecuting the said action against the said E. F. to wit, at, &c. (*venue*) aforesaid.

AGAINST
ATTOR-
NERS.

in a former action, to pay him 3s. 6d. per week, per quod, he was discharged under Insolvent Act.

[*379]

For that whereas, before and at the time of the making of the promise and undertaking of the said defendant, hereinafter next mentioned, to wit, on, &c. (*day of retainer of defendant, or about it*) the said plaintiff had contracted and agreed with certain persons, to wit, E. F. and G. H. for the purchase from them of certain tenements and premises, with the appurtenances, situate in the county of S—— in fee-simple, at and for a large

Against an attorney, for not ascertaining title, per quod, plaintiff having

AGAINST
ATTOR-
NIES.

bought an
estate
could not
re-sell it
(c).

[*380]

sum of money, to wit, &c. to be therefore paid for the same, which said tenements, with the appurtenances, the said E. F. and G. H. then assumed to have sufficient power to sell and convey to the said plaintiff in fee-simple, to wit, at, &c.; and thereupon heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there retained and employed the said defendant as an attorney, to ascertain the title of the said E. F. and G. H. to the said tenements, with the appurtenances, and to cause and procure an estate and interest therein, in fee-simple, to be duly conveyed by the said E. F. and G. H. to the said plaintiff, for reasonable fees and reward (*f*) to the said defendant in that *behalf, he the said defendant undertook and then and there faithfully promised the said plaintiff, to perform and fulfil his duty in the premises; and the said plaintiff in fact saith, that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) purchase from the said E. F. and G. H. the said tenements and premises, with the appurtenances, as in fee-simple, and did then and there pay to the said E. F. and G. H. a large sum of money, to wit, the sum of £— for the same and did afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, accept and receive of and from the said E. F. and G. H. a conveyance, by lease and release, of the said tenements, with the appurtenances, as in fee-simple. And although it then and there became and was the duty of the said defendant, under and by virtue of the said retainer, to endeavor to cause and procure a good and sufficient title to the fee-simple of and in the said tenements and premises, with the appurtenances, to be conveyed to the said plaintiff; yet the said defendant, not regarding his said duty in that behalf, nor his said promise and undertaking, but contriving and intending to defraud and injure the said plaintiff in this behalf, did not nor would endeavor to cause or procure a good and sufficient title to the fee-simple of and in the said tenements and premises, with the appurtenances, to be conveyed to the said plaintiff, but hath hitherto wholly neglected and refused so to do, and by reason of the neglect and improper conduct of the said defendant in that behalf, the said plaintiff hath not obtained *a good or sufficient title to the said tenements and premises, with the appurtenances, in fee-simple, and thereby hath been hindered and prevented from selling and disposing thereof; and the said tenements and premises, with the appurtenances, then became and are of little use or

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(c) See 4 M. & S. 53.—See precedent, 4 J. B. Moo. 532, at the suit of an administrator. In the case of the death of the purchaser, it may be sometimes questionable, whether the representative or heir should bring the action. If the contract was broken, and a damage accrued to the testator in his lifetime, the representative may sue; but this must appear on the declaration, 2 Lev. 26. 1 Ventr. 176.—4 J. B. Moore, 532; and the objection as to the party to sue, will be sometimes waived by demurrer, 4 J. B. Moore, 532. An attorney employed to advance his client's money on the security of a legacy given under a will, to the borrower, is not justified in relying on a partial ex-

tract from the will, furnished by his client, unless the latter agree to take the responsibility on himself, 3 Stark. 154; see ante, 371, note.

(See a precedent against attornies for allowing their client to execute an assignment of a lease, with a general unqualified covenant for title; and in consequence of a life upon which the lease depended having ceased, the title was sufficient, and the purchaser ousted from a moiety, and vendor (the plaintiff) sued on the covenant, and obliged to pay damages and costs, *Stanard v. Ullithorne*, 10 Bing. 491.)

(f) See note, ante, 372.

value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Add other counts, as the nature of the case may render expedient, and a general count on the principle of the one, post, 383, mutatis mutandis.*]

AGAINST
ATTOR-
NEYS.

For that whereas, before the making of the promise and undertaking of the said defendant hereinafter mentioned, to wit, on, &c. (*day of retainer, or about it*) at, &c. (*venue*) one E. F. was willing to grant an annuity, or yearly sum of £— during the term of natural lives of the said plaintiff, and one G. H. and the natural life of the survivor of them, and then and there proposed to charge the same on certain premises then and there represented by the said E. F. to be held by the said E. F. under and by virtue of a lease and demise thereof, therefore made to the said E. F. by certain persons, to wit, &c.* and then and there proposed to assign the said lease of the said premises, as a security for the due payment of the said annuity, and thereupon heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, at the special instance and request of the said defendant, retained and employed the said defendant, to ascertain whether the assignment by the said E. F. of the said lease of the said premises would be a good and sufficient security for the payment of the said annuity so proposed to be granted as aforesaid; and in case the same should appear sufficient, to obtain the proper deed and writings to secure the payment of the said annuity or yearly sum of £— and in consideration thereof, and of certain reasonable fees and reward (*h*) to the said defendant in that behalf, he the said defendant undertook, and then and there faithfully promised the said plaintiff to use due and proper care to ascertain whether the assignment of the said lease of the said premises would be a good and sufficient security for the payment to the said plaintiff of the said annuity of £— so proposed to be granted as aforesaid, and to perform and fulfil his duty in that behalf (*gg*); nevertheless the said plaintiff in fact saith, that the said defendant, not regarding his duty in that behalf, nor his said promise and undertaking, but contriving and intending to injure the said plaintiff in that behalf, did not nor would use due and proper care in ascertaining whether the assignment of the said lease would *be a sufficient security for the due payment to the said plaintiff, from the said E. F. of the said annuity or yearly sum of £— so proposed to be granted to the said plaintiff as aforesaid, or perform or fulfil his duty in the premises, but wholly neglected and omitted

Against an attorney employed to purchase an annuity for taking as a security from the grantor of the annuity, an assignment of a lease which contained a clause of re-entry in case of assignment, in consequence of which, and of the lease being assigned to a trustee under the annuity deed, the plaintiff (grantee of the annuity) lost his security (*g*).

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(*g*) See a form and law, M'Clel. & Y. 265, and notes, ante, 379.—If an attorney undertake to invest money for a party on a copyhold security, it amounts to a warranty by him, that such security shall be valid and effectual, 4 J. B. Moo. 308; see 2 Bing. 464. What a prospective damage, 4 M. & S. 53.

(*h*) See note, ante, 372.—The omission of this, on a count framed as above, without stating defendant was retained as an attorney, would be bad. Id. 4 B. & C. 345.—6 D. & R. 438, S. C. But a count, stating that the plaintiff had retained defendant at his request, to lay out 700*l.* in the purchase of an annuity, that defendant promised to lay it out securely; that plain-

tiff delivered the money to him for that purpose, and that defendant laid it out insecurely, it was held, after verdict, that the consideration for the defendant's promise was sufficiently stated. 2 Bing. 464.—10 J. B. Moores, 183, S. C. (But as the law only implies a contract on the part of an attorney to exert and evince *reasonable skill*, and certainly does not imply an engagement *absolutely* that there shall be a sufficient security, if the declaration laid the promise *too extensively*, the plaintiff must be nonsuited, or have a verdict against him *id. ibid.*)

(*gg*) (This appears to be the correct mode of describing the implied contract of an attorney in such a case.)

AGAINST
ATTOR-
NIES.

[*389]

General
count
against an
attorney,
for negli-
gence in
investiga-
ting a se-
curity.

so to do; and further disregarding his duty in that behalf, afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, falsely and deceitfully asserted and affirmed (i), and caused and procured the said plaintiff to believe, that the said lease would be a good and sufficient security for the payment to the said plaintiff, of the said annuity so proposed to be granted to him by the said E. F. as aforesaid; and the said plaintiff further saith, that he the said plaintiff, confiding in the said promise and undertaking of the said defendant, and his said representation and assertion, and believing that the said assignment by the said E. F. of the said lease, would be a good and sufficient security for the payment of the said annuity so proposed to be granted as aforesaid, afterwards, to wit, on, &c. (*day of advance of money, or about it*) at, &c. (*venue*) aforesaid, did advance and pay to the said E. F. the sum of £— for the said annuity or yearly sum of —l.; and the said defendant then and there caused to be prepared and executed by the said E. F. and the said plaintiff and the said G. H. therein mentioned, a certain indenture for securing the payment of the said annuity, whereby the said E. F. did covenant [*here copy covenant not to assign in the past tense*]; and the said plaintiff further saith, that by reason of the said indenture of lease, containing a clause and proviso, that the said E. F. should not assign the said term thereby granted, without the license and consent of lessor, in writing, and a certain proviso of re-entry, in case the same should be assigned without such license, and also by reason of the said defendant not having obtained the said license, authorising the said assignment, the lease by the said assignment became and was forfeited and void, and the said, &c. [*the lessors*] afterwards, to wit, on, &c. on account thereof, commenced a certain action of ejection in the court of our said lord the king, [before the king himself] for the recovery of the possession of the said tenements, with the appurtenances, and such proceedings were thereupon had, that afterwards, to wit, on, &c. the said, &c. [*the lessors*] recovered the possession of the said tenements, to wit, at, &c. (*venue*) whereby, *and by reason of which said several premises, the said plaintiff hath wholly lost and been deprived of the benefit of the said security for the payment of the said annuity, or yearly sum of —l. and hath been unable to enter into, or distrain in and upon the same premises, so granted by the said E. F. as aforesaid on the non-payment of the said annuity, or yearly sum of —l.; and the said annuity hath become and is of no value to him the said plaintiff; and also, by reason of the premises, the said plaintiff hath incurred great expenses, amounting together to a large sum of money, to wit, the sum of —l. in and about the resisting of the proceedings by and on the part of the said, &c. [*the lessors*] for the recovery of the possession of the said tenements, with the appurtenances, and in divers journies and attendances of the said plaintiff, and his attorney and agents, incidental thereto, to wit, at, &c. (*venue*) aforesaid.—[*Add other counts, as the case may require, and a general count like the next, mutatis mutandis.*]

And whereas also, before the making of the promise and undertaking of the said defendant hereinafter next mentioned, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, a certain person, to wit, the said H. J. was desirous

(i) See 4 B. & Cres. 345.—6 D. & R. 439, S. C. ante, 372, n.

of obtaining from the said plaintiff a loan of a certain sum of money, to wit, the sum of £1000, upon interest, at and after the rate of 5 *per cent. per annum*, and then and there, as a security for the re-payment thereof, and interest as aforesaid to the said plaintiff, proposed to incumber certain lands, tenements, and premises, situate in the county of S., and thereupon heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, at the special instance and request of the said defendant, retained and employed the said defendant, as an attorney, for fees and reward to him in that behalf, to ascertain the title of the said H. J. to the said lands, tenements, and premises, and to take due and proper care that the same should be a sufficient security for the re-payment of the said sum of money and interest; and in consideration thereof, he the said defendant undertook, and then and there faithfully promised the said plaintiff to use due and proper care and diligence, in and about the ascertaining the title of the said H. J. to the said lands, tenements, and premises, and to take due and proper care that the same should be a sufficient security for the re-payment of the said sum of money and interest. Nevertheless the said plaintiff in fact saith, that the said defendant, not regarding his duty in that behalf, nor his said promise and undertaking, but contriving and fraudulently intending to injure and deceive the said plaintiff in this behalf, did not nor would take due and proper care to ascertain the title of the said H. J. to the said lands, tenements, and premises, nor take due and proper care that the same should be a sufficient security for the re-payment of the said sum of 1000*l.*, and interest thereon. And the said plaintiff further saith, that he, confiding in the said last-mentioned promise and undertaking of the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, did advance and pay to the said H. J. the said sum of —1000*l.*, upon the security of certain lands, tenements, and premises, in the county aforesaid, as and for a sufficient security in that behalf; and the said defendant then and there, in pursuance of his said retainer, caused to be prepared and executed a certain indenture, and certain securities, relating to the supposed estate and interest of the said H. J. in the said last-mentioned lands, tenements, and premises, as and for such sufficient security for the re-payment of the said sum of 1000*l.* and interest as aforesaid.

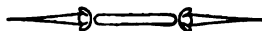
Against
attor-
neys.

Against
an at-
torney,
employed
to settle a
debt due
to plain-
tiff, for not
account-
ing for
monies
received.

See a form of Declaration, ante, 345.

COMMON
COUNTS.

*DECLARATIONS IN DEBT.



I. BEGINNINGS AND CONCLUSIONS.

Ellenborough.

——— (l) next after ——— in
Mich. Term., 1 Will. 4.

1. Declaration in debt, in K. B. by bill of latitat. (k). Middlesex (to wit) (m). (venue) A. B. the plaintiff in this suit, complains of C. D. the defendant in this suit, being in the custody of the Marshal (n) of the Marshalsea of our lord the now king, before the king himself, of a plea that he render to the said A. B. the sum of £— (o) of lawful money of Great Britain, which he owes to (p) and unjustly detains from him. For that whereas, &c. [*Here state the subject-matter (q) of the debt and the breach, as post, 385, 7, and conclude as follows:*] To the damage of the said plaintiff of £— (r) and therefore he brings his suit, &c.

Pledges, &c.

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*II. ON SIMPLE CONTRACTS.

1. Form of the *indebit.* And whereas also the said defendant afterwards, to wit, on, &c.

(k) See the form by *bill*, ante, 13.—The form in K. B. by *original*, ante, 9. In C. P. ante, 18. In exchequer, ante, 20.

(l) As to the title of the term, see ante, 12, n.

(m) As to the venue, see ante, vol. 1. 239, &c.

(n) Ante, 12, n.

(o) This sum is to be the aggregate of all the sums mentioned in the different counts. In debt the plaintiff may prove and recover less than the sum demanded in the commencement, or in each count, and a mistake is not demurrable. 11 East, 62. —1 Saund. 288, n. 1.—1 Hen. Bla. 251, 547.—Vin. Ab. tit. "*Miscasting*."—2 Chit. Rep. 234.

(p) Debt is in general to be in the *debet* and *detinet*, Com. Dig. tit. Pleader, 1 W. 8. —Gilb. on Debt, 359, 399, 400, 401; but in actions by or against executors and administrators suing or sued in that character, in general it must be in the *detinet* only, see Com. Dig. tit. Pleader, 2 D. 1, 2.—2 W. 8.

—1 Saund. 1, 112, n. 1, 216.—3 East, 2.—Ld. Raym. 698. So in the *detinet* for goods, Gilb. on Debt, 359, 400, 401. (And in actions by or against executors or administrators the declaration should in strictness be only in the *detinet*, Com. Dig. tit. "Pleader," 2 D. 1, 2; 2 W. 8; 1 Saund. 1, 112, note 1, 216; 3 East, 2; Ld. Raym. 698. But if "owes to and" be untechnically inserted by an executor or administrator, it is no ground of demurrer, nor an irregularity, *Collett v. Collett*, 3 Dowl. 211. In debt for specific goods, the declaration should be in the *detinet* only, Gilb. on Debt, 359, 400, 401.) Husband and wife are to be sued in the *debet* and *detinet*, Gilb. 402. Omission of both the *debet* and *detinet* has been considered to be demurrable, 6 Mod. 306.—*Sed vide* 11 East, 62.

(q) As to the declarations in debt in general, see Com. Dig. Pleader, 2 W. 7, &c.

(r) This sum is in general merely nominal, 2 Selw. N. P. 468. But if there be a demand for interest, let this sum be suffi-

at, (s) &c. (*venue*) aforesaid, was indebted to the said plaintiff in the sum of —*l.* of like lawful money, for, &c.

COMMON
COUNTS.

[Here state the subject-matter of the debt, whether relative to real property, personal property, work, services, &c. or money, precisely as in *assumpsit*, ante, 39 to 90, and then proceed as follows:]

tatus
count in
debt (s).

And to be paid by the said defendant to the said plaintiff when he the said defendant should be thereunto afterwards requested (*u*); whereby and by reason of the said last-mentioned sum of money, being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said defendant, the sum of —*l.* parcel of the said sum above demanded.

And whereas also afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had before that time, &c.

2. Form of
the *quantum meruit*
count in
debt (v).

*[Here state the subject-matter of the debt, as in the *quantum meruit* counts in *assumpsit*, ante, 39 to 87, and then proceed as follows:—]

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He the said defendant undertook, and then and there agreed to pay to the said plaintiff so much money as he therefore reasonably deserved to have of the said defendant when he the said defendant should be thereunto afterwards requested. And the said plaintiff avers, that he therefore reasonably deserved to have of the said defendant the further sum of —*l.* of like lawful money, to wit, at, &c. (*venue*) aforesaid, whereof the said defendant afterwards, to wit, on, &c. aforesaid, there had notice, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said last-mentioned sum of —*l.* other parcel of the said sum above demanded.

cient to cover it (see post, 436, n.) and insert also a count for the same in debt, as ante, 88. As to the conclusion in debt *qui tam*, see ante, 17 and 19.

(s) This is sufficient, see 2 T. R. 28.

(t) See forms, 5 Wentw. 145. See also ante, vol. i. 310, 97, 8. This form is usually adopted: formerly the count did not state that the defendant was indebted, &c. but was as follows: "And whereas also the said defendant on, &c. at, &c. bought of the said plaintiff certain, &c. for —*l.*, to be therefore paid by the said defendant to the said plaintiff, when he the said defendant should be thereunto requested;" and then the other counts followed, omitting the "*whereby*," &c. in the above precedent, and averring, at the end of the last count, "that all the sums mentioned in the [different counts together amount to the sum first demanded," see Ashton's Ent. 209, 210.—2 Mallory's Ent. 177.—Fortesc. 198.—Rast. Ent. 176; but in the declaration in *Emery v. Fell*, 2 T. R. 28. and MSS. prec. 23. V. 127. (which contained counts for goods sold,

work and labor, and all the money counts) each count began with the statement, "*that the defendant was indebted*," &c. as above, omitting, however the "*whereby*," &c. And the clause "*whereby*," &c. is not in the old Entries, see Coke's Ent. 125, except in cases where the debt arises from some misfeasance, as on a penal statute, or against a sheriff, for an escape, or on leases, awards, &c. See Gilbert's Action of Debt.

(u) This appears to be unnecessary, see supra, note (s).

(v) As to this count, see vol. i. 310, 97, 8. See form, 5 Wentw. 145, 150. The count must not contain the words "undertook and faithfully promised, &c." 3 B. & A. 208, but the words "undertook and agreed" are proper. 2 Smith's Rep. 618. 3 Smith's Rep. 114. The *quantum meruit* count seems in no case to be necessary, ante, 37, n. (d)—1 Hen. Bla. 249—Vin. Ab. tit. "*Miscasting*," and is in general better omitted. This is the form usually adopted, but it may be framed stating, "*that the said defendant bought*," &c. Fortesc. 198.

COUNTS
COUNTS.

Money
lent (w).

And whereas also the said plaintiff afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, at the like special instance and request of the said defendant lent to the said defendant, and the said defendant then and there borrowed of the said plaintiff a large sum of money, to wit, the sum of —*l.* of like lawful money, to be paid by the said defendant to the said plaintiff when he the said defendant should be thereunto afterwards requested, *whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said last-mentioned sum of —*l.* other parcel of the said sum above demanded.

Money
paid (z).
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And whereas also the said plaintiff afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, had paid, laid out, *and expended a certain other sum of money, to wit, the sum of —*l.* of like lawful money, for the said defendant, and at his like special instance and request, and to be paid by the said defendant to the said plaintiff when he the said defendant should be thereunto afterwards requested, whereby, &c. —[*Same as the last, from the asterisk to the end.*]

Money
had and
received
(y).

And whereas also the said defendant afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, had and received a certain other sum of money, to wit, the sum of —*l.* of like lawful money, to and for the use of the said plaintiff and to be paid by the said defendant to the said plaintiff when he the said defendant should be thereunto afterwards requested, whereby, &c. —[*Same as above, from the asterisk to the end.*]

Account
stated (z).

And whereas also the said defendant afterwards to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, accounted with the said plaintiff of and concerning divers other sums of money, before that time and then due and owing, and in arrear and unpaid, from the said defendant to the said plaintiff, and upon that accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of —*l.* of like lawful money, to be paid by the said defendant to the said plaintiff, when he the said defendant should be thereunto afterwards requested, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said last-mentioned sum of —*l.* residue of the said sum above demanded.

Breach
(j).

Yet the said defendant (although often requested so to to,) hath not as yet paid the said sum of —*l.* (a), above demanded, or any part thereof, to the said plaintiff. But he to do this hitherto hath wholly refused, and still

(w) See the forms in Rich. C. P. 118. Morg. 547.—Ast. Ent. 209.—2 Mall. 177, 8.—5 Wentw. 146, 7.—The count may state that the defendant was indebted, &c. See ante, 385, note (s).

(z) *Id.* *ibid.*

(y) Ante, 376, n.—5 Wentw. 146.

(z) As to this count, see Ashton's Ent. 200, 240.—2 Mall. 177.

(j) For the different breaches when the action is brought by or against particular persons, as surviving partners, &c. ante, 91 to 115, and see the precedents on bounds, post, 436, &c.—5 Wentw. 146, 7.

(s) This is the same sum as mentioned in the commencement of the declaration, being the aggregate of all the sums. See ante, 384, n. (a).

doth refuse, to the damage of the said plaintiff of *—l.* (d), and therefore COMMON COUNTS. he brings his suit, &c.

Pledges, &c.

*I. ON PROMISSORY NOTES.

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ON PROMISSORY NOTES.

For that whereas the said defendant heretofore, to wit, on, &c. (*day of notice*) at, &c. (*place where made*), that is to say, at, &c. (*venue*) made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and then and there delivered the said note to the said plaintiff, by which said note he the said defendant then and there promised to pay, [two] months after the date thereof, to the said plaintiff or order, the sum of 50*l.*, for value received, (cc) by means whereof, and by force of the Statute in such case made and provided, the said defendant then and there became liable to pay to said plaintiff the said sum of money, in the said promissory note specified, according to the tenor and effect of the said promissory note; and although the said sum of money, in the said promissory note specified, hath been long since due and payable according to the tenor and effect of the said note, yet the said plaintiff in fact saith that the said defendant, (although often requested so to do) did not nor would pay the said sum of *—l.* in the said note specified, or any part thereof, to the said plaintiff, in manner aforesaid, or otherwise howsoever, but hath hitherto wholly neglected and refused so to do, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of *—l.* in the said note specified, parcel of the said sum above demanded.—[*Add counts upon the consideration of the notes, money counts, account stated, and common conclusion, as ante, 386, 7.*]

Payee against maker of a promissory note (c).

II. ON BILLS OF EXCHANGE.

ON BILLS OF EXCHANGE.

For that whereas, the said plaintiff, heretofore, to wit, on, &c. (*date of Debt by*

(b) The sum here to be inserted is in general 10*l.*, or any other sum, though less than the real demand.—If there be a demand for interest then let this sum be enough to cover it, and also insert a count in debt for the same, as ante, 88.

(c) See other forms, 4 Morg. 548.—5 Went. 148.—Chitty on Bills, 7th ed. 511.—2 B. & P. 78. See notes, ante, 115 to 142, as to variances, &c. which will be here applicable. When debt lies on bills and notes, see Chitty on Bills, 7th edit. 427 to 429. This action may be supported by the payee of a promissory note against the maker, when expressed to be for value received, 2 B. & P. 78, or by the drawer

against the acceptor of a bill of exchange expressed to be for value received, 1 Bar. & Cres. 681. 3 D. & R. 165, S. C. or by the payee of a foreign or inland bill expressed to be for value received against the drawer, 2 B. & P. 82. Skin. 346, and by the first indorsee against the first indorser, who was also the drawer of a bill payable to his own order, 3 Price, 253; but not by the payee of a bill of exchange against the acceptor, Hardr. 485.—1 Taunt. 540; nor on a note payable by instalments, until the whole has become due. 1 Hen. Bla. 548.

(cc) (*Scemle*, that the words "*value received*" are essential to sustain an action of debt, Croswell v. Crisp, 2 Dowl. 635; Lyons

FOR ROAD
OR CANAL
CALLS.

they the said last-mentioned trustees did thereby authorize to receive the same in the parts and proportions following; that is to say, one half of the said sum on or before the 10th day of May, then instant, and the remaining half-part thereof on or before the — day of — then instant, of which said request, order, and direction, the said defendant afterwards, to wit, on the day and year last aforesaid, at &c. (*venue*) aforesaid, had notice; and by reason of the premises, he the said defendant then and there became liable, and ought to have paid to the said I. K. the said sum of —*l.* in the part and proportion aforesaid, to wit, at, &c. (*venue*) aforesaid, yet the said defendant not regarding the said Statute, hath not, although often requested so to do, as yet paid to the said I. K. the said sum of —*l.* or any part thereof, in the parts and proportions aforesaid, and at the times aforesaid, or otherwise howsoever, but on the contrary thereof, the said sum of —*l.* still continues wholly due and owing, and in arrear and unpaid from the said defendant, whereby an action, &c.

For road
calls on
another
statute,
giving
general
form of
declaring.

For that whereas the said defendant heretofore, to wit, on, &c. at, &c. (*venue*) he the said defendant then and there being the owner of divers, to wit, two shares in a certain undertaking, mentioned in a certain act of parliament made and passed in the 51st year of the reign of our lord the late King George the Third, intituled “An act for making and maintaining “a railing or tram road, from or near the public wharf of the Brecknock “Abergavenny canal, in the parish of St. John the Evangelist, in the “county of Brecon, to or near to a certain place called Barton Cross, in “the parish of Eardisley, in the county of Hereford;” that is to say, a certain undertaking for making and maintaining the said railway or tram road, and other works mentioned in the said act of parliament, was indebted to the said company in a large sum of money, to wit, the sum of £100 of like lawful money, for divers, to wit, five calls, of the sum of £10 each upon each of the said shares belonging to the said defendant, whereby an action hath accrued to the said company, by virtue of the aforesaid act

[*391] *of parliament, to demand and have of and from the said defendant the said sum of £100, above demanded; yet the said defendant, although often requested so to do, hath not as yet paid the said sum of £100 above demanded, or any part thereof, to the said company but he to do this hath hitherto wholly refused, and still doth refuse, to the damage of the said company of £20, therefore, &c.

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For instal-
ment of a
subscrip-
tion to-
wards ma-
king, &c.
a canal,
&c. under
a private
act of par-
liament
(g).

For that whereas, before the making of the call of money hereinafter next mentioned, and also before the making of a certain act of parliament, made and passed in the 49th year, &c. intituled, &c. [*here set out the title of the act*] to wit, on, &c. at, &c. (*venue*) the said defendant, in and by a certain instrument in writing, then and there signed by him, subscribed and undertook to advance and lend a certain sum, to wit, &c. to make, with other sums of money to be subscribed by divers other persons the sum of, &c. of lawful, &c. to be applied in addition to the sum of, &c. granted by parliament in the improvement, &c. on the credit of the funds, to be vested in the commissioners by an act of parliament to be obtained

FOR ROAD
OR CANAL
CALLS.

for, &c. [*here state the purposes of the act*] the said money to be advanced at instalments of 25 *per cent*, at not less than six months' distance from each other, and the first call not to be sooner than six months from the then present time; and whereas the said defendant having so subscribed as aforesaid, afterwards, and after the passing of the said statute so made and passed in the year, &c. to wit, on, &c. at, &c. (*venue*) certain persons, to wit, &c. then and there respectively being commissioners for putting in execution the powers and authorities of the said first-mentioned act, given and granted, did, by virtue of the powers and directions of the said act, duly make a certain call for the payment of all instalments, viz. one instalment of 20 *per cent*. upon the sum of, &c. so subscribed by the said defendant as aforesaid, and the other sums of money subscribed for the purposes in the said act mentioned; and did then and there duly require the said defendant to pay the sum of, &c. (the same being the first instalment of and upon the said sum of, &c. so by him subscribed as aforesaid), on or before the — day of, &c. to the said plaintiff, who at the time of the making of such call was, and from thence hitherto hath been, and still is, *the treasurer to the said commissioners, whereof the said defendant then and there had notice; and he, by reason of the premises, became and was liable to pay to the said plaintiff, as such treasurer as aforesaid, the said sum of, &c. being 20 *per cent*. on the said sum by him subscribed as aforesaid, whereby, &c. *actio accrevit*.

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Second
count.

And whereas also the said defendant, before the passing of the said first-mentioned act, and more than six months before the making of the call of money hereinafter next mentioned, at, &c. (*venue*) had subscribed to advance a certain other sum, to wit, &c. for the purposes aforesaid, and in manner aforesaid, and thereupon, after the passing of the said first-mentioned act, to wit, on, &c. at, &c. (*venue*) certain persons, to wit, the said, &c. then and there respectively being commissioners for putting into execution the powers and authorities by that act given and granted, did, by virtue of the said act, duly make a certain call for the payment of an instalment; that is to say, an instalment of 20 *per cent*. on the sum of, &c. so subscribed by the said defendant as aforesaid, and did then and there duly require the said defendant to pay the sum of, &c. on or before, &c. to the treasurer of the said commissioners; and the said plaintiff, who at the time of the making of such last-mentioned call was, and from thence hitherto hath been such treasurer, further saith, that no other instalment had been advanced, or call been made, in respect of the money so subscribed as last aforesaid, within six months next preceding the said — day of, &c. of all which said premises the said defendant afterwards, to wit, on, &c. at, &c. (*venue*) had notice, according to the directions of the said act, by reason whereof, &c.—[*Add indebitatus count, as ante, 53, also a count on an account stated.*]

*IV. ON AWARDS.

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[*Usual commencement in debt for the sum in the award, not for the*
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ON
AWARDS.
On an

ON
AWARDS.

penalty of the bond.—For that whereas certain differences (i) having arisen and being depending between the said plaintiff and the said de-

award,
where the
submis-
sion was
by arbitra-
tion bonds
(h).

(i) As to the sufficiency of this, see *supra*, note.

(h) See the forms, post, 397, &c.—7 *Wentw. Index*, 514.—J. B. Moore, 674, as to awards in general, and the remedies thereon, &c. see *Tidd's Prac.* 9th edit. 810 to 845.—3 *Chit. Com. Law*, 637 to 668.—*Watson on Awards*.—Caldwell on Arbitrations. Kyd on Awards, and notes, ante, 241.—(*Chit. Gen. Pract.* vol. ii. 73 to 126.)—As to this declaration, and the action on awards in general, see the forms in *assumpsit*, and the notes, ante, 241, and the form and notes in 2 *Saund.* 61, 62. *Id.* 127, 8. 1 *Saund.* 163, 4.

As to who may sue on the award, where there are several parties to the submission, see 3 J. B. Moore, 674.—1 B. & B. 350, S. C.

Form of Remedy.—Debt lies on an award for the payment of money, whether the submission be by rule of court or by deed, or by writing without deed, or by parol. 2 *Saund.* 62 a, n. 5.—1 *Sid.* 452.—3 B. & A. 57.—(2 *Chitt. Gen. Pract.* 123, 124.)—But to maintain debt on the award, it is necessary that the whole of the money thereby directed to be paid to be due; and that the cause of the action be merely for non-payment of money, and not for the non-performance of any other act. 1 *Hen. Bla.* 547.—2 *Saund.* 62, n. 5.—*Ld. Raym.* 1040. And debt will not lie against executors or administrators on an award made in the deceased's life-time, unless the submission were under a seal, because the deceased might have waged his law. *Cro. Eliz.* 557, 600.—When the submission is by deed, with a *penalty*, and the award is made within a limited time, an action of debt lies upon the deed for the non-performance of the award, and that whether the award be for the payment of money, or the performance of a collateral act; 3 T. R. 529; and debt would lie on such deed for revoking it, 4 B. & C. 103. 6 D. & R. 113, S. C.

Where an award for the payment of money is made under bonds of submission, the party to whom the money is to be paid, may either bring an action upon the bond for not performing the award, or have an action of debt for the money, and declare upon the award itself.—*Freem. Rep.* 410, 415.—2 *Stra.* 923. It has been said, that when the demand is merely for money due on the award, it is in general more advisable to declare on the award as above, than on the bond, in order to avoid the delay and expense of a writ of inquiry, which is necessary when the action is on the bond, and the defendant suffers judgment by default. 6 *East*, 613.—*Watson*, 200.—But on the other hand, many advantages are gained by declaring on the bond, especially in the proofs; and in the late case in 7 B. & C. 427.—1 M.

& R. 222, S. C. which decided, that in debt on an award, the execution of the submission by all the parties must be proved. Bayley, J. observed, "I hope this decision will have the effect of inducing parties to declare on the arbitration bond. By declaring on the award, the plaintiff takes upon himself the *onus* of proving a mutual submission. By declaring on the bond, he transfers the burden of proof on the defendant, for it lies on the latter to discharge himself from the penalty by showing a performance of the conditions." Where the submission is by bond, and the award is to do some collateral act, or the submission has been revoked, debt on the bond is the only form of remedy.

Where the parties who had submitted disputes to arbitration by mutual bonds by indorsement *under seal*, on the bonds of submission made within the time limited for making the award, agreed, that the time should be enlarged to a future day; it was decided, that an action of debt on the bond would lie for non-performance of an award made after the original time had expired, but within such enlarged time; for such indorsement operated as a defeazance or further defeazance to the original bond. 3 D. & R. 446.—2 B. & C. 179; S. C. But if the indorsement had not been under seal, no action could have been maintained on the bond for non-performance of the award, 3 T. R. 592, n. The remedy in the latter case would be in debt or *assumpsit* on the award, or *assumpsit* on the agreement. *Watson on Awards*, 202.

Covenant lies on a submission by deed for the non-performance of an award, or for the revocation of the deed, there being covenants in the deed to perform the award. 1 D. & R. 106.—5 B. & A. 507, S. C.—5 *East*, 266.—4 B. & C. 103.—6 D. & R. 113, S. C. On a judgment by default in covenant for the non-performance of an award, the Court will refer it to the Master to compute what is due for principal and interest on the award. *Tidd*, 9th edit. 471.

As to when *assumpsit* lies, see ante, 241, when matters are referred to arbitration without bond, and the arbitrators award a certain sum to be due, it may be recovered under a count on an *insimul computasset*. 1 *Esp. Rep.* 194.—*Sed vide*, *Id.* 377. (A sum awarded to be due upon a parol submission, may be recovered under a count for the original claim, using the award as settling the amount of the claim. *Allen v. Milner*, 2 *Tyrw.* 418.

So in *covenant* on a lease an award is good evidence of the quantum of damages, *Whitehead v. Tattersall*, 1 *Adol. & El.* 491.)

Form of Declaration.—When the submission was by bonds, and the award is merely to pay money, the plaintiff may

ON
AWARDS.

fendant (*k*), the said plaintiff heretofore to wit, on &c. (*date of deed*) at, &c. (*venue*) *by a certain bond of arbitration (*l*), bearing date, to wit, the day and year aforesaid, became bound to the said defendant in a certain penal sum in the said bond mentioned; and the said defendant then and there, by a certain other bond of arbitration, bearing date, to wit, the day and year aforesaid, became and was bound to the said plaintiff in a certain penal sum in the same bond mentioned, which said bonds were respectively conditioned to (*m*) [*here set out the substance of the condition, which may be thus*] abide the award and determination of E.

either declare on the defendant's bond, without stating the condition (as in forms, post, 436. 1 Saund 168.—Pl. A. 352.—3 J. B. Moore, 674;) or may set out the bond and condition, and the award and breach. It is best to adopt the former mode of declaring. (See per Bayley, J. 7 Bar. & Cr. 427; 1 Man. & Ry. S. C.)

The notes to the form in assumpsit, ante, 241, will, for the most part, be here applicable. In debt on the award, it is necessary to state, by way of inducement, the nature of the differences that had arisen between the parties. The concise averment adopted in the above form, will suffice. 2 Saund. 62, n. 1. In some cases, however, it would, perhaps, be as well to state them more minutely, as in the form, post, 398. In such action, on the award, the mutual submission must be stated, 2 Saund. 62, note 1, though the mode of submission, as whether in writing or not, needs not be shown. *Id.* Where, however, the parties are bound by their submission in a different manner from what they would in general be liable, it is necessary to state the terms of that submission in that particular case. 2 Saund. 61, n.—7 T. R. 352.—1 B. & B. 350.—Watson on Awards, 205. The submission need not be stated at full length, but the substance and legal effect of it should be stated. It must be so stated as to correspond with and support the award, Show. 81. A profert of the deed is necessary, 8 T. R. 571. Where six partners entered into two bonds of submission to arbitration; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award, and the three latter gave a similar bond to the three former. In the recital of the bonds, the differences were stated to be depending between the above bounden three and the above named three. In setting out the bond in the declaration, the differences were laid to be depending between the six parties collectively. It was held, this was no variance. 3 J. B. Moore, 674.—1 B. & B. 350, S. C.

It is sufficient to state so much of the award only as to entitle the plaintiff to his action. 2 Saund. 62 b, n. 5.—Ante, 243, n. b.—1 Burr. 280.—1 Salk. 72. It is safest to use the very words of the award. It will do to state, that "amongst other things," it was awarded, Lit. Rep. 312.—1

Leon. 72.

It must appear that the award was in form as well as in substance, made according to the submission; as if the submission be on the terms of the award, being in writing, and under the hand and seal of the arbitrator, it will not suffice to aver only that it was in writing; and an averment that the award was *duly* made would not cure the defect.—2 Marsh. 301, 308.—6 Taunt. 645, S. C.—3 M. & S. 512.—2 Saund. 62 b, n. 5.—Ante, 242.

So where time and place are fixed in the submission for the delivery of the award, it must be shown that the award was correct in those particulars.—Cro. Jac. 577.—3 Mod. 331.—But where it is provided "that the award shall be made in writing, &c. ready to be delivered to the parties in difference, or such of them as shall require the same, on or before a certain day," it is sufficient to state that the arbitrator made his award without stating that it was ready to be delivered, although the precedents in common use contain this latter averment. 1 Saund. 327 b, n.—Watson, 207.

There is no occasion to make any profert of the award, and this, though it be under the hand and seal of the arbitrator, Styles, 459.

There is no occasion to state defendant had notice of the award, unless the submission expressly require it. 2 Saund. 62, n.—Ante, 242.

Where money is awarded to be paid at a particular time and place, it does not appear to be necessary to state the attendance of the plaintiff at the place, or a demand by the plaintiff there. 2 B. & B. 233; but it is otherwise where money is awarded to be paid at a certain time and place, on a collateral thing being done by the plaintiff, as on giving a covenant, or the like, and in that case it must be alleged that the plaintiff was ready at the place to perform his part of the award.—2 Chit. Rep. 40.—Watson, 208.

(*k*) What not a variance in description of parties to the deed, 3 J. B. Moore, 674. 1 B. & B. 350, S. C.—Supra, note.

(*l*) As to the statement of the mode of submission, see supra, note.

(*m*) The submission must be so stated as to correspond with and support the award.—Supra, note, 395 a.—Show. 81.

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award.

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F. of, &c. an arbitrator indifferently elected and named, as well by (n) and on the part and behalf of the said defendant, as by and on the behalf of the said plaintiff, to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties, or any or either of them, so as the said award should be made in writing, under the hand of the said E. F. (o), and ready to be delivered to the said parties in difference, or such of them as should desire the same on or before, &c. And the said plaintiff further saith, that the said E. F. having taken upon himself the burden of the said arbitration, did in due manner, and within the time for that purpose appointed, to wit, on, &c. (*date of award*) at, &c. (*venue*) duly make and publish his award in writing subscribed with his own proper hand (p) of and concerning the said matters in difference between the said parties ready to be delivered to the said parties in difference, or such of them as should desire the same, and bearing date, to wit, the day and year last aforesaid, and did thereby award and direct (q) that the said defendant should pay to the said plaintiff the sum of —*l.* [*set out the award so far as relates to the payment of the money,*] which, when paid, should be in full satisfaction or all claims and demands of the said plaintiff upon or against the said defendant for or in respect of the said matters in difference; and the said E. F. did thereby further award and direct that *the said plaintiff should pay [forty guineas] as and for the costs of that his award (r), and that the said defendant should, upon demand, repay to the said plaintiff, or to —, his solicitor, one moiety of such sum of forty guineas, and that in all other respects the said parties respectively should bear their own costs of that reference; as by the said award, reference being thereunto had, will more fully appear, of which said award the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) had notice (s). And although the said defendant did afterwards, to wit, on, &c. pay to the said plaintiff the said sum of —*l.* in the said award mentioned, yet the said defendant did not, on the said day in the said award in that behalf mentioned, pay to the said plaintiff the said sum of —*l.* in the said award mentioned, or any part thereof, nor hath he since paid the same, or any part thereof, although to pay the said last-mentioned sum of money the said defendant was requested by the said plaintiff, to wit on, &c. appointed for the payment of the said sum of —*l.* to wit, at, &c. (*venue*) aforesaid, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of

(n) This is necessary, 2 Stra. 923.—Saund. 61 g. note 2.—1 Burr. 278.

(o) This will depend on the terms of the bond, see 2 Marsh. 304.—6 Taunt. 645, S. C.—Ante, 395 a, note.

(p) As to this allegation see 2 Saund. 62 b. n. 5.—Ante, 395. note.—If required to be sealed or subscribed by the arbitrator, the averment must be accordingly.—2

Marsh. 301.—6 Taunt. 645, S. C. 3 M. & S. 512.—Ante, 395, note.

(q) It is sufficient to show so much of the award only as to entitle the plaintiff to his action.—2 Saund. 62 b. n. 5.—1 Burr. 280.—1 Salk. 72.—Ante, 395, note.

(r) *Quære*, if this be legal, 8 East, 13.

(s) The reference to the award is unnecessary; and it is in general unnecessary to state defendant had notice of it.

£—, parcel of the said sum above demanded (t).—[*Add an indebitatus count in debt, on award, as ante, 89, also counts for money paid, and an account stated in debt, and common conclusions, as ante, 387.—When an interest count is useful, see 1 Gow, C. N. P. 18, 3 Campb. 468.*]

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AWARDS.

*For that whereas divers disputes, controversies, and differences having arisen and being depending between the said plaintiff and the said defendant of and concerning divers sums of money claimed by the said plaintiff to be due to him from the said defendant, and also of and concerning an agreement for the purchase by the said defendant from the said plaintiff of the lease, good-will, and fixtures of a certain house and premises, used as a baker's shop, in W—— street, in the county of M. the said plaintiff, to wit, in Trinity Term, in the —— year of the reign of our lord the now king, commenced an action at law in his majesty's court of King's Bench, at W. against the said defendant for the recovery from her of the said sum of money so claimed to be due to him as aforesaid; and the said plaintiff also, to wit, in Trinity Term aforesaid, commenced a suit in the High Court of Chancery against the said defendant to compel a specific performance of the said agreement, and which said action or suit, at the time of making the order hereinafter mentioned, was depending and undetermined, to wit, at, &c. and thereupon heretofore, to wit, on, &c. at, &c. (*venue*) by an order of the honorable Mr. Justice L—— then being one of the justices of the said court of King's Bench, made in the said action, dated, &c. (*the date*) it was, amongst other things ordered (*let the following correspond with the order*), with the consent of the attornies on both sides in the said cause, that all matters in difference between the said parties thereto, should be referred to the award, order, arbitrament, final end and determination of G. H. esq. so that he should make and publish his award in writing, of and concerning the matters aforesaid, ready to be delivered to the said parties, or either of them requiring the same, on (w) or before the —— day of —— in the year, &c. and that the costs of the said action should abide the event of the said award to be made and published as aforesaid, and that the costs of the said references should be in the discretion of the said arbitrator, and that the said parties did and should respectively in all things duly abide by, and perform the said award as therein directed; and that neither of the said parties should bring or prosecute, or cause to be brought or prosecuted, any writ of error, or file any bill in equity against the said arbitrator, or against each other; and the said plaintiff further saith, that by another order of the said Mr. Justice L—— afterwards, to wit, on, &c. to wit, at, &c. aforesaid, the time for the making of the said award was duly enlarged (x) until,

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On an
award
made pur-
suant to a
Judge's
order (u.)

(t) Arbitrators may recover a compensation for their trouble, and plaintiff may claim a moiety of the expense from defendant, 1 Gow's Ca. Ni. Pri. 18.

(u) See the notes to the preceding form. See other forms, 5 Wentw. 336 to 354.—2 Mod. Ent. 219, 243, 259, to 269—Where there is a reference at Nisi Prius which is afterwards made a rule of court, it is said an action lies on such rule.—Sid. 452.—3 Bar. & Ald. 57, ante, 395, n.

(w) If no time be limited for making the award, the arbitrator is bound to proceed

within a reasonable time, 3 M. & S. 147. It is open to the parties to the agreement to request the arbitrator to proceed within a reasonable time, and if he neglect or refuse, they may revoke his authority.

(x) In the statement of the enlargement the precise day is immaterial. 1 Gow, C. N. Pri. 6.—It was said by Le Blanc, J. 1 M. & S. 2, that the terms of the reference ought never to render it necessary to have a Judge's order to enlarge the time, but that it ought to be left to the discretion of the arbitrator alone, to do as he may re-

ON
AWARDS.

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&c. as by such order, reference being thereto *had, will more fully appear; and the said plaintiff in fact says, that afterwards, and before the expiration of the said enlarged time for making the said award, to wit on, &c. (*date of award*) at, &c. (*venue*) aforesaid, the said G. H. in pursuance of the said orders, having taken upon himself the burden of the said arbitration, (*this is usually taken from the recitals in the award*) and having deliberately, and at large heard, read, and duly and maturely examined, weighed, and considered, all and singular the allegations, vouchers, proofs, and evidences brought and produced before him, by and on the parts and behalf of the said parties respectively, touching the said matters in dispute and difference between them, and referred to him as aforesaid, did make and publish his award, arbitrament, final end, and determination in writing, of and concerning the said premises, ready to be delivered to the said parties in difference, or such of them as should require the same, and bearing date, to wit, the day and year last aforesaid, and did thereby award, order and direct that (*here set out the award for the payment of money*) the said defendant was justly and truly indebted to the said plaintiff in respect of his claims in the said action as aforesaid, in the sum of £— of lawful money of Great Britain, and the said G. H. did thereby award, order, and direct that the said defendant should pay to the said plaintiff or his order, the sum of £—, on, &c. (y); and the said arbitrator did thereby further find, that the aforesaid agreement between the parties relative to the aforesaid lease, good-will and fixtures, was not binding upon them, and the said *arbitrator did therefore declare the same void accordingly; and the said arbitrator did award and declare, that the said plaintiff had no claim or demand whatsoever against the said defendant in respect or on account of the said agreement, and he did thereby order and award, that the said plaintiff should immediately cause his said suit against the said defendant in the said Court of Chancery to be dismissed in due manner, with costs to be paid and sustained by himself. And the said arbitrator did also thereby further order and award the said defendant forthwith to deliver up the possession of the said house and fixtures to the said plaintiff, and that the said defendant should, when required, and upon being duly indemnified by him the said plaintiff in that respect, permit and suffer him to make such use of his name, and do such other acts as he should be advised was and were necessary to be done by him to enable him to sue for, and recover the rents then due and owing from any person or persons whomsoever, for or in respect of the said house and premises in — aforesaid, or any part thereof, and which said rents the said arbitrator did thereby award and declare the said plaintiff to be entitled to for his own use and benefit. And the said arbitrator did thereby award, order, and determine, that the costs of the said reference, and of that his award, should be borne, paid

quire; in that case there was a *proviso* in the Judge's order, that the award should be made on or before a day certain, but that if the arbitrator should not then be prepared, *that the time should be enlarged as he might require, and a Judge of the court think reasonable and just*; and it was held, that the time for making the award was duly enlarged by the arbitrator indorsing on the order, on the day preceding the

expiration of the original time, that he required further time, although the Judge's order granting such further time, was not obtained till a subsequent day.

(y) If money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, it carries interest from that day, if duly demanded at the place appointed, 3 Campb. 468.—See 1 Gow, 18, as to the recovery of interest.

ON
AWARDS.

for, and sustained by the said plaintiff and defendant in equal shares and proportions, upon payment of the said sum of £— and the due performance of that his award; and he did thereby further award, order, and direct, that the said plaintiff and defendant should forthwith in due manner execute to each other a general release of all matters whatsoever in dispute and difference between them as aforesaid, up to the date of the said rule or order of the said — day of — as by the said award, reference being thereunto had, will more fully and at large appear; of which said award the said defendant afterwards, to wit, on the day and year last aforesaid, had notice (z), to wit, at, &c. (*venue*) aforesaid. And the said plaintiff further saith, that afterwards, to wit, on Wednesday next after the Octave of St. Martin, in Michaelmas Term, in the — year aforesaid, it was duly ordered by the said court, that the said first-mentioned order of the honorable Mr. Justice L. should be entered and made a rule of the *said court; and the said plaintiff further saith, that the costs of the said action, afterwards, to wit, on the day and year last aforesaid, to wit, at, &c. (*venue*) aforesaid, were duly taxed at a large sum of money, to wit, the sum of £— of like lawful, &c. of all which said premises the said defendant afterwards, to wit, on the day and year aforesaid, there had notice; yet the said defendant, did not nor would, on the said, &c. or at any time before or since, although often requested so to do, pay to the said plaintiff the said sum of —l. in the said award mentioned, and the said sum of —l. or any part thereof, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at, &c. aforesaid, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant, the said sums of —l. and —l. amounting, to wit, to the sum of —l. parcel of the said sum above demanded, &c. [*Money paid, account stated, and common conclusion in debt.*]

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V. ON BYE-LAWS.

ON
BYE-LAWS
Debt on a
bye-law,
for pay-
ment of an
annual
sum made
in pursu-
ance of a
charter
granted to
the col-
lege of
surgeons
(a).

London, to wit.—The Royal college of surgeons in London complain of Samuel Hunt being in the custody of the marshal *of the Marshalsea of our Lord the now king, before the king himself, of a plea that he render unto them the said royal college, the sum of £2 of lawful money of Great Britain, which he owes to, and unjustly detains from them. For that whereas his late Majesty King George the Third, by his certain letters patent under the great seal of England, bearing date at Westminster, the 22d day of March, in the 40th year of his reign, and which said letters patent, sealed as aforesaid, the said royal college now bring here into court, the date whereof is the same day and year aforesaid, after reciting,

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(z) As to the notice of and reference to the award, see ante, 395, n.

(a) This form was settled with great care by the then Solicitor-General, Sir Vicary Gibbs, upon examination of the form in 7 Wentw. 383, and other forms. See other forms, 1 Lut. 562.—Thomp. Ent.

115, 120.—2 Mod. Ent. 225, 230 —Lil. Ent. 153.—5 Wentw. 166 to 222.—7 Id. 501 to 503.—1 Wills. Rep. 281.—1 Hen. Bla. 370. —1 Burr. 235.—3 Burr. 1847.—1 B. & P. 100.—2 M. & P. 194. As to bye-laws in general, see Com. Dig. tit. "By Law," per totum. 2 Chit. Com. Law, 217 to 224.—

ON BYE-LAWS.

Charter,
22d
March, 40
G. 3. reci-
ting prior
charters
and stat-
utes.

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Reference
to the
charter.

&c.—[Recites a charter granted by Edward the Fourth, by which he incorporated the barbers freemen of the city of London, and gave twelve or eight of them power to elect governors to direct the art of surgery; also a charter of the 32d Henry the Eighth, which, after stating that two companies of surgeons, one called barbers, and the other surgeons, were then in existence, unites them into one body corporate, called "The Masters and Governors of the Mystery of and Commonalty of the Barbers and Surgeons of London;" and directs, that they shall be impleaded by that name. It then recites the charter of 5 Car. 2, which confirms to the united company all their privileges, possessions, and powers, and empowers them to elect two masters, and ten examiners of surgeons annually. It next sets forth the 18 Geo. 2, whereby the barbers and surgeons were again made distinct corporations; the incorporation effected in the reign of Henry the Eighth was declared void, and those who had been regularly admitted surgeons, were made a distinct body corporate, to be called and impleaded by the name of "Master, Governors, and Commonalty of the Art and Science of Surgeons of London," and to take to themselves property not exceeding £200 per annum in value. The charter then proceeds to state, that this incorporation has been dissolved, and that his Majesty thereby constituted James Earle, and the other members of the late company, a body corporate and politic, with a common seal, by the name of "The Royal College of Surgeons," enabling them to purchase, and hold a hall or council-house, &c. It then *authorizes the college to elect twenty-one persons to be a court of assistants, of whom ten should be examiners of surgeons for the college, one of which latter number should be principal master, and two other governors; and then proceeds to enable the masters, governors, with ten of the members of the court of assistants, to hold courts to make, confirm, or annul bye-laws. It then appoints the first master, governors, examiners, and assistants, the latter for life, the two former for a year, and directs the time of their meeting, and the oath they are to take; it prescribes the annual election of masters and governors. It then precludes all persons not regularly educated, &c. from becoming members, and concludes with a promise, that the parties may act under the charter without testifying their assent to it in writing.] As by the said letters patent of his said late majesty, under the great seal of England, reference being there into had, will, amongst other things, more fully and at large appear. And the royal college further say, that after the making of the said letters patent, and within thirty days next after the

To secure an obedience to a bye-law, a penalty should be annexed to the breach of it—5 Co. 63 b.—3 Leon. 265.—If the bye-law does not regulate the mode of recovering the penalty, an action of debt lies for it, 1 Rol. Ab. 366, C. pl. 3, and the bye-law may ordain, that it shall be recovered by debt, 5 Co. 64. a.—1 Rol. Ab. 366, C. pl. 2, or that the chamberlain of London shall bring debt for it, Id. Ibid.—But a bye-law, "that none but freemen shall keep shop," cannot confine the action for the penalty to the port-mote court, where none but the sheriff or coroner (who must be freemen) can array a jury, 3 Burr. 1847, 1858.

As to the Declaration.—The declaration must state the particular facts which subject the defendant to the penalty, therefore a count stating the penalty as being forfeited under and by virtue of a certain bye-law of the company before that time duly made, is bad, on special demurrer, 1 B. & P. 98; and see 2 M. & P. 164.—The power of making bye-laws is incident to every corporation, but the law implies the right to be in the whole body, and if it be exercisable by a select part of it, such power must be shown. 1 B. & P. 100, 101. Doug. 158, 9; see a form in 2 M. & P. 164, held bad for not averring a condition precedent.

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LAWS.

date thereof, and upwards of fourteen days before the day of holding the meeting hereinafter next mentioned, to wit, on the 25th day of March, A. D. 1800, to wit, at, &c. aforesaid, in the parish of St. M. le B. in the W. of C. the said Charles Hawkins then and there being such master of the said college of surgeons as aforesaid, and the said W. L. and G. C. then and there being such governors of the same college as aforesaid, did, in pursuance of the said letters patent, give and publish in the gazette, a certain notice, bearing date the 25th day of March, in the year last aforesaid, that they, the said masters and governors of the said college, did appoint and direct that the members of the said court of assistants of the said college, in the said letters patent named, should meet on Thursday, the 3d day of April then next, at two o'clock in the afternoon precisely, at the hall or council-house of the said college, situate in Portugal Row, in Lincoln's Inn Fields, in the county of Middlesex, (the same being the place at which the persons, members of the said late corporation, had usually held their meetings for upwards of six months then last past); and that the said members of the said court of assistants, for carrying into effect the said letters, and of such intended meeting of the said court of assistants, they, the said master and governors did thereby give that public notice to all persons who were or might be concerned or interested therein. And the said *royal college of surgeons further say, that after the making of the said letters patent, and within thirty days next after the said date thereof, and upwards of fourteen days after the giving such notice as aforesaid, to wit, on the 10th day of April, in the year of our Lord 1800 aforesaid, being the time mentioned and appointed in the said notice, the said master and governors, and the said other members of the said court of assistants in the said last-mentioned letters patent named and appointed, did in pursuance of the same letters patent, and of the said notice, meet at the said hall or council-house of the said college in the said notice mentioned, and did then and there duly hold a court of assistants for carrying into effect his said late majesty's said letters patent, and did administer unto each other respectively, and each of them did then and there take the said respective oaths, as directed and required by the said last-mentioned letters patent as aforesaid. And the said royal college further say, that at the said meeting it was then and there duly resolved by the said master, governors, and other members of the said court of assistants so assembled, and so constituting the said court of assistants as aforesaid, that in pursuance of the said clause in the *said charter*, which related to the election of three new members of the court of assistants to fill up the then present vacancies therein, a court of assistants should be holden at the said college, being the said hall or council-house of the said college, situate in Portugal Row aforesaid, for the purpose of such election, on Friday, the 2d day of May, then next, at two o'clock precisely, the same being within one month next after the first meeting of the said court of assistants, as aforesaid. And the said royal college of surgeons further say, that the said Samuel Hunt, before the day of the date of the said last-mentioned letters patent, to wit, on the 4th day of June, in the year of our Lord 1789, was a member of the said late corporation of surgeons, established by the said act, made and passed in the 18th year of the reign of his said late Majesty King George the Second, and so remained and continued such member, until the dissolution thereof, to wit, at London

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OF SYR-
LAWS.

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aforesaid, in the parish and ward aforesaid. And the said royal college of surgeons further say, that the said Samuel Hunt, so having been such member of the late corporation of surgeons as aforesaid, afterwards, and after the making of the said last-mentioned letters patent, to wit, on the 21st day of April, in the year of our Lord 1800 *aforesaid, at London aforesaid, in the parish and ward aforesaid, was willing to become, and be a member of the said college, by the said last-mentioned letters patent, established and incorporated, and did afterwards, and within six calendar months after the date of the said letters patent, to wit, on the same day and year last aforesaid, that is to say, at London aforesaid, in the parish and ward aforesaid, testify his acceptance of his said late majesty's said letters patent, and his consent to become a member of the said college, by then and there signifying such his acceptance and consent in writing, to the court of assistants of the said college; and which said acceptance and consent of the said Samuel Hunt was afterwards, to wit, on the day and year last aforesaid, duly entered in a certain book kept by the said court of assistants for that purpose, at the said hall or council-house of the said college, situate in Portugal Row aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid; and the said Samuel Hunt then and there became, and was and still is a member of the said Royal College of Surgeons in London, to wit, at London aforesaid, in the parish and ward aforesaid. And the said Royal College of Surgeons further say, that after the making of the said letters patent, and within one month next after the said first meeting of the said court of assistants as aforesaid, to wit, on the 2d day of May, in the year of our Lord 1800 aforesaid, at the said college, being the said hall or council-house of the said college, situate in Portugal Row aforesaid, in pursuance of the said resolution, the said master, and the said governors, and the said other members of the said court of assistants, so named and appointed in the said letters patent as aforesaid, did then and there assemble, and duly hold a court of assistants of the said college of surgeons, to wit, at London aforesaid, in the parish and ward aforesaid. And the said Royal College further say, that at the said court of assistants so assembled as last aforesaid, the said master, governors, and other members of the said court of assistants, so named in the said letters patent as aforesaid, did then and there duly elect John Samuel Charlton, Edward Ford, and William Norris, to fill up the said three vacancies, then existing in the said court of assistants, and the said three last-mentioned persons were then and there duly elected, and then and there became members of the said court of assistants. And the said royal college further say, that afterwards, and within six calendar months after *the date of the said letters patent, to wit, on the said 2d day of May, in the year of our Lord 1800 aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, the said master, governors, and other members of the said court of assistants, so named and appointed in the said letters patent as aforesaid, did respectively duly testify their acceptance of the said letters patent, and their consent to become members of the said college, by then and there signifying such their acceptance and consent in writing, which said acceptance and consent was then and there duly entered in a certain book kept for that purpose, at the said hall or council-house of the said college, situate as aforesaid; and that within the said six calendar months, to wit, on the same day and year last afore-

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LAWS.

said, divers, to wit, 100 members of the said late dissolved corporation, and also divers, to wit, 20 persons, who, since the dissolution thereof, had obtained such letters testimonial as aforesaid, under a seal, purporting to be the seal of the said late dissolved company or corporation, did, in like manner, duly testify their acceptance of the said letters patent, and their consent to become members of the said college, to wit, at London aforesaid, in the parish and ward aforesaid, which same acceptance and consent was then and there also duly entered in the said book. And the said royal college further say, that afterwards, to wit, on the 2d day of June, in the year of our Lord 1800 aforesaid, at the said college, situate in Portugal Row aforesaid, a court of assistants of the said royal college of surgeons was then and there duly holden, and that, at such last-mentioned meeting of the said court of assistants, the said John Samuel Charlton, Edward Ford, and William Norris, having respectively duly accepted the said office of members of the said Court of assistants, the said oath, so directed by the said letters patent to be taken by the members of the said court of assistants as aforesaid, was duly administered to each of them, the said John Samuel Charlton, Edward Ford, and William Norris, and they did then and there respectively take the said oath as directed and required by the said letters patent, to wit, in London aforesaid, in the parish and ward aforesaid; and the said royal college of surgeons further say, that afterwards, to wit, on the 8th day of January, in the year of our Lord 1802, at the said college, being the said hall or council-house of the said college, situate in Portugal Row aforesaid, the said George Chandler, then and there being the principal master of the *said college, and the said Thomas Keate and Charles Blicke, then and there being the governors of the said college, and the said Charles Hawkins, Jonathan Wathen, William Lucas, Samuel Howard, James Earle, William Long, Thomas Foster, John Birch, John Heavinside, John Howard, William Blizard, Henry Cline, David Dundas, John Samuel Charlton, Edward Ford, and William Norris, together with James Ware and Edward Home, then and there being the whole of the members of the said court of assistants, did then and there respectively duly assemble, and duly hold a court of assistants of the said royal college of surgeons, in order to treat and consult about and concerning the rule, order, state, and government of the said college; and the said last-mentioned master, governors, and court of assistants, being so assembled as aforesaid, did in pursuance and by virtue of the said letters patent, (make and ordain the following bye-law, rule, and ordinance, the same appearing to them, the said master, governors, and court of assistants, so assembled as last aforesaid, requisite and convenient for the regulation, government, and advantage of the said college and the same bye-law, rule, and ordinance, not being contrary to law, and whereby it was then and there duly ordained) that every member of the court of assistants should annually pay the sum of 40s. and every other member of the college, who should reside in or within seven miles of the city of London, should pay the sum of 20s. towards defraying the necessary charges and expenses of the college, which several annual sums should be due and payable upon the 24th day of June in every year, and the first thereof should be due and payable upon the 24th day of June, 1802; which said bye-law, rule, and ordinance, so made and ordained as aforesaid, afterwards, to wit, on the same day and year last

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The making of the bye-law.

ON BYE-
LAWS.
Allow-
ance of
bye-law
by chan-
cellor and
chief jus-
tice, &c.

Notice to
defend-
ant.

Residence
of defend-
ant with-
in seven
miles, and
liability to
pay.

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aforesaid, at London aforesaid, in the parish and ward aforesaid, pursuant to the directions of the said last-mentioned letters patent, was, according to the Statute in such case made and provided, examined, approved of, and allowed by the right honorable John Lord Eldon, then lord high chancellor of Great Britain, the right honorable Edward Lord Ellenborough, then chief justice of his late majesty, assigned to hold pleas in the court of our said lord the now king, before the king himself, and the right honorable Richard Pepper Lord Alvanley, then lord chief justice of his late majesty, of the bench at Westminster, to wit, at London aforesaid, in the parish and ward aforesaid; of all which said several premises the said Samuel Hunt, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, had notice. And the said royal college of surgeons further say, that the said Samuel Hunt, so being such member of the said royal college of *surgeons as aforesaid, on the said 21st day of April, in the year of our Lord 1800 aforesaid, resided, and hath thence hitherto resided within seven miles of the city of London, to wit, in Little St. Martin's Lane, in the parish of St. Martin in the Fields, in the city and liberty of Westminster, in the county of Middlesex, to wit, at London aforesaid, in the parish and ward aforesaid; and by means thereof, and by virtue of the said bye-law, he the said Samuel Hunt, after the making of the said bye-law, to wit, on the 24th day of June, in the year of our Lord 1804, at London aforesaid, in the parish and ward aforesaid, became liable to pay, and ought to have paid to the said royal college of surgeons, a large sum of money, to wit, the sum of 20s. of lawful money of Great Britain, for one year of the said contribution, ending on the said 24th day of June, in the year of our Lord 1804, aforesaid, towards defraying the necessary charges and expenses of the said royal college; whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said royal college of surgeons to demand and have of and from the said Samuel Hunt the said sum of 20s. parcel of the said sum above demanded.

Second
count
more con-
sise.

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And whereas also his late majesty King George the Third, by his certain other letters patent under the great seal of England, bearing date at Westminster, the said 22d day of March, in the 40th year of his reign aforesaid, and which said last-mentioned letters patent, sealed as aforesaid, the said royal college of surgeons now bring here into court, the date whereof is the same day and year last aforesaid, after reciting, amongst other things, that the corporation of master, governors, and commonalty of the art and science of surgeons of London, had become and then was dissolved, did, of his special grace and mere motion, and at the humble petition of James Earle, esq. the then late master of the aforesaid then late corporation of surgeons, for himself, his heirs and successors, will, ordain, constitute, and declare, give and grant unto the aforesaid James Earle, and unto all the members of the said then late corporation of master, *governors, and commonalty of the art and science of surgeons of London, having been admitted and approved surgeons within the rules of said company, and also unto all such persons who, upon or since the dissolution of the said corporation should have obtained letters testimonial, under a seal, purporting to be the seal of the said late dissolved corpora-

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tion, authorizing them to practice the art and science of surgery, that they, from henceforth forever thereafter, should be and remain, by virtue of the said last-mentioned letters patent, one body corporate and politic, by the name of the royal college of surgeons in London, and by the same name should and might have perpetual succession, and a common seal, with power to break, alter, and make anew the said seal, from time to time, at their will and pleasure, and by the same name should and might implead, and be impleaded, before all manner of justices, in all courts, and in all manner of actions and suits; and his said late majesty did, by the said letters patent, further will and please, that it should and might be lawful to and for the said college, thereby established and incorporated, from time to time, in the manner thereafter mentioned, to elect, choose, and appoint twenty-one persons to be the court of assistants of the said college, of which court of assistants ten persons should, at all times, be constituted and appointed examiners of surgeons for the said college, and of such ten persons one should be principal master, and two others should be governors, to be respectively qualified and admitted in such manner, and to continue in the said offices respectively for such time or times as by the said last-mentioned letters patent was thereafter ordered and appointed; and that it should and might be lawful for the master and governors of the said college, or for one of them, together with ten or more of the members of the said court of assistants for the time being, when and as often as to any one of the master or governors should seem meet, to hold courts and assemblies, in order to treat and consult about and concerning the rule, order, state, and government of the said college; and also that it should and might be lawful to and for the said master and governors, and court of assistants, so assembled, or the major part of them, to make, ordain, confirm, annul, or revoke, from time to time, such bye-laws, ordinances, rules, and constitutions, as to them should seem requisite and convenient for the regulation, government, and advantage of the said college, so as such bye-laws, ordinances, rules, *and constitutions, should not be contrary to law, and in all such cases as should be necessary, be examined, approved of, and allowed, as by the laws and statutes of this realm is provided and required; and his said late majesty, by his said letters patent, did further will that Charles Hawkins, esq. one of his principal serjeant-surgeons should be and he was thereby constituted and appointed the first master of the said college of surgeons, and that William Long, and George Chandler, esqrs. should be and they were thereby constituted and appointed the first governors of the same; and that the said Charles Hawkins, William Long, and George Chandler, together with J. W., W. L., S. H., and W. C., esqrs. the said James Earl, Thomas Kent, esqrs. the surgeon-general to his said late majesty's forces, and Charles Blicke, esq. should be, and they were thereby constituted and appointed the first examiners of surgeons for the said college; and also that the said Charles Hawkins, William Long, George Chandler, and J. W., esqrs. the said W. L., S. H., W. C., J. E., and C. B., T. F., esq. J. B., esq. the said T. K. H., J. H., W. B., and H. C., esqrs. D. D., esq. the other of his said Majesty's principal serjeant-surgeons, and such three other persons as should be elected to that office, on the day whereon the court of assistants of the said college thereby incorporated should first meet, after the date of his said Majesty's letters patent, or at a court of assistants, to be holden with-

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in one month then next after, should be, and they were thereby constituted the first court of assistants of the said college of surgeons thereby incorporated and established; and it was his said Majesty's further will and pleasure, that after the day of the date of his said last-mentioned letters patent, no person, except those who, before the day of the date of the said last-mentioned letters patent, were members of the late corporation of surgeons, established by the said act made and passed in the 18th year of the reign of his said Majesty's royal grandfather King George the Second, and also excepting such persons as should have received such letters testimonial as in the said last-mentioned letters patent mentioned, under a seal purporting to be the seal of the late dissolved company or corporation of surgeons, should be capable of becoming a member of the said college, thereby established, unless he should have obtained letters testimonial of his qualifications to practice the art and science of surgery, under the common seal of the college thereby established; but every person *who should hereafter obtain such letters testimonial under the common seal of the college aforesaid, should thereby, by virtue of such letters testimonial, become, and may be constituted a member of the said college; subject to all the regulations, provisions, and bye-laws of the said college; and it was his said Majesty's further will and pleasure, that the members of the said late corporation, and such other persons who, since the dissolution thereof, should have obtained such letters testimonial under a seal, purporting to be the seal of the late dissolved company or corporation as aforesaid, and who should be willing to become and be members of the said college thereby established and incorporated, should testify their acceptance of his said Majesty's letters patent, and their consent to become members of the said college, by signifying such their acceptance and consent in writing, to the court of assistants, within six calendar months after the date of his said Majesty's said letters patent, who should cause such acceptance and consent to be entered in certain books, to be kept for that purpose at the hall or council-house of the said college; and the said court of assistants were, by the said letters patent, required to keep such books, and have such entries made therein accordingly, as by the said last-mentioned letters patent of his said late Majesty, under the great seal of England, reference being thereunto had, will, amongst other things, more fully and at large appear; and the said royal college of surgeons further say, that the said Samuel Hunt, before the day of the date of the said last-mentioned letters patent, to wit, on the said 4th day of June, in the year of our Lord 1789, was a member of the said late corporation of surgeons, established by the said act, made and passed in the 18th year of the reign of his said late Majesty King George the Second, and so remained and continued such member thereof, until the dissolution thereof, to wit, at London aforesaid, in the parish and ward aforesaid; and the said royal college of surgeons in London further say, that the said Samuel Hunt, so having been such member of the said late corporation of surgeons as aforesaid, afterwards, and after the making of the said last-mentioned letters patent, to wit, on the 21st day of April, in the year of our Lord 1800 aforesaid, at, &c. was willing to become and be a member of the said college, by the said last-mentioned letters patent established and incorporated, and did afterwards, and within six calendar months after the date of the said letters patent, to wit, on

*the same day and year last aforesaid, at, &c. aforesaid, testify his acceptance of his said late Majesty's said last-mentioned letters patent, and his consent to become a member of the said college, by then and there signifying such his acceptance and consent in writing, to the court of assistants of the said college; and the said S. H. then and there became, and was, and still is, a member of the said royal college of surgeons in London, to wit, at London aforesaid, in the parish and ward aforesaid; which said last-mentioned letters patent, after the making thereof, to wit, on the 2d day of May, in the year of our Lord 1800 aforesaid, at London aforesaid, in the parish and ward aforesaid, was duly accepted by the said master and governors, and other members of the said court of assistants therein named, and also by divers, to wit, one hundred members of the said late dissolved corporations, and also, by divers, to wit, twenty persons, who since the dissolution thereof, had obtained such letters testimonial as aforesaid, under a seal, purporting to be the seal of the said late dissolved company or corporation; and the said royal college further say, that afterwards, to wit, on the 8th day of January, in the year of our Lord 1802 aforesaid, at the said college, being the said hall or council-house of the said college, situate in Portugal Row aforesaid, the said George Chandler then and there being the principal master of the said college, and the said Thomas Keate and Charles Blicke then and there being the governors of the said college, and the said Charles H., J. W., W. L., S. H., J. E., W. L., T. F., J. B., J. H., J. H., W. B., H. C., D. D., J. S. C., E. F., W. N., J. W., and E. H. then and there being members of the said court of assistants, did then and there respectively duly assemble and duly hold a court of assistants of the said royal college of surgeons, in order to treat and consult about and concerning the rule, order, state, and government of the said college; and the said last-mentioned master, governors, and court of assistants being so assembled as aforesaid, did then and there, in pursuance and by virtue of the said last-mentioned letters patent, duly make and ordain the following bye-law, rule, and ordinance, the same appearing to them the said master, governors, and court of assistants so assembled as last aforesaid, requisite and convenient for the regulation, government, and advantage of the said college, and the same bye-law, rule, and ordinance not being contrary to law; and whereby it was then and there duly ordained, that every member of the court of assistants *should annually pay the sum of forty shillings, and every other member of the college who should reside in or within seven miles of the city of London, should pay the sum of twenty shillings towards defraying the necessary charges and expenses of the college, which several annual sums should be due and payable upon the 24th day of June in every year; and the first part thereof should be due and payable upon the 24th day of June, 1802; which said last-mentioned bye-law, rule, and ordinance, so made and ordained as last aforesaid, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, and pursuant to the directions of the said last-mentioned letters patent, and according to the form of the Statute in such case made and provided, was examined, approved of, and allowed by the right honorable John Lord Eldon, then lord high chancellor of Great Britain, the right honorable Lord Ellenborough, then chief justice of his late majesty, assigned to hold pleas in the court of our said lord the now king, before the

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king himself, and the right honorable Richard Pepper Lord Alvanley, then lord chief justice of his late Majesty, of the bench at Westminster, to wit, at London aforesaid, in the parish and ward aforesaid: of all which said several premises the said Samuel Hunt, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, had notice; and the said royal college of surgeons further say, that the said Samuel Hunt, being such member of the said royal college of surgeons as aforesaid, on the 21st day of April, in the year of our Lord 1800 aforesaid, resided, and hath thence hitherto resided, within seven miles of the city of London, to wit, in the parish of St. Martin in the Fields, in the city and liberty of Westminster aforesaid, in the county of Middlesex, aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid; and by means thereof, and by virtue of the said bye-law, he the said Samuel Hunt, after the making of the bye-law, to wit, on the 24th day of June, in the year of our Lord 1804, at London aforesaid, in the parish and ward aforesaid, became and was liable to pay, and ought to have paid to the said royal college of surgeons, a large sum of money, to wit, the sum of twenty shillings, of lawful money of Great Britain, for one year of the said contribution, ending on the said 24th day of June, in the year of our Lord 1804 aforesaid, towards defraying the necessary charges and expenses of the said royal college, whereby, *and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said royal college of surgeons, to demand and have of and from the said Samuel Hunt the said last-mentioned sum of twenty shillings, residue of the said sum above demanded; yet the said Samuel Hunt, (although often requested so to do) hath not as yet paid the said sum of forty shillings above demanded, or any part thereof, to the said royal college of surgeons, but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, to wit, at London aforesaid, in the parish and ward aforesaid; to the damage of the said royal college of surgeons of £10, and therefore they bring their suit, &c.

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ON FOR-
EIGN
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MENTS
AND JUDG-
MENTS OF
INFERIOR
COURTS.
On a Ja-
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judgment.
(b) (1).

V. ON JUDGMENTS OF FOREIGN OR INFERIOR COURTS.

For that whereas the said plaintiff, heretofore, to wit, at a supreme court of judicature of our sovereign lord the king, holden at the town of St. Jago de la Vega, in and for the island of Jamaica, and within the

(b) As to when debt or assumpsit lies on the judgment of a foreign or inferior court, see ante, 243, notes. (*Becquet v. Macarthy*, 2 Bar. & Adol. 951; 1 Crom. M. &

Ros. 277, and see form of declaration, *Soot v. Bevan*, 2 Bar. & Adol. 78.) See also as to when such judgment is conclusive, *id.* Also as to the form of the declaration, *id.*

(1) See the precedent, *Richards, Adm. v. Bickley*, 13 Serg. & Rawle, 395, which was debt upon a Barbadoes judgment. When the foundation of the foreign judgment is a specialty, and it is so stated in the declaration, the Statute of Limitation (*actio non accrevit*) is not a good plea, *ibid.*

ON FOR-
EIGN
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MENTS OF
INFERIOR
COURTS.

jurisdiction of the said court (c), to wit, at, &c. (*venue*) the last Thursday in August, in the — year of the reign of our said lord the king, and in the year of our Lord —, before the honorable —, esq. chief judge of the said court, and his associates, then sitting judges of the same court by the consideration and judgment of the same court, recovered against the said defendant, as well the sum of £— current money of the said island of Jamaica, for his damages which he had sustained by occasion of the non-performance of certain promises and undertakings before that time made by the said defendant to the said plaintiff, as also the sum of £— current money of the said island of Jamaica, for his costs and charges by him about his suit in that behalf expended, to the said plaintiff, *by the said court of his own assent, then and there adjudged, whereof the said defendant is convicted, which said judgment still remains in that court, in full force and effect, in no wise satisfied, recovered, or annulled, (that is to say) at, &c. (*venue*) aforesaid. And the said plaintiff in fact saith, that he hath not yet obtained execution of the aforesaid judgment, and that the damages, costs, and charges aforesaid, in form aforesaid recovered, are of great value, to wit, of the value of £— (d) of lawful, &c. to wit, at, &c. (*venue*) aforesaid, whereby an action hath accrued to the said plaintiff, to demand and have, of and from the said defendant the said sum of £— parcel of the said sum above demanded.—[*Add counts on debt, for the debt upon which the judgment was obtained, money counts, and the account stated.*]

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For that whereas heretofore, to wit, on, &c. a certain decree and sentence was made, in and by his majesty's court of sessions in Scotland, to wit, at, &c. (*venue*) in a certain matter then depending in the same court wherein the said plaintiff was pursuer, and the said defendant was defender, by which said decree it was found, and the lords of council and sessions being the judges of the same court, did thereby then and there find the said defendant liable to the said plaintiff in the sum of £— sterling, as the said plaintiff's salary for eighteen nights he had been engaged to perform by the said defendant at certain theatres, &c.—[*Set out the adjudicatory part of the decree carefully*] as by the said decree and sen-

On a
Scotch de-
cree (e).

(c) These words are unnecessary, and the declaration would be good without them, upon special demurrer, 1 Wils. 319, 390.—Com. Dig. Pleader, 2 W. 12. See form in assumpsit, and notes, ante, 243; and notes to the next precedent.

(d) To ascertain the value in this case, multiply the current money by five, and then divide by seven, which produces the amount in sterling English money. (The value to be recovered is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment, *Scott v. Bevan*, 2 Bar. & Adol. 78.)

(e) See the form in assumpsit, and notes, ante, 245, and that assumpsit lies, see 1 M. & P. 663.—4 Bing. 686, S. C. Debt lies upon the decree of a colonial court (of Equity) which has no power to enforce its decrees in this country, 1 Campb. 253. It does not lie on a decree of (an English) court of Equity, (though it be for the payment of a specific sum of money, when it is founded on equitable considerations only), 3 B. & A. 52; (2) nor on a mere interlocutory order of a court of law, 2 H. B. 248. 4 Taunt. 705. when it lies on a rule of reference, 1 Sid. 452.—2 B. & A. 57.

(2) In Pennsylvania an action of debt is maintainable on a decree of a court of Equity of a sister state for the payment of money. *Evans adm. v. Tatem*, 9 Serg. & Rawle, 252. The considerations upon which the decree was founded do not appear by the report.

ON SCOTCH
DECREE.

Second
count
more gen-
eral.

tence more fully appears (*f*), of which said decree and sentence the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, had notice, which said decree and sentence still remain in full force and effect, not in anywise reversed, set aside, or otherwise vacated; and the said plaintiff hath not obtained any satisfaction of or upon the said decree or sentence for the said several sums of money so decreed and ordained as aforesaid, whereby an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of £—parcel of the said sum above demanded. And whereas also the said defendant afterwards, to wit, on the said, &c. at, &c. (*venue*) aforesaid, had become and was indebted to the said plaintiff in the further sum of £—of like lawful money, upon and by virtue of a certain decree and sentence before then made in and by his said majesty's court of sessions in Scotland aforesaid, in a certain matter then depending in the same court, wherein the said plaintiff was pursuer, and the said defendant was defender, by which said last-mentioned decree and sentence the said defendant was decreed and ordained to pay to the said plaintiff divers sums of money, in the whole amounting to the said last-mentioned sum of £—which is still wholly unpaid and unsatisfied to the said plaintiff, to wit, at, &c. (*venue*) aforesaid, whereby an action hath accrued to the said plaintiff to demand and have, of and from the said defendant the said last-mentioned sum of £—other parcel of the said sum above demanded. [*Add counts for the original debt for which the decree was obtained, and the money counts, and account stated in debt, and breach.*]

On a judg-
ment re-
covered in
the bor-
ough
court of
Liverpool
(*g*).

For that whereas the said plaintiff, heretofore, to wit, on, &c. (*the day when judgment given, or about it*) in the court of record of our said lord the king of the borough of Liverpool, in the county palatine of Lancaster, holden in the common hall within the exchange, before P. W. B. Esq. the mayor of the said borough, according to the custom of the borough aforesaid, from time whereof the memory of man is not to the contrary, used and approved of within the said borough, by the consideration and judgment of the said court, recovered against the said defendant the sum of £14. 7s. parcel of the said sum above demanded, which in and by the said court was adjudged to the said plaintiff for his damages which he had sustained as well by reason of his not performing certain promises and undertakings then lately made to *the said plaintiff by the said defendant in the borough aforesaid, and within the jurisdiction of the said court, (*gg*) as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof remaining, &c. which said judgment remains in full force and effect, not reversed, vacated, set aside, annulled, paid off, or satisfied, and the said plaintiff has not as yet obtained any satisfaction or execution of the said judgment in form aforesaid recovered, whereby an action hath accrued to the said plaintiff, to demand and have, of and from the said defendant, the said sum of £14. 7s. parcel of the said

(*f*) As to this averment, see Doug. 1. 5 of declaring.
East, 473.

(*g*) Debt lies on the judgment of an inferior court, see 243 *a*; and see ante, 243, as to assumpsit, and the note as to the form

(*gg*) (This allegation seems essential in debt upon the judgment of an inferior court, Read v. Pope, 1 Crom. M. & Ros. 302; Salter v. Slade, 1 Adol. & Ell. 608.)

sum above demanded.—[Add counts on the original cause of action, account stated, and breach.] ON SCOTCH DECREE.

VII. FOR ESCAPES.

FOR
ESCAPES.

For that whereas the said plaintiff heretofore, to wit, in — Term (term of judgment), in the — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself [or, if

Against a sheriff for the escape of a prisoner in his custody, under a *capias ad satisfaciendum* (A).

(A) See other forms, post, and those referred to in 1 Saund. 37, n. 1.—Com. Dig. Escape, Pleader, 2 W. 11.—7 Wentw. 553 to 507—1 Rich. C. P. 463.—Herne, 89, and see a form in case for an escape on an attachment for not performing an award, 8 B. & C. 124; also one in debt for an escape in execution, on a judgment revived by *scire facias*. 4 B. & C. 380.—6 D. & R. 500. S. C.—(1 Crom. M. & Ros. 163.)

When an action lies.—It would exceed the limits of a note to point out fully all the requisites to maintain an action for an escape. It must be deemed sufficient to insert the following points;—

The sheriff is liable for the escape of a prisoner taken on an *erroneous* judgment. Carth. 148. If a court, not having jurisdiction, orders an officer to discharge a prisoner, and the officer obeys the order, he is liable to an action for an escape. 8 T. R. 424. The sheriff cannot take advantage of any defects in the proceedings against the prisoner. Cro. Jac. 288. But unless a party be lawfully in custody, no action lies for his escape, 7 B. & C. 80.—8 B. & C. 129; and it seems the officer is not liable if the judgment was *void*, B. N. P. 65, 6.—Wats. on Sheriffs, 54; or if the writ of execution was absolutely *void*. Cro. Jac. 3, 288.—B. N. P. 66. An escape effected by the act of God, or the king's enemies, or by the prison taking fire, is excused. 4 Co. 84.—B. N. P. 66. The sheriff is liable though he arrest in a liberty. 3 B. & A. 502. Letting a man that was arrested go to the next house, situate in another jurisdiction, was held an escape. Sheriff of Hampshire v. Godfrey, 12 G. 2. B. R.—12 Mod. 116, n. b.—1 B. & P. 24. Touching the party, and endeavoring ineffectually to hold him, is an escape. 2 Younge & Jerv. 399, and see further as to what is an arrest, Rosc. Evid. 376. If a sheriff allow the party to go at large on his paying him (the sheriff) the money, he will be liable for an escape. 14 East, 468, and see 4 B. & C. 26.—Ry. & Moo. C. N. P. 26, 321. If there be a judgment against two persons in execution, and one escape, the sheriff will be liable for the whole debt. Rol. Ab. Escape, F. 4. and so where husband and wife are in custody, and the wife escape. Id. Cro. Jac. 6:7.

Who may sue.—The proper party to sue is the plaintiff in the original action. The nominal plaintiff in an action for mesne profits may sue for an escape in an execution upon a judgment therein. 2 M. & S. 473. The hundred may sue for an escape on a judgment obtained by them. Fitz. 296. An executor may sue as such for an escape in his testator's life-time, on a judgment obtained by the testator. Lord Raym. 973.—6 Mod. 125, S. C. The executor may sue in his own right on a judgment obtained by him, whether in his representative character or not. 2 T. R. 126. If while the defendant be in the custody of the sheriff, in an action at the suit of A. a writ be lodged in the office of the sheriff at the suit of B. and the defendant escape, A. as well as B. may sue for the escape. 1 Bos. & Pul. 24.—Salk. 273.

Who may be sued.—The action should be brought against the superior officer, and not the inferior officer, who permitted the escape. Wats. on Sheriffs, 144, 5. Where there are two sheriffs who suffer an escape, and one dies, the action lies against the survivor, or if pending the action one dies, the action may be continued against the survivor. Cro. Eliz. 625. If the old sheriff, at the expiration of his office, omit to turn over a prisoner by assignment to the new sheriff, he is liable for an escape. 3 Rep. 71 b. and see Wats. on Sheriffs, 145. The heir or executor of a sheriff are not liable. Dyer, 271, 322.—Lord Raym. 299.

Form of remedy.—At common law *case* was the only remedy against a sheriff for an escape of a prisoner in execution on final process, and that form of action must still be adopted when the escape is before final process. 2 Inst. 382. But the stats. Westm. 2. 13 Ed. 1. c. 11. and 1 Rich. 2. c. 12. give the action of *debt* against the sheriff, or gaoler, for an escape, to recover the sum for which a prisoner was charged in execution, and to which action of debt the statute of limitations cannot be pleaded. 1 Saund. 37, 38, n. 2.—2 Saund. 67, n. 10. Sid. 305. (See an ancient precedent, 3 Reeve's Hist. E. L. 61.) These statutes do not deprive the party aggrieved of his remedy by action on the case. Cro. Jac. 288. Debt is preferable to case when an escape after judgment can be proved,

FOR
ESCAPES.

*the judgment were in *C. P. say "in the court of our said lord the king, of the Bench at Westminster, before the Right Honorable ———, knight, and his companions, then his said Majesty's Justices of the bench"] [or, if the judgment were in the exchequer, say "before his Majesty's Barons of his exchequer"] at Westminster, in the county of Middlesex (i), by the consideration and judgment of the same court, recovered (k) against one E. F. a certain debt [or, if the judgment was in assumpsit, state it as*

because the jury must give the whole debt, 1 Saund. 36, n. 1. 2 T. R. 129.—2 Chit. Rep. 454. 2 Hen. Bla. 113; (1) whereas in an action on the case the jury may give what damages they think fit. Id. —2 T. R. 130. Debt lies on these Statutes as well where the escape is negligent, as where it is voluntary. 2 Stra. 827.—2 Hen. Bla. 108. But debt does not lie against a sheriff for omitting to arrest a party on a *ca. sa.*, when he had an opportunity of so doing; in that case the plaintiff must sue in case in one count, as for an escape, and in another for not arresting defendant. 2 Bla. Rep. 1048.—2 Hen. Bla. 113. See form, post, 737. Debt does not lie for an escape on an attachment for non-payment of money. 2 B. & A. 56.—8 B. & C. 124. The form of remedy by a sheriff against the party escaping, through the sheriff's negligence, is by action on the case.—Wats. on Sher. 142. If the escape was *voluntary*, the sheriff is without remedy.

Form of Declaration.—The observations as to the form of the declaration will be found under the following notes to each precedent. Great attention should be paid to setting out the proceedings accurately. The declaration must aver not only the escape of the prisoner, but show that he was lawfully in custody, and how.

An *amendment* of any mistake may, it seems, be allowed. 2 J. B. Moore, 561, 3 Taunt. 515, S. C.—6 B. & C. 196. In the latter case, in an action against the marshal for an escape, the bill was entitled generally of Michaelmas Term, and the escape was alleged to have taken place on the 15th November. There was a special demurrer; for that the cause of action appeared to have accrued after the first day of the Term to which the bill had relation. The court allowed the plaintiff to amend on payment of costs, although it appeared by affidavit that the prisoner had returned into the custody of the marshal before any application for liberty to amend was made.

Plea.—Nil debet is a good plea to an action of debt for an escape, 2 Salk. 565. 5 Mod. 9; and before the statute 8 & 9 W. 3 c. 27. fresh pursuit might have been given in evidence under it. 1 Mod. 116; but that statute renders it necessary to plead the fact specially, s. 6. If the escape were voluntary it will not avail the sheriff to

plead a fresh pursuit. R. 2 Roll. 583.—Com. Dig. tit. Escape, E.—See the forms of pleas and notes, post, vol. iii. 957.

(i) Stating a judgment in K. B. to have been recovered "in the Court of the Bench," would be bad.—1 J. B. Moore, 19.—7 Taunt. 271, S. C.

(k) The judgment must be stated, 1 Saund. 37.—8 B. & C. 128; but this concise mode of stating the recovery is sufficient, 1 Saund. 39, n. 4; and though the judgment was revived by *scire facias*, there is no occasion to state the judgment on the *scire facias*. 4 B. & C. 380. 6 D. & R. 500. S. C.—*Infra*, 417 a. If there be a substantial variance it will be fatal. It suffices however if the judgment be *substantially* proved as alleged. Where the judgment was stated to have been recovered as of Trinity Term, and the proof was of a judgment of Easter Term, it was held immaterial, and this although the declaration referred to the record of the judgment; for such reference was surplussage. 3 B. & C. 2.—4 D. & R. 624, S. C.—9 East. 157.—4 B. & A. 435.—5 Id. 964. So where the declaration stated that the plaintiff recovered a judgment against H. W., and that in Trinity Term afterwards, such proceedings were had in the said court, that it was considered that the plaintiff should have execution against H. W. for the damages aforesaid, as appeared by the record thereof; and that thereupon a *ca. sa.* was issued, and H. W. committed to the marshal's custody in execution, it was considered unnecessary to prove the judgment on the *scire facias*, and that any variance in the statement of it was not material. 4 B. & C. 380.—6 D. & R. 500, S. C. But a substantial variance will be fatal.—Therefore it should seem that stating the judgment to be on certain promises and undertakings, when it was only on a promise and undertaking, would be bad, 5 B. & C. 339.—8 D. & R. 98, S. C. but that was not an action for an escape. Stating a judgment of the Court of King's Bench to have been recovered "in the court of the bench" would be bad. 1 J. B. Moore, 19.—7 Taunt. 27, S. C. As to what a variance in declaration on escape on *meane process*, see post, 737.—4 B. & C. 403. 6 D. & R. 483, S. C.—11 East, 516.

(1) *Shewell v. Fell*, 3 Yeates, 17. 4 Yeates, 47. And the insolvency of the person in custody would be no defense to the action. *Wolverton v. The Commonwealth*, 7 Serg. & Rawls, 273.

FOR
ESCAPES.

in the next form] of £—, and also £— costs, which in and by the same court were adjudged to the said plaintiff, and with his assent for his damages, which he had sustained as well by occasion of the detaining of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted (l); and the said plaintiff further saith, that he the said plaintiff, for having execution of the said judgment, afterwards, to wit, on, &c. (m) in the — year of the reign of our said lord the king, sued and prosecuted out of the said court at Westminster aforesaid, a certain writ of our said lord the king called a *capias ad satisfaciendum*, (or, a *testatum capias ad satisfaciendum, according to the fact*) upon the said judgment against the said E. F. directed to the sheriff of Essex (n) by which said writ our said lord the king commanded the said sheriff that he should take the said E. F. if he should be found in his bailiwick, *and him safely keep, so that the said sheriff might have his body before our said lord the king at Westminster, on — next after —, [or, if in C. P. say, “before his said Majesty’s Justices at Westminster, on — then next following”] to satisfy the said plaintiff the debt and damages (o) aforesaid, [or, if in *assumpsit*, say, “the damages aforesaid”] in form aforesaid, recovered, and that the said sheriff should have there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff, to be executed as is hereinafter mentioned, to wit, on, &c. at, &c. (venue) was duly indorsed with a direction to the said sheriff, requiring him to levy £—, [besides sheriff’s poundage, officer’s fees and all other incidental expenses (p).] And which said writ so indorsed as aforesaid, afterwards, and before the said return thereof, to wit, on, &c. (q) (venue) was delivered to the said defendant, who then and from thenceforth, untill and at and after the return of the said writ (r), was sheriff of [Essex] aforesaid, to be executed in due form of law; by virtue of which said writ the said defendant, so being sheriff as aforesaid, afterwards, and before the said return of the said writ, to wit, on the day and year last aforesaid, and within the bailiwick of the said sheriff, to wit, at, &c. (venue) aforesaid, took and arrested the said E. F. by his body, and then and there by virtue of the said writ, and of the said indorsement, so made thereon as aforesaid, had and detained him in his custody, in execution for the said sum of money (s), so indorsed on the said writ as aforesaid [besides sheriff’s poundage, officer’s fees, and all other incidental expenses], and kept and detained him in his custody, from thence until the said defendant, so being sheriff as aforesaid, afterwards, to wit, on the day and year last aforesaid, at &c. (venue) aforesaid, without *the leave and

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(l) There is no occasion to refer to the record of the judgment by a *prout patet per recordum*. 3 B. & C. 2.—4 D. & R. 624, 8. C.—Willes, 127.—2 Salk. 565.

(m) The *teste* of the *capias ad satisfaciendum*. The writ, whether a *testatum* or *non omittas ca. ss.* is to be set out *verbatim*, or according to the substance.

(n) It may be described as issued to the sheriff, naming him.—2 Campb. 525.

(o) If the writ be correctly described in substance, it will suffice. The word “damages,” when the writ is damages and costs, is not a variance. 9 East, 296, and

see further, post.

(p) Let this correspond with the indorsement on the writ. These are not leviable under a *ca. ss.* unless there was judgment for penalty, or express authority for the levy by the defendant’s agreement.

(q) Any day about the time when the writ was delivered to the sheriff.

(r) It should seem that this would be no variance, though the defendant’s shrievalty expired before the return of the writ, see 3 D. & R. 483.

(s) Or “for the debt and damages aforesaid.”

FOR
ESCAPES.

license, or against the will of the said plaintiff, suffered and permitted (t) the said E. F. to escape and go at large, and the said E. F. did then and there escape and go at large, wheresoever he would, out of the custody of the said defendant, he the said defendant so then being sheriff as aforesaid; and the said sum of money, so indorsed on the said writ as aforesaid, being then and still wholly unpaid and unsatisfied to the said plaintiff, to wit, at, &c. (*venue*) aforesaid, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the sum of £—, above demanded; yet, &c.—[*Conclusion as ante*, 387.]

Bill
against
the mar-
shal for
the escape
of a pris-
oner com-
mitted to
his custo-
dy in exe-
cution (u).

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—, (to wit,) A. B. complains of C. D. esq. marshal of the Marshalsea of our lord the now king, before the king himself, present here in court in his own person, of a plea that he render to the said A. B. the sum of £— of good and lawful money of Great Britain, which he owes to, and unjustly detains from him. For that whereas the said plaintiff, heretofore, to wit, in — Term, in the — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, at Westminster, in the county of Middlesex, by the consideration and judgment (w) of the same court, recovered against one E. F. —l. which were adjudged to the said plaintiff, in and by the said court, for his damages, [or, *if in debt, state the judgment, as in form, ante*, 417], by him sustained, as well on occasion of the not performing certain promises and undertakings (x) before then made by the said E. F. unto the said plaintiff, as for his costs and charges, by the said plaintiff about his suit in that behalf expended, whereof the said E. F. was convicted (y). And thereupon (z) on — next after — in — Term, in the — year of the reign aforesaid, the said E. F. then being present in the said court of our said lord the now king, before the king himself, at Westminster aforesaid, was then and there, in and by the said court, at the prayer of the said plaintiff, committed to the custody of the said defendant, then being marshal of the Marshalsea of our said lord the king, before the king himself, in execution for the damages aforesaid, there to remain until he

(t) Under a count for a voluntary escape, a negligent escape may be proved. 2 T. R. 126.

(u) This precedent is applicable when all the proceedings have been in K. B. See the notes to the last precedent, which are here applicable, and Lil. Ent. 152. If the bill against the marshal be filed in the vacation, as is frequent, there should be a special memorandum, similar to that against an attorney when filed in vacation, see 5 T. R. 325. See the form, ante, 30. As to the marshal's liability, and the necessity in some cases for filing the bill, whilst the prisoner is out of the rules, see 2 T. R. 129. See a precedent against the marshal, for an escape on mesne process, 5 East, 440, post, 743. An amendment of the bill will be allowed. 2 J. B. Moore, 561.—8 Taunt. 515, S. C. 6 B. & C. 196, ante, 416, n. In an action for an escape against the marshal, the plaintiff must prove the person that escaped was in actual custody since the *committitur*; the entry of the

committitur in the marshal's book, or on record is insufficient, 1 Keb. 375, 775. See also 2 Rol. Ab. 681, pl. 4.—2 Keb. 384.—Salk. 99.

(w) Let the judgment be stated so as to agree in substance with that recovered; see the notes as to the mode of stating it, and what a variance, ante, 417, n.

(z) If the judgment was on one count only, as where there has been a reference to the master, say, "promise and undertaking." 5 B. & Cres. 339.—8 D. & R. 98, S. C.

(y) There is no occasion to refer to the record of the judgment, ante, 417, note.

(z) As to the meaning of the word *thereupon*, see 4 Bar. & Cres. 384. This is to be according to the language of the entry of the *committitur*, for which see Tidd's Prac. Forms, 6th edit. 135. The above form would, it should seem, be equally applicable whether the party were brought up by habeas or not.

should satisfy the said plaintiff the said damages, as by the record of the said commitment remaining in the said court more fully appears (a). By virtue of which said commitment the said defendant, so being such marshal as aforesaid, kept and detained the said E. F. in his custody, in execution for the damages aforesaid, at the suit of the said plaintiff, until the said defendant, so being such marshal as aforesaid, not regarding the duty of his said office as marshal of the said Marshalsea as aforesaid, afterwards, to wit, on, &c. (*the day of escape, or about it,*) at, &c. (*venue*) freely and voluntarily (b) suffered and permitted the said E. F. to escape and go at large out of the said prison and out of the said custody of the said defendant, wheresoever the said E. F. would, without restraint, and without the license, and against the will of the said plaintiff, he the said plaintiff then and still being wholly unpaid and unsatisfied his said damages (*or debt and damages, if in debt,*) and every part thereof, and the said judgment then and still being in force and effect wholly unpaid and unsatisfied, by reason whereof an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of £— parcel of the said sum above demanded.—[*It would be prudent to add the following general count.*]

FOR
ESCAPES.

And whereas also the said E. F. before and at the time of the escape hereinafter mentioned, was in custody of the said defendant, as marshal

A general count against the marshal for the escape of a prisoner in execution (c).

(a) There appears considerable confusion in the authorities relative to the necessity of referring to the record of the commitment. It seems, however, that inasmuch as a commitment in execution ought to be (2 B. & Cres. 342.—3 D. & R. 597, 8 C.—2 Stra. 1215—3 Burr. 1841) entered of record on the judgment-roll, and inasmuch as such commitment is as much the foundation of the action as the escape itself, (*per* Chambre, J. 3 B. & P. 463) there ought to be an averment referring to the record of such commitment, otherwise the declaration would be bad on special demurrer. In 2 J. B. Moore, 561.—3 Taunt. 512, 8 C. in an action for an escape against the warden, on a commitment in execution, in the Common Pleas, an omission to refer to the record of it was considered bad on special demurrer. Indeed that court can only act by record.

In 2 Stra. 1226, K. B. which was an action against the marshal for an escape in execution, the declaration averred a commitment by Sir W. C. "as by the said commitment may more at large appear," and on special demurrer, for that it did not appear the commitment was of record, the declaration was held ill. In that case the commitment was by a single judge. In another case, 3 B. & Pul. 463, which was an action for an escape on final process, the declaration averred that the party was by *habeas corpus* brought before a Judge of the King's Bench and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in

the said court more fully appears;" and it was there decided, that evidence of a commitment by a Judge of that court, but not filed of record, would not support the action; and secondly, that the allegation, although unnecessary, must be proved as laid. In 2 J. B. Moore, 561. 8 Taunt. 512, 8 C. in an action against the warden for an escape on a commitment by *habeas corpus*, the declaration referred to the commitment but not to its record, the plaintiff amended the declaration on a special demurrer, for not referring to the record of the commitment. It is always safest and best therefore to refer to the record of the commitment. It is clear there is no necessity to refer to the record of a commitment in the King's Bench, by *habeas* or otherwise on *mesne process*, for there can be no such record. 5 East, 440. 2 M. & S. 202; and see also 1 Saund. 39, n. 4. However, a reference to the record would not prejudice, and might be proved by production of the *habeas* and commitment from the clerk of the papers, for they are proceedings *quasi* of record, *id.* 3 Y. & Jervis, 104.

(b) Under a count for a voluntary escape, a negligent escape may be given in evidence.—2 T. R. 126. See the form, Lil. Ent. 156; ante, 418, where these words are omitted.

(c) It should seem that this general count, which has of late been adopted in practice, would, at all events, suffice after verdict; but *query* whether the omission to state the mode in which the party came into defendant's custody, would not be bad on demurrer.

FOR
ESCAPES.

of the marshalsea of our said lord the king, before the king himself, in execution at the suit of the said plaintiff, for the sum of [£100], upon and by virtue of a certain judgment (d) for that sum before then, to wit, in [Michaelmas] Term, in the [first] year of the reign of our said lord the now king, recovered by the said plaintiff, against the said E. F. in the court of our said lord the king, before the king himself, at Westminster aforesaid, and which last-mentioned judgment then was and still is in full force and effect not in any respect reversed, annulled, paid off, satisfied, discharged, or made void, as by the record and proceedings thereof still remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, will more fully appear. And the said E. F. so being in custody of the said defendant as such marshal as aforesaid, in execution at the suit of the said plaintiff, for the said last-mentioned sum of money, the said defendant not regarding the duty of his office of marshal aforesaid, but contriving and intending to injure and aggrieve the said plaintiff, afterwards, to wit, on the said — day of — (*day of escape, or about it*) in — aforesaid, to wit, at, &c. (*venue*) aforesaid, freely and voluntarily suffered and permitted the said E. F. to escape and go at large out of the said prison, and out of the custody of him the said defendant, so being such marshal as aforesaid, wheresoever he the said E. F. would, without restraint, and without the license or consent, and against the will of the said plaintiff, he the said plaintiff being then and still wholly unpaid and unsatisfied, the said last-mentioned sum of money, and the said last-mentioned judgment, being then and still in full force and effect, not in any respect reversed, annulled, paid off, satisfied, discharged, or made void, whereby an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the said sum of 100*l.* residue of the said sum of money above demanded. Yet, &c.—[*Add the usual breach, &c. as ante, 387, and conclude with the usual prayer of relief, thus: — To the damage of the said plaintiff of —*l.* and therefore he prays relief, &c.*

Pledges, &c.

Against
marshal
for escape
of prisoner
charged in
execution on
judgment
in C. P.
removed
into K. B.
on error,
for damages
in C. P.
and
costs in
error.

For that whereas the said plaintiff, heretofore, to wit, in — Term, in the — year of the reign of our lord the now king, in the court of our said lord the king, before the Right Hon. Sir R. D. knight, and his companions, then his majesty's justices of the court of our said lord the king of the bench at Westminster, in the county of Middlesex, by the consideration and judgment (e) of the same court, recovered against one J. Y. —*l.* which were adjudged to the said plaintiff for his damages by him sustained, as well on occasion of the non-performing of a certain promise and undertaking [or "promises and undertakings," *if the judgment was on more than one count, and if the judgment was in debt state it as ante, 417.*] before then made by the said J. Y. to the said plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said J. Y. was convicted, as by the record and proceedings thereof which were afterwards removed by a certain writ of error into the court of our said lord the king, before the king himself, for certain alleged

(d) As to the statement of the judgment,
see ante, 417, note.

(e) As to the statement of the judgment,
see ante, 417, note.

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causes of error, and are there now remaining, fully appears; and afterwards, that is to say, in — Term, in the — year of the reign aforesaid, such proceedings were had upon the said writ of error in the said court of our said lord the king before the king himself, that it was in that Term considered and adjudged in and by the said court of our said lord the king before the king himself, that there was no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid, and that the judgment aforesaid, in form aforesaid, should be in all things affirmed, and should stand in full force and effect, and that the said plaintiff should recover against the said J. Y. as well his damages aforesaid, as also £— which in and by the said court of our said lord the king, before the king himself, were adjudged to the said plaintiff, at his request according to the form of the Statute in such case made and provided, for his damages, costs, and charges, which he had sustained and expended by reason of the delay of the execution of the judgment aforesaid, on pretence of the prosecution of the said writ of error, which said damages, costs, and charges, in the whole amount to £—, and that the said plaintiff should have execution thereof, whereof the said J. Y. was also convicted, as by the record and proceedings thereof still remaining in the said court of our said lord the king, before the king himself, at Westminster, will more fully and at large appear. And such proceedings were thereupon had, that afterwards, to wit, on, &c. (*day of commitment*) and in — Term, in the — year of the reign aforesaid, the said J. Y. then being a prisoner in the custody of the defendant, as such marshal of the Marshalsea as aforesaid, and being present in the said court of our said lord the now king, before the king himself, at, &c. in his proper person was, in and by the said court of our said lord the king, before the king himself, at the prayer of the said plaintiff, committed to the custody of the said defendant, then being marshal of the Marshalsea of our said lord the king, before the king himself, in execution for the said sum of £— the damages, costs, and charges aforesaid, so recovered as aforesaid, there to remain, until the said J. Y. should satisfy the said plaintiff the said damages, costs, and charges. By virtue of which said commitment the said defendant so being such marshal as aforesaid, kept and detained the said J. Y. in his custody in execution for the damages aforesaid, at the suit of the said plaintiff until the said defendant so being such marshal as aforesaid, not regarding the duty of his said office as marshal of the Marshalsea as aforesaid, afterwards, to wit, on, &c. (*day of escape, or about it,*) at, &c. (*venue*) aforesaid, freely and voluntarily suffered and permitted the said J. Y. to escape and go at large out of the said prison, and out of the said custody of the said defendant wheresoever the said J. H. would, without restraint, and with the license and against the will of the said plaintiff, the said plaintiff then and still being wholly unpaid and unsatisfied the said sum of £—, so recovered as aforesaid, and every part thereof, and the said judgment then and still being in full force and effect wholly unpaid and unsatisfied, by reason whereof an action hath accrued, &c.—[*Conclude as usual. It may be as well to insert a general count, as ante, 420 b.*]

*[*Commence as ante, 31.*—For that whereas the said plaintiff heretofore, to wit, in the Term of — in the 1st year of the reign of our lord the now king, in the court of our said lord the king, before the king him- [*421]
Bill a-
gainst
warden

FOR
ESCAPES.

Fleet for escape, where prisoner removed by *habeas corpus* from the sheriff's custody to the *Fleet*, and original action in K. B. (f).

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self, at Westminster, in the county of Middlesex, by the consideration and judgment (g) of the said court, recovered against one G. H. a certain sum of £— which in and by the said court was adjudged to the said plaintiff for his damages, [or if in debt state the judgment, as ante, 417.] which he has sustained, as well by reason of the non-performance of certain promises and undertakings by him before then made to the said plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said G. H. was convicted (h). And the said plaintiff in fact further saith (i), *that the said G. H. afterwards, to wit, on the, &c. (day of commitment) was, by virtue of his majesty's writ of *habeas corpus cum causa*, issuing out of the court of our said lord the king, of the bench here, to wit, at Westminster aforesaid, directed to the sheriff of [Middlesex,] (who had heretofore taken the said G. H. by his body, by virtue of his majesty's writ of *capias ad satisfaciendum*, at the suit of the said plaintiff on the aforesaid judgment, for the damages aforesaid, indorsed to levy the whole of the said sum of £— (k) and who then had the said G. H. in his custody, by virtue of the said last-mentioned writ) and returnable, before the justices of our said lord the king, at Westminster, on — by the said sheriff brought up before the honorable Sir — — knt. then one of the justices of our said lord the king of the bench here, to wit, at Westminster aforesaid, in and by the return of the said writ of *habeas corpus cum causa*, the said G. H. was then and there, by the said sheriff, charged, (amongst other things) with the said writ of *capias ad satisfaciendum*; and thereupon the said G. H. was then and

(f) See other forms Herne, 89.—Lil. Ent. 156.—2 Mod. Ent. 400. tit. *Escapes*. 5 Wentw. 222 to 232. 7 Id. 503 to 509; and ante, 416.—Formerly a bill could not be filed against the warden of the *Fleet* in vacation, 6 Taunt. 347.—2 Marsh. 49, S. C. —6 Taunt. 352.—2 Marsh. 54, S. C.; but now it may, by the 59 Geo. 3. c. 64. See 2 B. & B. 51, and form of commitment, ante, 31.—Debt lies for an escape against the warden of the *Fleet*, as superior, the grantee for life being insufficient, 2 Mod. 119. Com. Dig. tit. *Escape*, B. 3. *As to the declaration*, see 2 Mod. Ent. 297. If a prisoner be removed by *habeas corpus* from the King's Bench to the Common Pleas, the plaintiff need not show a process in C. B. against the prisoner in an action for an escape, 2 Stra. 950. Com. Dig. *Escape*, C. (g) How to state the judgment, and what a variance, see the notes, ante, 417.

(h) That there is no occasion to refer to the record of the judgment, see ante, 417, n.

(i) Some of the forms state the *capias* here, and then the *habeas corpus*, in the following manner:—"And the said plaintiff, for having execution of the said judgment, afterwards, to wit, on, &c. in — Term sued and prosecuted out of the said court of our said lord the king, before the king himself, at W. aforesaid, his said majesty's writ of *capias ad satisfaciendum* upon the said judgment, directed to the sheriff

of M. by which said writ our said lord the king commanded the said sheriff, that he should take the said G. H. if he should be found in his the said sheriff's bailiwick, and safely keep him, so that he might have his body before our said lord the king, on, &c. to satisfy the said plaintiff in the said sum of —l. which the said plaintiff had recovered against the said G. H. for his damages aforesaid, and that the said sheriff should have there and then that writ,* which said writ afterwards, and before the return thereof, to wit, on, &c. was delivered to — and — then being sheriff of the said county of M. to be executed in due form of law; by virtue of which said writ the said — so being sheriff as aforesaid, afterwards, and before the return thereof, to wit, on, &c. at, &c. within the bailiwick of the same sheriff, took the said G. H. in execution of the said damages, and kept and detained the said G. H. in his custody, in execution of the damages aforesaid, at the suit of the said plaintiff from thence until the said G. H. afterwards, to wit, on, &c. by virtue of his majesty's writ of *habeas corpus cum causa* before then sued out of the court of our said lord the king of the bench here, against the said G. H. directed, &c. and returnable, &c. was brought before, &c." See 1 Wentw. 231.

(k) As to the statement of levying expenses, &c. see ante, 418 n.

*As to the statement of levying expenses, &c. ante, 418, note.

there, by the said Sir ——— so being such justice as aforesaid, (the said G. H. then and there being before the said justice on the occasion aforesaid) committed to the custody of the warden of his majesty's prison of the *Fleet*, charged (among other things) in execution for the said sum of —*l.* so indorsed on the said last-mentioned writ as aforesaid, as by the record (l) of the said writ of *habeas corpus cum causa*, and the return thereof, and the aforesaid commitment thereupon, remaining in the said court of our said lord the king of the bench, more fully and at large appears. By virtue of which commitment the said defendant *who before, and at the time of the said commitment was, and ever since hath been, and still is, warden of his majesty's prison of the *Fleet*, on the day and year last aforesaid, at, &c. (*venue*) received and had the said G. H. in his custody in the said prison, in execution for the said sum of money so indorsed on the said writ of *capias ad satisfaciendum*, at the suit of the said plaintiff, and there kept and detained him in his custody so in execution for the said sum, until he the said defendant, so being warden of the *said prison of the *Fleet* as aforesaid, not regarding the duty of his said office of warden of the said prison, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) wrongfully, and unlawfully, and unjustly, without the leave or license of the said plaintiff, and against his will, suffered and permitted the said G. H. to escape and go at large from and out of the said prison, and the custody of the said defendant, then and still being warden of the said prison, he the said plaintiff then and still being wholly unsatisfied his said damages, [or if the judgment was in debt, say "debt and damages,"] and every part thereof; by reason of which said premises an action hath accrued to the said plaintiff to demand and have, of and from the said defendant, so being warden of the said prison of the *Fleet*, the said sum of —*l.* above demanded. Yet the said, &c.—[Conclude as usual, as ante, 387, and add a general count like the one ante, 420 b, mutatis mutandis.]

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ESCAPES.

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For that whereas the said plaintiff heretofore, to wit, in — Term, Bill (term of judgment) in the — year of the reign of our lord the now king, before Sir — knt. and his companions, then his majesty's justices of the court of our said lord the king, of the bench at Westminster, in the county of Middlesex, by the consideration and judgment (m) of the same court, recovered against one G. H. —*l.* which were adjudged to the said plaintiff for his damages, [or, if in debt, state the judgment, as ante, 417,] by him sustained, as well on occasion of the not performing certain promises and undertakings before then made by the said G. H. to the said plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said G. H. was convicted (n). And the said plaintiff in fact says, that thereupon, afterwards, to wit, on, &c. (day of commitment) in — Term last past, the said G. H. then being in the custody of the said defendant, then and from thenceforth hitherto (being warden of his majesty's prison of the *Fleet*,) he the said G. H. was brought to the bar of the court aforesaid, by the said defendant,

Bill
against
warden of
Fleet for
an escape,
where
original
action in
C. P., and
prisoner
brought
up before
the court
and re-
commit-
ted.

(l) As to the necessity of this, see ante, 420, note (y). (n) That there is no occasion to refer to the record of the judgment, see ante, 417

(m) As to the statement of the judgment, a, n. (l). and what a variance, see ante, 417, note.

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ESCAPES.

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then warden of the prison of the *Fleet* aforesaid, by virtue of his majesty's writ of *habeas corpus*, before then issued out of the said court, directed to the said warden; and *thereupon the said G. H. at the request of the said plaintiff was by the same court then and there committed to the said prison in execution for the said damages, [or, *if in debt, say* "debt and damages,"] as by the record of the said commitment, remaining in the said court more fully and at large appears. By virtue of which commitment, &c.—[*Proceed as in the last precedent, from the asterisk to the end, and add another general count, like the one ante, 420 b, mutatis mutandis.*]

IV. ON SPECIALTIES.

ON DEEDS-
POLL.

I. ON DEEDS-POLL.

On a deed
whereby a
testator
appointed
5000*l* to
be paid to
the plain-
tiff on the
event of
his death
(*o*).

[*425]

For that whereas in the life-time of the said L. F. to wit, on, &c. at, &c. (*venue*) by a certain deed-poll then and there made by the said L. F. in his life-time, bearing date the day and year aforesaid, sealed with his seal, and to the court of our said lord the king now here shown, the said L. F. did, for the provision and relief of the said J. H. in such deed-poll described as the only son of E. H. deceased, his (the said L. F.'s) aunt's son, the first cousin, thereby grant, assign, and deliver over unto him (the said plaintiff) the sum of £5000, sterling, good and lawful money of Great Britain, immediately after he the said plaintiff attained the age of twenty-one years, for and in consideration of the love and affection he (the said L. F.) always bore for the said E. H. his father, and in consideration of the several services he (the said E. H.) had therefore rendered him in his life-time; and the said L. F. thereby then and there declared that the said sum of £5000 so granted, should and might be recovered from and off all or any part of his (the said L. F.'s) estates, lands, premises, goods, chattels, and so forth, wherever the same might be situated, for the sole use and behoof of the said J. H.; and the said L. F. thereby declared that the said £5000, or any part thereof, or the interest or interests thereupon arising, or which might thereafter at any time arise or grow due, should not, upon any pretext, extend or be granted to any other person or persons *after the decease of him the said John Hodnett, wherever the same might happen to be; but that the aforesaid grant of £5000 should be prudently and carefully appropriated for the said John Hodnett, excluding heirs, assigns, or survivors of any description whatsoever, and in case of his [the said Luke Foreman's] decease at any time before the said John Hodnett should attain the aforesaid age of twenty-one years, that then and in such case it should and might be lawful for him the said John Hodnett, or his lawful attorney nominated, to enter upon and recover the said sum as thereinbefore recited, in any of his Majesty's courts in Great Britain, as counsel learned in the law should direct,

(*o*) This was the declaration in Hodnett v. Foreman, in which plaintiff recovered a verdict, and which was settled by an eminent barrister, A. D. 1815.

or advise or devise; and the said Luke Foreman did thereby nominate, constitute, and appoint John Barry, uncle of the said John Hodnett, to be principal guardian and trustee to him, in the economy and necessary arrangement of the aforesaid grant of £5000, but without any claim or demand upon any part of the same as in and by the said deed-poll, reference being thereunto had, will appear: And the said John Hodnett in fact saith, that afterwards, to wit, on, &c. (p) at, &c. aforesaid, he the said John Hodnett attained the age of twenty-one years, whereof the said Foreman in his life-time, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, had notice; yet neither the said L. F. in his life-time, nor the said Mary, James, and John Chandler, executrix and executors as aforesaid, since his decease, hath or have (although often severally requested so to do), paid the sum of £5000 or any part thereof, to the said John Hodnett, and, on the contrary thereof, after the said John Hodnett so became of age, and after the death of the said Luke Foreman, to wit, on, &c. at, &c. aforesaid, the said sum of £5000, together with a further large sum of money, to wit, the further sum of £785, for interest thereon, making together the sum of £5785 became, and was and still is in arrear and unpaid to the said J. H. contrary to the form and effect of the said deed-poll, to wit, at, &c. aforesaid, whereby an action hath accrued to the said J. H. to demand and have of and from the said M. J. and J. C. as executrix and executors as aforesaid, the said sum of £5785 above demanded, yet the said M. J. and J. C. executrix and executors as aforesaid, hath not, nor hath either of them *(although often requested so to do) paid the said sum of £5785 above demanded, or any part thereof, to the said J. H. but have, and each of them hath, hitherto wholly neglected and refused, and they still neglect and refuse, and each of them neglects and refuses so to do; to the damage of the said John Hodnett of £1000, and therefore he brings his suit, &c.

ON DEEDS-POLL.

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II. ON CHARTER-PARTIES.

ON A CHARTER-PARTY.

For that whereas heretofore, to wit, on, &c. (*date of charter-party*) to wit, at, &c. (*venue*) by a certain charter-party of affreightment, then and there made between the said plaintiffs, by the name and description of Messrs. A. B. and E. F. therein described as the owners of the good ship or vessel called the — (whereof E. H. was then master), of the burden of — tons or thereabouts, then on the River Tyne, of the one part, and the said defendant, therein described as the freighter of the said ship, of the other part; (one part of which said charter-party, sealed with the seal of the

By owner against freighter, for penalty incurred, by not loading the cargo, and not paying freight

(p) This should be the true date of the plaintiff's coming of age, from which date only the interest would be calculated.

(q) See other forms, 7 Wentw. 27, 29, 34; and those in Assumpsit, ante, 221; and in Covenant, post, 528. Debt lies upon a charter-party, if the sum demanded is ascertained thereby, or it sufficiently appears

how much is due,—Andr. 156.—2 Stra. 1089, S. C.—The plaintiff has his option of proceeding for the penalty, or on the covenant which defendant has broken, 13 East, 343. It is in some respects more advisable to sue in debt, on account of being able to insert the common counts.

(q).

ON A
CHARTER-
PARTY.

[*427]

said defendant, the said plaintiffs now bring here into court, the date whereof is a certain day and year therein named, to wit, the same day and year aforesaid, the said plaintiffs [*here set out the charter-party in the past tense, thus :*] let the said ship to freight for one voyage, from the Island of St. Michael's to the ports of, &c. optional to the affreighter or his agent, with liberty to take on board a cargo of coals, and goods, and deliver them in her way to — ; and the said defendant hired the same in manner and form therein mentioned, to wit, that the said ship then was, and should, during the said intended voyage, be at the expense of the said plaintiffs, the said owners, kept staunch, tight, and strong, well manned, victualled, tackled, and provided, *in every respect fit for merchant's service, and particularly for performing such intended voyage (the dangers and perils of the seas, restraints of princes and rules, fire and enemies, during the same, always excepted); and also that the said G. H. with the said ship, after she delivered her cargo of coals and goods should, with the first opportunity of wind and weather, proceed directly for —, and, on her arrival there, to receive on board a full and complete cargo of fruit, in common-sized boxes, at such convenient place or places where the said ship and cargo might safely come; and also that the said ship should, for her loading at — and delivering at — lay the full space of twenty working days, if required, and so to end the said intended voyage; in consideration of which the said defendant did agree, not only to load and put on board the said ship the said cargo of fruits as aforesaid, and to receive or cause the same to be received from on board her, at — or — at the option of the said defendant, and that within the days and time limited for her loading and discharging as aforesaid, but also should and would pay, or cause to be paid, unto the said plaintiffs or their assigns, on the safe delivery of the cargo at — or — optional to the said defendant or his agent, half cash, and the remainder by an approved bill on London, at four months' date, in full for the freight and hire of the said ship for the said voyage, at and after the rate of £ — sterling per ton, of twenty common-sized boxes of fruit, and in proportion for any less quantity than a ton. It was understood, in the stowing of the cargo, a well-hole of two feet square was to be kept open, from the keels on to the deck, opposite each hatchway, for the purpose of airing the fruit, and that the boxes must be stowed on their bottoms, and not their ends, nor edge-ways, together with the sum of four guineas *per* day, to be paid day by day as the same should grow due, for every day of the ship's detention over and above the days and time limited for her loading and discharging as aforesaid; as also £10 *per cent.* on the amount of the above specified freight, in lieu of all port-charges and pilotage; and for the true performance thereof, each of the said parties bound himself, his executors, administrators, and assigns, reciprocally unto the other, especially the said plaintiffs, bound their said ship, her freight and appurtenances; and the said defendant the goods to be loaden on board her, each to the other, in the penal sum of £1000, firmly by the said charter-party of affreightment; as by the said

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*charter-party, reference being thereunto had will more fully appear: And the said plaintiffs in fact say, that the said G. H. with the said ship or vessel in the said charter-party mentioned, afterwards, to wit, on, &c. proceeded to — according to the meaning and effect of the said charter-party, and afterwards, to wit, on, &c. aforesaid, arrived at — aforesaid,

ON A
CHARTER-
PARTY.

and was, to wit, on, &c. last aforesaid, ready and willing to receive on board the said ship or vessel a cargo of fruit, and would have proceeded therewith, to, &c. according to the meaning and effect of the said charter-party, and the said ship or vessel was then fit and ready to receive on board a cargo of fruit, according to the meaning and effect of the said charter-party; and the said plaintiffs were ready and willing that the said charter-party should be performed in all things on their part, according to the meaning and effect of the said charter-party, of which said premises the said defendant afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, had notice; yet the said defendant did not nor would, load or put on board the said ship or vessel a cargo, according to the meaning and effect of the said charter-party, or any cargo or part of a cargo whatever (r), but therein wholly failed and made default, contrary to the form and effect of the said charter-party, and the covenant of the said defendant so made in that behalf as aforesaid; and the said defendant hath not paid the said plaintiffs any freight for the said voyage, or any port-charges or pilotage in respect thereof; by reason of which premises, the said plaintiffs have lost and been deprived of the freight and reward, and the port-charges and pilotage, and of great gains, profits, and emoluments which might and otherwise would have become due and payable to them under and by virtue of the said charter-party, amounting in the whole to a large sum of money, to wit, the sum of —*l.* to wit, at, &c. (*venue*) by reason of which said premises an action hath accrued to the said plaintiffs to demand and have of and from defendant, the sum of —*l.* mentioned in the said charter-party, parcel of the said sum of money above demanded.—*[Add counts for freight, and for the use and hire of the ship, and the money counts and account stated.]*

*III. ON SEA POLICIES.

[*429]

ON A SEA
POLICY.
Against
London
Assurance
Company
on a policy
on a ship (s).

London, to wit.—The governor and company of the London Assurance were summoned to answer A. B. of a plea of debt, and thereupon the said plaintiff by —his attorney, complains, for that whereas, heretofore, to wit, on, &c. (*date of policy*) at, &c. (*venue*) by a certain deed-poll, or policy of assurance, then and there made by the said governor and company, and sealed, with the common seal of the said governor and company, and which said deed or policy of insurance, sealed with the seal of the said governor and company, the said plaintiff now brings here into court, the date whereof is a certain day and year therein mentioned, the same day and year aforesaid, the said plaintiff as well in his own name, &c.—*[Set forth the policy verbatim to the end.]*—In witness whereof the said London Assurance had caused their common seal to be thereunto affixed, and the sum and sums by them assured to be therein under-written, under which said deed or policy of assurance a certain memorandum was then and there written, whereby the said governor and

(r) See another mode of stating breach, covenant; and other forms, 7 Wentw. 38, ante, 225, 228. &c.

(s) See ante, 178, and post, 536, 541, in

ON A SEA
POLICY.

Second
count, on
6 Geo. 1.
c. 18. s. 4
(t).
[*430]

company declared the said policy to be free from average on corn, fish, salt, &c.—[*Set forth the usual memorandum at the foot of the policy.*]—And also a certain other memorandum was then and there written, whereby the said governor and company declared themselves to be content with that assurance for £1400 on the whole ship, valued at that sum; as by the said deed or policy of assurance, and memorandum so made as aforesaid, more fully appears. And thereupon the said governor and company became insurers to the said plaintiff for the said sum of 1400*l.* in the said deed or policy of assurance; and the said plaintiff further says, &c.—[*Averments as usual that plaintiff was interested, the ship's safety, departure and damage at sea, &c. according to the facts, and as in the precedents in assumpsit, ante, 183 to 208.*]—Of all which said premises the said governor and company, afterwards, to wit, on, &c. there had notice; by reason whereof an action hath accrued to the said plaintiff, to demand and have, of and from the said governor and company, the said sum of 1400*l.* so insured as aforesaid, parcel of the said sum above demanded. And whereas also, after the making of a certain act of parliament, made and passed in the 6th year of the reign of his late Majesty King George the First, to wit, on, &c. at, &c. (*venue*) aforesaid, *the said governor and company became and were, and still are, indebted to the said plaintiff in a large sum of money, to wit, the sum of —*l.* of like lawful money, other parcel of the said sum above demanded, and have not paid the same, according to the said act, but have hitherto wholly neglected and refused so to do, contrary to the said Statute, whereby an action hath accrued to the said plaintiff to demand and have, of and from the said governor and company, the said sum of —*l.* parcel of the said sum above demanded, to wit, at, &c. (*venue*) aforesaid.—[*Then add money had and received, account stated, and breach in debt.*]

ON
LEASES.

For rent
on a demise (u).
[*431]

IV. ON LEASES.

[*Commencement in debt, as ante, 384.*]—For that whereas the said plaintiff heretofore, to wit, on, &c. at, &c. (*venue*) *demised to the said de-

(t) This form is authorized by the Statute, but it is not usually adopted in practice. 2 Marsh. on Insurance, 599, 601, n. a.

In cases where debt lies, it may be frequently better to declare in debt on the policy than in covenant, because in the former a count for debt, for money had and received, may be joined, and under which in some cases the premium may be recovered, though the loss may not; and the count on an account stated, would be useful if there was an adjustment.

(u) See form, Plead. A. 345, 6.—Lil. Ent 185.—See a form in debt on the *reddendum* of a lease for tithes, 2 Saund. 296, and against an administrator on the *reddendum* in a lease of lands, 1 Saund. 1, 2. Also a form in debt for rent on the *reddendum* of a lease to commence in future, 1 Saund.

250, 1, and another form in debt for a rent charge, or annuity against the pignors of the profits, 1 Saund. 276, 282, note 1.—1 T. R. 378.—Dougl. 928.

As to debt on leases, stating the lease, see ante, vol. i. index, "*Lease*"—2 Rich. C. P. 252, 259, 265, 267, 270. This action cannot be supported by the lessor against the lessee after he has accepted an assignee as his tenant, his remedy against the lessee is by action of covenant, 1 Saund. 241, n.—1 T. R. 92.—Ante, vol. i. 107. The assignee of the lessee may be sued in debt for rent, and see a form, post, 431. The assignee of the lessor may sue in debt for rent due on a demise, 5 B. & Cres. 512, and see outline of a form there.

When it is doubtful whether the demise were by deed, it is advisable to declare in

ON
LEASES.

defendant a certain messuage and premises, with the appurtenances (*w*), to have and to hold the same to the said defendant for a certain term of years to wit, for and during, and until the full end and term of [twenty-one] years, then next ensuing, and fully to be completed and ended, yielding and paying therefore, during the said term, to the said plaintiff, the yearly rent of £— of lawful money of Great Britain, at the four most usual feasts or days of payment in the year, that is to say, on, &c. [*as in the indenture*] by even and equal portions. By virtue of which said demise, the said defendant entered (*x*) into the said demised premises, with the appurtenances, and was possessed thereof from thenceforth, until and upon the [feast of St. Michael the Archangel, A. D. 1830,] when (*y*) a large sum of money, to wit, the sum of £— of the rent aforesaid, for the space of — ending, on the day and year last aforesaid, and then last elapsed (*z*), became and was due and payable from the said defendant to the said plaintiff, and still is in arrear and unpaid to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. Whereby an action hath accrued (*a*) to the said plaintiff, to demand and have of and from the said defendant, the sum of —*l.* parcel of the said sum above demanded. And whereas also the said defendant afterwards, to wit, on, &c. aforesaid, to wit, at, &c. (*venue*) was indebted, &c.—[*The form of indebitatus count in debt will be as ante, 385; and the subject-matter of the debt, for use and occupation, will be as ante, 41.—Conclude as ante, 387.*]

Count for
use and
occupa-
tion (*b*).

*V. ON ANNUITY DEEDS.

[*433]
ON ANNUITY
DEEDS.

[*Commencement in debt, as ante, 384, note.*]—For that whereas heretofore, to wit, on, &c. (*date of deed*) at, &c. (*venue*) by a certain indenture then and there made between the said plaintiff of the one part, and

On an annuity
deed for

the above form, stating the substance of the terms of the demise, and adding a count for use and occupation. It is settled, that in debt for rent reserved by deed, the plaintiff may declare without stating the deed; (see the precedents and notes in 1 Saund. 276, n. 1. 202, 325, n. 4.—Ld. Raym. 1503.) unless in case of a lease of tithes, or other incorporeal hereditaments, 2 Saund. 297, n. 1.—This is the only case in which the plaintiff is allowed to declare generally, and to produce a deed in evidence in support of such declaration, 1 New Rep. 104, 109.

When the declaration sets out the *lease*, it is similar to the declaration in covenant for rent, except in the commencement and conclusion, see post, 549, to which precedent, with the notes, the reader is referred. Though furniture, &c. be demised, also by the indenture, it need not be stated, 6 B. & Cres. 251. If the declaration profess to set out the terms of the reservation of rent, it is a variance to omit an exception referring to a subsequent proviso, by which a deduc-

tion is to be made, if a certain event happen, although that event have not happened, 6 B. & C. 430.

(*w*) It is not necessary to show the local situation, 3 M. & S. 380.—4 Taunt. 25.—6 East, 348.

(*x*) As to the allegation of the lessee's entry, see 1 Saund. 203, n. 1.—Com. Dig. Pleader, 2 W. 14, and post, 551.

(*y*) In debt for rent on a demise, it must be shown at what time the rent became due, Gilb. Debt. 407, see 110 East, 142, 4 B. & Cres. 157, post, 552.

(*z*) See 4 Bar. & Cres. 157, 159.

(*a*) In Gilb. on Debt. 414, this is said to be incorrect.

(*b*) This count in debt for use and occupation is sustainable, when the demise is not by deed, (1) or there was no covenant sealed by the defendant, 6 T. R. 62.—5 Taunt. 25, and without stating the local situation of the premises, 6 East, 348.—Ante, 431, n. (*w*).

(1) See *Davis v. Shoemaker*, 1 Rawle, 135.

ON ANNUITY DEEDS.

arrears of the annuity (c).

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the said defendant of the other part, (which said indenture, sealed with the seal of the said defendant, the said plaintiff now brings into court, the date whereof is a certain day and year therein named, to wit, the day and year aforesaid), he the said defendant, for the consideration therein mentioned, did grant, &c. [*here state in the past tense, the grant of the annuity, and the defendant's covenant to pay it, and proceed as follows:*—As by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. Nevertheless the said plaintiff in fact saith, that after the making of the said indenture, and during the natural life (d) of the said E. F. to wit, on, &c. (*day when the last payment *to be made became due*) at, &c. (*venue*) aforesaid, a large sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, of the said annuity or yearly rent-charge, for [one year and a quarter of a year] (*the time during which the arrears were accruing due*) which expired on the day and year last aforesaid, then last elapsed, became and was due and owing from the said defendant to the said plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said indenture, and of the said covenant of the said defendant in that behalf made as aforesaid, to wit, at, &c. (*venue*) aforesaid. Whereby an action hath accrued, to the said plaintiff to demand and have, of and from the defendant, the said sum of —*l.* being the said sum above demanded. Yet, &c.—[*Conclusion as ante*, 387.]

VI. ON MORTGAGE DEEDS.

ON MORTGAGE DEEDS.

On a mortgage by lease and release for principal and interest (e).

[*Commencement in debt, as ante*, 384, note.]—For that whereas heretofore, to wit, on, &c. (*date of indenture*), at, &c. (*venue*) by a certain indenture then and there made between the said plaintiff of the one part, and the said defendant of the other part, which said indenture, sealed with

(c) See a form in debt for an annuity or rent-charge against the pignor of the profits.—1 Saund. 276.—Debt is preferable to covenant on an annuity deed, because in debt the judgment is final in the first instance. Even in covenant, however, there would be no occasion to execute a writ of Inquiry on a judgment by default, as it might be referred to the Master in K. B. or Prothonotary in C. P. to compute the amount due. 2 Chit. Rep. 32.—Tidd's Prac. 9th edit. 570.—It is also more advisable to declare in debt on the covenant than on the annuity bond, because, in the latter case, damages must be assessed, in pursuance of 8 & 9 W. 3, c. 14. s. 8, which causes expense and delay, Tidd, 9th edit. 1108, 584. When debt does not lie for arrears of annuity, see ante, vol. i. 99.—2 D. & R. 603. 4 M. & S. 113.—2 Saund. 304, note.

(d) That is a sufficient averment of his being alive, see 1 Saund. 285, note 8.

(e) In general it is more advisable to declare in debt than in covenant on a mortgage deed, because in the former the judgment is final in the first instance. Even in covenant, however, there would be no occasion to execute a writ of inquiry on a judgment by default, as it might be referred to the Master in K. B. or Prothonotary in C. P. to compute the amount due. 8 T. R. 326.—2 Chit. Rep. 234, 265.—Tidd, 9th edit. 570. Debt on the covenant is also preferable to debt on a mortgage bond, conditioned as well for payment of the money, as performance of covenants in the mortgage deed, because in the latter case the damages must be assessed under the 8 & 9 W. 3. c. 11. s. 8, which creates expense and delay.

In the case of a devise of the mortgagee's interest, the action must be brought in the executor's name, 8 Taunt. 227, and see a form there.

the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is a certain day and year therein named, to wit, the day and year aforesaid, after reciting as therein is recited, the said defendant, for the considerations therein mentioned, [did grant, bargain, sell, alien, release, and confirm unto the said plaintiff, and to his heirs and assigns, certain messuages, lands, tenements, and premises, *with the appurtenances therein mentioned, and particularly described (f). To have and to hold, &c. [copy the habendum verbatim] subject, among other things, to a certain proviso or condition, that is to say (g), that if the said defendant, his heirs, executors, or administrators, did and should pay to the said plaintiff, his executors, administrators, or assigns, the full sum of —l. and lawful interest for the same, of good and lawful money of Great Britain, on the — day of — next ensuing the date of the said indenture, then the said indenture should be void. And the said defendant did thereby for himself, his heirs, executors and administrators, covenant, promise, and agree, to and with the said plaintiff, his executors, administrators, and assigns, that he the said defendant, his heirs, executors, administrators, or some or one of them, should and would well and truly pay, or cause to be paid unto the said plaintiff, his executors, administrators, or assigns, the said sum of —l. and lawful interest for the same, upon the day and time mentioned and appointed for payment thereof, in and by the said proviso, according to the true intent and meaning of the said indenture; as by the said indenture, (reference being thereunto had) will, amongst other things, more fully and at large appear. Nevertheless the said plaintiff in fact saith, that the said defendant did not nor would well and truly pay, or cause to be paid, unto the said plaintiff, the said sum of —l. and lawful interest for the same, on the day and time mentioned and appointed for payment thereof as aforesaid, but therein failed and made default, and there is now due and owing from the said defendant to the said plaintiff, for and on account of the said sum of —l. and interest (h) thereon, until *the said — day of — a large sum of money, to wit, the sum of —l. being the sum above demanded, to wit, at, &c. (venue) aforesaid, whereby an action hath accrued to the said plaintiff, to demand and have, of and from the said defendant, the said sum of —l. above demanded. Yet, &c.—[Common conclusion in debt, as ante, 387.]

ON MORT-
GAGE
DEEDS.[*435]
Proviso.

Covenant.

[*436]

The like

For that whereas heretofore, to wit, on, &c. (date of indenture) at, &c.

(f) The premises ought not to be stated at length, but in this concise way. Cowp. 665, 727.—1 Saund. 233, n. 2.—2 Saund. 366. Indeed, it is not necessary to state the grant, or the *habendum*, or proviso, and it would suffice merely to state the covenant, according to the legal effect, as in the next form.

(g) The proviso is to be copied from the deed *verbatim*, in the past tense. However, it is not necessary to state the premises, the *habendum*, or the proviso, for, as in covenant on a deed it is sufficient to state the covenant and the breach, and the former may be stated according to its legal effect; so the declaration in debt on a mortgage deed, may state the covenant to have been to pay the principal and interest

on the day mentioned in the proviso, without stating such proviso; and see these suggestions adopted in the next form, post, 436.

(h) As the covenant is usually to pay the principal-money and interest on a certain day, the *subsequent* interest cannot be properly included as a *debt* in the sum demanded, but may be recovered as damages for the detention of the principal sum and interest due beyond the named day, and a sum sufficient to cover the *subsequent* interest should be laid as damages at the end of the declaration, and the verdict should be taken for *damages* including such subsequent interest. (6 Car. & P. 661. 3 & 4 W. 4. c. 42.)

ON MORT-
GAGE
DEEDS.

—
in a short-
er form
(i).

(*venue*) by a certain indenture then and there made between the said plaintiff of the one part, and the said defendant of the other part, which said indenture, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, after reciting as therein is recited, the said defendant, for the considerations therein mentioned, did, for himself, his heirs, executors, and administrators, covenant, promise, and agree, (*let this agree with the indenture*) to and with the said plaintiff, his executors, administrators, and assigns, that he the said defendant, his heirs, executors, or administrators, or some or one of them, should and would, well and truly pay, or cause to be paid, unto the said plaintiff, his executors, administrators, or assigns, the said sum of —*l.* and lawful interest for the same, upon the — day of — (*day mentioned in indenture for payment of principal and interest,*) according to the true intent and meaning of the said indenture, as by the said indenture (reference being thereunto had) will, amongst other things, more fully and at large appear. Nevertheless the said plaintiff in fact saith, that the said defendant did not nor would well and truly pay, or cause to be paid, unto the said plaintiff, the said sum of —*l.* and lawful interest for the same, on the said — day of — as aforesaid, but therein failed and made default, and there is now due and owing from the said defendant, to the said plaintiff, for and on account of the said sum of —*l.* and interest (*k*) thereon, until the said — day of — a large sum of money, to wit, the sum of —*l.* being the sum above demanded, to wit, at, &c. (*venue*) aforesaid, whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of —*l.* above demanded. Yet, &c.—[*Common conclusion in debt, as ante, 387.*]

ON BONDS
GENE-
RALLY (i).
On a mo-
ney bond
in K. B.
(m).

VII. ON BONDS GENERALLY.

[*Commencement by bill, as ante, 384, and by original, as ante, 9.*]
For that whereas the said defendant heretofore, to wit, on the — day

(i) That this shorter form may be adopted, see ante, 435, and observe the other notes to that precedent.

(k) See the note, p. 436, as to the interest and statement of damages.

(l) As to the declaration on bonds in general, see Com. Dig. Pleader, 2 W. 9.

(m) See forms, Plead. A. 347, 357, 366. —Lil. Ent. 185.—2 Mall. Ent. 178, 241. In an action against one of several obligors on a joint and several bond, it is usual only to state, that the defendant made the bond; but, it should seem, that if it be stated that all made it, the execution of the defendant alone need be proved, 4 Campb. 34. It is a fatal variance to describe a bond conditioned for payment by A. B. and C. as a bond conditioned for payment by A. B. and D., although the bond be several as well as

joint, and the action be brought against A. severally, 6 Bing. 110.

There seems to be some perplexity in the cases as to what name the plaintiff should sue or the defendant be sued by, where in the body of the bond or deed he is described by one name and he executed it by another. In a late case, where in an action of covenant on a deed, the declaration stated that the deed was made between the plaintiff of the first part, James Cook and Hannah his wife, of the second part, and A. R. of the third part; and the deed, when produced, appeared on the face of it to be by the plaintiff, as trustee of James Cook and Hannah his wife, of the first part, George Cook and Hannah his wife, of the second part, and A. B. of the third part, and the deed was executed by the

of — in the — year of our *Lord — at — (*venue*) by his certain writing obligatory, sealed with his seal (*n*), and now shown (*o*) to the court of our said lord the king, before the king himself here, the date whereof is a certain day and year above named, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiff in the sum of —*l.* above demanded, to be paid to the said plaintiff* (*p*); yet the said defendant (although often requested so to do) hath not as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. To the damage of the said plaintiff of £10, and therefore he brings his suit.

ON BONDS
GENE-
RALLY.

Pledges, &c.

[*The commencement in C. P. as ante, 18, and then proceed as follows:*] —For that whereas the said defendant heretofore, to wit, on the — day of — in the year of our Lord — [*date of bond*], at — (*venue*) by his certain writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound to said plaintiff in the said sum of —*l.* above demanded, to be paid to the said plaintiff* (*r*); yet the said defendant (although often requested so to do) hath not as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses, so to do. Wherefore the said plaintiff saith, that he is injured, and hath sustained damage to the amount of £10, and therefore he brings his suit, &c. And the said plaintiff brings here into court the said writing obligatory, sealed as aforesaid, which gives sufficient evidence to the said court here of the debt aforesaid, in form aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above mentioned.

The like
in the
Common
Pleas (*q*).

Profert
(*e*).

*For that whereas the said defendant heretofore, to wit, on, &c. (*date of instrument*) in the island of Jamaica, to wit, at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and to the court of our lord the king, before the king himself, now here shown, the date whereof

[*438]
On a Ja-
maica
bond, for
current
money of
the island.
First
count, sta-
ting that
the bond
was un-
der seal
(*t*).

name of *George* Cook, it was considered a fatal variance, and it being uncertain, from the body of the deed, whether the party's real name was *James* or *George*, and he having executed it by the name of *George*, it should have been stated to have been made by *George* Cook of the second part, 2 C. & P. 474.—1 M. & M. Ca. Ni. Pri. 6. Another case has been decided, that a declaration against the obligor, by his right name, stating that he executed the bond by his wrong name, is bad in arrest of judgment, 3 Taunt. 504.—5 B. & A. 682. Gilb. C. P. 216.—Lutw. 894.—2 Stra. 1218. Upon the whole it seems, in general, necessary to declare by or against a party in the name by which he is called in the deed or bond, and not in the name by which he executed the deed or bond. But if in the deed or bond he be called by different names, then he should sue or be sued by the name by which he executed, for the

execution in that name would be considered as clearing up the ambiguity.

(*n*) As to the statement of defendant having sealed, and the omission of it, see 1 Saund. 291, note.

(*o*) As to the profert and averment of excuse for not making it, see post, 439.

(*p*) Here are usually inserted the following words: "*When he the said defendant should be thereunto afterwards requested;*" but as they are not usually in the bond, they seem better omitted in the declaration.

(*q*) See Forms, Plead. A. 380.—Rich. C. P. 117.—Morg. 494. See the notes to the form, ante, 436.

(*r*) See ante, 436, note.

(*s*) In the Common Pleas, the profert is usually at the end instead of the middle of the declaration, but this is not material. As to the profert in general, and averment of excuse for not making it, see post, 439,

(*t*) 1 B. & P. 360.

ON BONDS is a certain day and year therein mentioned, to wit, the same day and
GENE- year aforesaid, acknowledged himself to be held and firmly bound to the
RALLY. said plaintiff in the sum of —*l.* current money of the island aforesaid, to be paid to the said plaintiff; and the said plaintiff avers, that the said sum of —*l.* current money of the said island, at the time of making the said writing obligatory, was and still is of the value of —*l.* of lawful money of Great Britain, to wit, at, &c. (*venue*) aforesaid; whereby, and by reason of the said sum of — being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of the said defendant the said sum of —*l.* parcel of the said sum above demanded. And whereas also, the said defendant afterwards, to wit, on the day and year aforesaid, in the said island of Jamaica, to wit, at, &c. (*venue*) aforesaid, by his certain other writing obligatory, then and there by him subscribed with his own proper hand and name, and duly made and delivered according to the usage and custom of the said island (*w*) and to the said court of our said lord the king, now here also shown, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiff in the sum of —*l.* other current money of the island aforesaid, to be paid to the said plaintiff; *and the said plaintiff avers, that the said —*l.* current money of the said island, in the last-mentioned writing obligatory, specified, at the time of the making of the said last-mentioned writing obligatory, was and still is of the value of —*l.* of lawful money of Great Britain, to wit, at, &c. (*venue*) aforesaid being other parcel of the said sum of —*l.* above demanded.—[*Add counts on the original debt, account stated, and breach in debt.*]

Second count, that bond was subscribed and duly made according to usage of Jamaica (*w*).

[*439]

Counts on several bonds, &c. *Several counts on different bonds may be joined in the same declaration, see the form, 1 Sauud. 288, and id. note 1. and Lil. Ent. 167.—Com. Dig. Pleader, 2 W. 9.—In this case proceed as in the above form, to the asterisk; and then before the breach insert the count on the other bond, as follows:—*“And whereas also, the said defendant, heretofore, to wit, on, &c. at, &c. (*venue*) by his certain other writing obligatory, sealed,” &c.—[*Same as the first count, ante, 436, to the end, and then state—*] which said several sums of money in the said first and second counts mentioned, amount together to the said sum of —*l.* above demanded; yet the said defendant, &c. [*proceed with the breach as above, to the end. There appears to be no occasion to conclude each count with the words “whereby,” &c. See the form, 1 Sauud. 288, and ante, 385, n.*]

Averment in excuse of a profert.

As to the profert, see ante, vol. i. Index, “Profert” —If a bond or

(*u*) 1 B. & P. 360.

(*w*) The instruments were not sealed, but merely signed by the defendant, and a cross put at the end of the name in the presence of an attesting witness; the plaintiff sued upon the bond in the island, but on a bill filed there against him in equity, an injunction was obtained for want of an answer. Mr. Wood, in A. D. 1797, gave the following opinion: “I think plaintiff may maintain an action of debt against defendant, and declare upon these instruments as bonds, though not sealed, if it be the

practice of the island of Jamaica to make such writings, and if they have there the force and obligation of bonds, the same as sealed bonds here. It will be proper to declare upon them first as sealed bonds, secondly, as writings obligatory, subscribed by the obligor, and duly made according to the custom of the island, and to add common counts to include the original demands for which these bonds were given.” See also 1 B. & P. 360. As to the mode of calculating the value in British sterling, see ante, 414.

other deed be pleaded with a proferat, and the defendant pleaded non est factum, and the plaintiff cannot produce the bond, &c. at the trial, he will be non-suited. 4 East, 585. It is therefore frequently necessary, or advisable, instead of the proferat in the above precedent, to insert in the declaration one of the following excuses, which are to be framed according to the fact, or at least to add a second count, containing such excuse. These excuses of the proferat run as follows.—If the bond be lost—“and which said writing obligatory having been lost,” or, “and which said writing obligatory having been destroyed by accident,” or, “by the said defendant,” the said plaintiff cannot produce the same to the said court here. See 3 T. R. 151.—If the bond be in the possession of the defendant, the excuse of proferat runs thus — “and which said writing obligatory being in the possession of the said defendant, the said plaintiff cannot produce the same to the said court here.”—It seems sufficient if an allegation of this *nature be true at the time of declaring, and if the deed be afterwards found, it will not vitiate the allegation, 2 Campb. 557, 558. [*440]

ON BONDS
GENE-
RALLY.

VIII. ON BONDS STATING CONDITION.

ON BONDS
STATING
CON-
DITION.

[When necessary to state condition and breaches of bond.] The Stat. 8 & 9 W. 3. c. 11. s. 8. ante, vol. i. Index, “Bond,” which provides that the plaintiff shall execute a writ of inquiry, on a judgment for plaintiff on demurrer, or by confession or *nihil dicit*, in an action on a bond with a penalty, and show upon the record the breaches of the bond, receives a very liberal construction, being made in favor of defendants, 5 D. & R. 636; and the Statute is compulsory on the plaintiff to proceed in the manner it prescribes, 2 Wils. 377.—13 East. 3 a.—Tidd, 9th edit. 584.

The following bonds are within the meaning of the act, and the conditions and breaches thereof must be stated in the declaration assigned in the replication or suggested on making up the issue, as the case may require, viz. an annuity bond, 8 T. R. 126; an arbitration bond, 6 East, 613.—2 Smith. 666, S. C.; a bond for the payment of money by instalments, 6 East, 550.—2 Smith, 653, S. C. (1). Where covenants and agreements are contained in the condition of a bond, they are within the Statute, as well as where they are in a different instrument, 2 Burr. 772.—2 Ken. 492.—2 Burr. 820.—2 Bla. Rep. 843. Where a bond upon the face of it appeared to be conditioned for the payment of a sum certain, but by an indenture of the same date, declaring the purposes for which the bond was executed, it was *agreed* that it should be lawful for the obligees to commence an action upon the bond, and to proceed to judgment whenever they should think fit; and upon judgment being obtained, to issue execution, and that the judgment should be a security for the payment to the obligees on demand, of all sums of money which then were or might thereafter become due to them; and judgment having been

(1) Acc. *Munro v. Allaire*, 2 Caines, 390.

ON BONDS STATING CONDITION. entered up by virtue of this deed, the obligees issued execution, without assigning breaches or executing a writ of inquiry; the court held, that this was a bond substantially within the meaning of the 8 & 9 Will. 3. c. 11. s. 8. and that the obligees ought to have assigned breaches thereon, 5 B. & Cres. 650.—8 D. & R. 424, S. C. (2).

But the statute does not extend to bonds conditioned for the payment of a sum certain, at a certain time, as *post obit* bonds, 2 Campb. 285, n.—2 B. & Cres. 82, 89.—3 D. & R. 278, 281, S. C.; or other bonds for the payment of money, which are provided for by the 9 Ann. c. 16. s. 13.—2 J. B. Moore, 220; nor does it extend to bail bonds, Tidd, 9th edit. 584. 2 B. & P. 446; or replevin bonds, 3 M. & S. 155; or a petitioning creditor's bond, 3 East, 22.—7 T. & R. 300. And where judgment is entered on a warrant of attorney, it is not within the act, and this, although a bond be also given. 2 Taunt. 195.—3 Taunt. 74.—5 Taunt. 264.—16 East, 164.—6 Bingham, 385.—5 B. & Cres. 656; nor does the Statute apply to cases where the damages assessed are calculated by the jury, to meet and satisfy the entire condition of the bond, 13 Price, 715. It is not necessary for the crown to assign breaches under the act, and if any one breach be proved, the crown is entitled to judgment, 1 Younge & J. 171. Tidd, 9th edit. 585.

Mode of stating condition and breaches :—There is some confusion in the books, as to whether the condition and breach of a bond, within the meaning of the above Statute of William, should be stated in the declaration assigned in the replication, or suggested on the roll in making up the issue.

In some cases it may be absolutely requisite to set forth the condition and breach in the *declaration*, see 2 New Rep. 362. As in actions on a bail bond or replevin bond, at the suit of the *assignee*, or on a bastardy bond, at the suit of succeeding overseers, or the like, where, without stating the condition and breach, it would not appear, how the plaintiff was entitled to sue as assignee or succeeding overseer.

In other cases, though not absolutely requisite, it may be advisable to state the condition and breach in the declaration, and especially where a plea not leading to an issue, or the breach, as *non est factum*, or the like, or where a judgment by default is expected, for in the latter case some delay would be avoided, and the plaintiff moreover would not have to prove, nor could defendant deny the truth of the breach, on the execution of the inquiry, which would otherwise be the case, see 1 Saund. 58 d.—3 Car. & P. 608.

On the other hand, in many cases where it is not absolutely necessary to state the condition and breaches in the declaration, it may be advisable not to do so, and especially where a defense, either sham or otherwise, is expected. In such cases it is best to reserve the assignment of the

(2) Vide *Hodges v. Suffelt*, 2 Johns. Cas. 406. *Van Benthuyne and another v. De Witt and others*, 4 Johns. 213. 16 Johns. 209.

breaches for the replication, (as may be done, 8 T. Rep. 255.—2 Chit. Rep. 298.—2 Saund. 187 a.) (1) because the defendant in rejoining to the replication can only present one answer to each breach, whereas, in pleading to the declaration and breaches stated therein, he may answer each breach by any number of pleas.

OF BONDS
STATING
CONDI-
TION.

If the condition and breach of a bond within the above Statute of William 3. be not stated in the declaration, and the defendant plead any plea on which the plaintiff might at common law have taken an issue in his replication without showing a breach, such as a plea of *non est factum* or that the bond was obtained by fraud or the like, the plaintiff may still take such issue, and must enter a distinct and separate *suggestion* of breaches under the Statute, but he cannot incorporate such issue and such suggestion in one and the same replication, see 8 T. R. 255.—1 Esp. 277.—5 M. & S. 60.—5 J. B. Moore, 198.

If to such a declaration the defendant plead a plea which made it necessary at common law for the plaintiff to assign a breach in the replication, as for instance, a plea of general performance, the plaintiff must still assign the breach in the *replication*, with this difference, that he may now assign several breaches under the Statute, whereas at common law he could only assign one. If only one breach be assigned in the replication, it is not necessary to state it in terms, to be "according to the form of the statute," 13 East, 1; otherwise if more than one.

Before the above Statute of William 3. the plaintiff could assign in the declaration only one breach of the condition, and if he assigned more, the declaration was demurrable for duplicity, 1 Saund. 58, n. 1. It is not however necessary in a declaration assigning more than one breach, to refer to its being according to the Statute, 13 East. 1. It suffices to prove part of the breach assigned, *id*.

*IX. BASTARDY BONDS.

[*441]

ON

BASTARDY
BONDS.

On a bas-
tardy
bond, by
the suc-
ceeding
overseers
(z).

— (to wit.) A. B. and C. D. overseers of the poor of the parish (or district, &c. *as the case may be*) of — in the county of — according

(z) The action on such a bond *must* be brought in the name of the overseers for the time being, and not in the name of those to whom the bond was given. 54 Geo. 3. c. 170. s. 8.—3 J. B. Moore, 21. See Burn, J. tit. "*Bastards*," Forms, 1 M. & S. 310. Plead. A. 366.

If the bond was given to the *plaintiffs*

themselves, whether as overseers, or otherwise, it may be declared on as on a common bond.

A proferet, or an excuse for the omission of it is as necessary in this as in common declaration. 2 Saund. 187 c. ante, 439. The defendant cannot plead *nil debet*, 2 Saund. 187 a. n. 2.

(1) Acc. Post Master General of U. States v. Cochran, 2 Johns. 413. If the plaintiff assigns breaches in his declaration, the defendant cannot plead performance generally, but must particularly answer the breaches assigned, and show when, how, and where he performed his covenants, *ibid*.

ON BAS-
TARDY
BONDS.

Condition
of bond
(y).

Reference
thereto.

to the form of the Statute in such case made and provided, complain of E. F. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea, that he render to the said plaintiff and defendant, as such overseers aforesaid, the sum of —l. of lawful money of Great Britain, which he owes to and unjustly detains from them—[*If the action be in C. P. or Exchequer alter the commencement accordingly.*] For that whereas the said defendant heretofore, to wit, on, &c. (*date of bond*) to wit, at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and now shown to the court of our said lord the king now here, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound unto G. H. and I. K. churchwardens, and L. M. and N. O. overseers of the poor of the parish aforesaid, in the said county, in trust for the parishioners of the said parish (*as in bond*) in the said sum of —l. above demanded, to be paid by the said defendant to the said G. H., I. K., L. M., and N. O. Which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that [*set out the whole of the recitals, and the condition in the past tense, which is, in general to indemnify the parish, as follows:*] “that A. M. of — single woman, had in and by her voluntary examination, taken in writing upon oath before — one of his majesty’s justices of the peace in and for the said county of — declared that she was with child, and that the said child was likely to be born a bastard, and to be chargeable to the said parish of — and that the said defendant did get her with child;” [*If the bond was after the birth, then say,*] “that A. M. of — single woman, in her examination taken in writing upon oath, before — one of his majesty’s justices of the peace in and for the said county, had declared, that on the — day of — then last past, at — in the parish of — in the county aforesaid, she the said A. M. was delivered of a (male) bastard child, and that the said bastard child was likely to become chargeable to the said parish of — and had charged the said defendant with having gotten her with child of the said bastard child;” it was conditioned, that if therefore the said defendant, his heirs, executors or administrators, did and should, from time to time, and at all times thereafter, fully and clearly indemnify and save harmless, as well the above-named church-wardens and overseers of the poor of the said parish of — and their successors for the time being, as also all and singular the other parishioners and inhabitants of the said parish of — which then were or thereafter should be for the time being, of and from all manner of costs, taxes, rates, and assessments, and charges whatsoever, for or by reason of the birth, education, and maintenance of the said child, and of and from all actions, suits, troubles, and other charges and demands whatsoever, touching and concerning the same, then that obligation should be void, otherwise of force, as by the said writing obligatory, and the condition thereof will more fully and at large appear, [*and then proceed as follows (z);*]—And although

(y) See Burn’s J. tit. “Bastards.”

(z) If the bond were given before the birth of the child, the following averment should be here introduced, “and the said plaintiff in fact saith, that after the making of the said writing obligatory, to wit, on,

&c. at, &c. the child with which the said E. F. was so pregnant, and whereof the said defendant was such reputed father as aforesaid, was born and still is living, to wit, at, &c. aforesaid.”

ON BAS-
TARDY
BONDS.

Breach.

[*442]
Second
breach.

the said child, whereof the said defendant so was the reputed father as aforesaid, is still living, to wit, at, &c. (*venue*) aforesaid; yet the said defendant hath not, from the time of the making of the said writing obligatory, fully and clearly indemnified and saved harmless as well the above-named, &c. [*negative the words in the condition, and proceed as follows:*] —but the said defendant hath hitherto wholly neglected and refused, and still neglects and refuses so to do; and by means thereof the said G. H., I. K., L. M., and N. O. after the making of the said writing obligatory, and whilst they were churchwardens and overseers as aforesaid, to wit, on the day and year first aforesaid, and on divers other days and times afterwards, were forced and obliged to, and did necessarily lay out and expend divers sums of money (*a*), in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the birth, maintenance, and *education of the said child, to wit, at, &c. (*venue*) aforesaid. And the said plaintiffs, for assigning a further breach of the said condition of the said writing obligatory, according to the form of the Statute (*b*) in such case made and provided, further say, that a certain person, to wit, P. Q. and R. S., the successors of the said G. H. and I. K. as such churchwardens, and the said plaintiffs, the successors of the said L. M. and O. P. and such overseers as aforesaid, after the making of the said writing obligatory, to wit, on, &c. (*c*) and on, divers other days and times between that day and the day of exhibiting the bill of the said plaintiffs in this behalf, were forced and obliged to, and did necessarily lay out and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the maintenance and education of the said child, to wit, at, &c. (*venue*) aforesaid, by means of which said premises the said several churchwardens and overseers, and the other parishioners, and inhabitants of the said parish, in the said condition named, have sustained damages to a large amount, to wit, to the amount of —*l.* (*d*) by reason of which said breaches the said writing obligatory became forfeited, and according to the said statute an action hath accrued to them the said plaintiffs as overseers as aforesaid, to demand and have of and from the said defendant, the said sum (*e*), above demanded; yet the said defendant (although often requested so to do) hath not as yet paid the said sum of money above demanded, or any part thereof, to the said plaintiffs, or otherwise, according to the said writing obligatory and condition, but to pay the same hath hitherto wholly refused, and still doth refuse. To the damage of the said plaintiffs, as overseers as aforesaid, of —*l.* (*f*) and thereof they bring their suit, &c.

Pledges, &c.

(a) As to what expenses the defendant is liable for, and how far he is discharged by bankruptcy and certificate, see Burn, J. tit. "*Bastards*."—3 Bing. 154.

(b) 8 & 9 W. 3. c. 11. s. 8.—Before this statute, the plaintiff could only assign one breach of the condition, and if he assigned two or more, the declaration was demurrable, for duplicity, 1 Saund. 58, n. 1. It is not, however, necessary, in assigning the breach, to refer to the statute, and it is suffi-

cient to prove a part of the breach assigned. 13 East, 1, 2.

(c) The day the churchwardens and overseers came into office, or about it.

(d) The amount of the penalty of the bond.

(e) The penalty; as to this conclusion, see 2 Saund. 187 c.

(f) The sum here inserted is merely nominal, to cover damages for the detention of the debt, see 1 Saund. 58. b.

X. ON ANNUITY BONDS.

ON
ANNUITY
BONDS.

On an annuity
bond (g).
[*443]

[*Set out the bond and condition, as directed in the last form mutatis mutandis, and then assign the breach as follows:*—Nevertheless the said plaintiff in fact saith, that *after the making of the said writing obligatory (h) to wit, on, &c. (*day it fell due*) at, &c. (*venue*) aforesaid, a large sum of money, to wit, the sum of —l. (*state enough*) of the said annuity, or yearly sum of —l. for [one quarter of a year] then elapsed, became and was due and owing from the said defendant to the said plaintiff and still is in arrear and unpaid, contrary to the form and effect of the said writing obligatory, and of the said condition thereof, by reason of which said breach the said writing obligatory became forfeited, and whereby an action hath accrued to the said plaintiff to demand and have, of and from the said defendant the sum of —l., (*the penalty*) above demanded. Yet the said defendant (although often requested so to do) hath not as yet paid the said sum of money above demanded, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof, hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of 10l. (i), and therefore he brings his suit, &c.

ON BOND
TO RE-
PLACE
STOCK,
&c.

On a bond
to replace
stock and
pay divi-
dends (k).

Second
breach.

XI. ON BOND TO REPLACE STOCK.

[*Set out the bond and condition, as directed, ante, 440, and then proceed as follows:*—Yet the said plaintiff in fact saith, that the said defendant hath not, at his own proper costs and charges, transferred, or caused or procured to be transferred, unto or to the account of the said plaintiff, in the books of the said governor and company of the Bank of England, the said sum of —l. share or interest in the said joint stock of —l. per cent. consolidated bank annuities, but hath hitherto wholly neglected and refused so to do, and the said sum of —l. share or interest in the said joint stock, wholly remains untransferred and unpaid and unsatisfied to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And for assigning a further breach of the said condition of the said writing obligatory, the said plaintiff, according to the form of the Statute in such case made and provided, saith, that the said defendant hath not as yet answered, paid, or made good to the said plaintiff all dividends, interest, and produce which he the said plaintiff could have received, and would have been entitled to in case the said —l. so remaining untransferred and unpaid and unsatis-

(g) See ante, vol. i. Index "*Annuity*," and see ante, 433, as to its being most advisable in general to sue on the annuity deed.

(h) If the annuity be payable during the life of a third person, here insert the following allegation: "*And during the life of the*

said E. F." which will be a sufficient averment of the life of the third person, 1 Saund. 235, n. 8.

(i) Ante, page 442, note (f).

(k) See ante, 275, note, a form in assumpsit for not replacing stock. See notes, 1 Chit. Col. Stat. tit. "*Stock-jobbing*."

fied as aforesaid, had remained and continued standing in the books of the said governor and company of the Bank of England, in the names and as the property of him the said plaintiff, but on the contrary thereof although he the said plaintiff, after the making of the said writing obligatory, to wit, on, &c. at, &c. (*venue*) aforesaid could have received, and would have been entitled unto certain dividends, interest, and produce, to a large amount, to wit, the sum of —*l.* in case the said sum of —*l.* had remained and continued standing in the books of the said governor and company of the Bank of England, in the name and as the property of him the said plaintiff as aforesaid, whereof the said defendant, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, had notice. Yet the said plaintiff in fact saith, that the said defendant hath not (although often requested so to do) as yet transferred, paid, or made good unto the said plaintiff, the said last-mentioned sum of money, or any part thereof, but hath hitherto wholly neglected and refused so to do, and still neglects and refuses so to do, to wit, at, &c. (*venue*) aforesaid. By reason of which said breach the said writing obligatory became forfeited, and thereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of —*l.* above demanded. Yet the said defendant hath not (although often requested so to do) as yet paid the said sum of money above demanded, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses to pay the same, or any part thereof, to the said plaintiff. To the damage of the said plaintiff of £10 (*l.*), and therefore he brings his suit, &c.

ON BOND
TO RE-
PLACE
STOCK.

*XII. ON A BOND TO PERFORM COVENANTS IN ANOTHER INDENTURE.

[*444]
ON A BOND
TO PER-
FORM COV-
ENANTS IN
ANOTHER
INDEN-
TURE (m)

[*Proceed as in the form on bonds in K. B. and C. P. ante, 436, 7, to the asterisk in each, and then as follows:*]—And the said plaintiff, according to the form of the Statute in that case made and provided, says, that the said writing obligatory was made with a condition thereunder written, that if [*set out the condition verbatim, and which may be as follows:*] the above bounden defendant did well and truly observe, &c. all and singular the covenants, &c. whatsoever, which on the part of the said defendant were or ought to be observed, &c. in a certain indenture bearing even date with the said writing obligatory, and made between the said plaintiff of the one part, and the said defendant of the other part, according to the true intent and meaning of the said indenture, then the said obligation was to be void, &c. And the said plaintiff further says, that by the said indenture in the condition of the said writing obligatory mentioned, which he the said plaintiff now brings here into court, he did demise unto the said defendant all that, &c.—[*Here set out the demise, and such of the covenants as have been broken, and assign breaches of*

(l) *Ante*, 442, n. (f).

(m) See the form in 1 *Saund. Rep.* 58 b.

ON BOND
TO PER-
FORM COV-
ENANTS,
&c.

them, as in a declaration in covenant, post, and conclude thus:—By reason of which said breaches the said writing obligatory became forfeited, and thereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of —*l.* (*the penalty*) above demanded. Yet the said defendant (although often requested so to do) hath not as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to the damage of the said plaintiff of £10, and therefore he brings his suit, &c.

Pledges, &c.

[*445]

ON BAIL
BONDS.

Ellenborough.

*XIII. ON BAIL BONDS.

—— next after —— (o), in
—— Term, 1 Will. 4.

On a bail-
bond by
the as-
signee
against
the princi-
pal or bail,
where the
first suit
was in K.
B. by bills
(n).
The writ.
[*446]

—— (to wit,) (p) A. B. assignee of E. F. esq. sheriff (q) [or "late sheriff"] of the county of —— according to the form of the Statute (r) in such case made and provided, complains of *C. D. being in the custody of the Marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that he render to the said A. B. as assignee, as aforesaid, the sum of —*l.* (*the penalty*) of lawful money of Great Britain, which he owes to (s) and unjustly detains from him. For that whereas the said plaintiff, heretofore, to wit, on, &c. (t) in the —— year of the reign of our said lord the now king, sued and prosecuted out of the court of our said lord the now king before the king himself (u), at Westminster (w), in

(n) See other forms, post, 450, &c.—Morg. 496.—2 Rich. C. P. 248.—5 Wentw. 474.—1 Rich. C. P. 455.—7 Wentw. Index, 530, 1, and on a bail bond on an attachment out of Chancery. 2 Marsh. 280.

This action, whether in the name of the sheriff or the assignee of the bond, must be brought in the court from which the process in the original action issued, 2 Saund. 61 b.—8 T. R. 152 acc.—1 H. Bl. 631. cont. (Vide Haswell v. Bates and Lansing, 9 Johns. Rep. 80.—12 Johns. Rep. 459,—where actions on bail-bonds, taken in inferior courts, the process of which was insufficient to reach all the parties to the bond, were sustained.) The defendant cannot take the objection under the plea of *non est factum*, 2 Camp. 396. An attorney, by entering into a bail bond in another court, waives his privilege, Barnes, 117.—3 Wils. 348.—2 Bla. Rep. 838, S. C.—1 Hen. Bla. 631.

If the action be by the sheriff, it is usual to declare as on a common money bond, as ante, 436.

(o) If the bond was assigned after the first day of Term, the declaration must be entitled specially, or will be demurrable, 1 T. R. 116.—7 T. R. 474.—Ante, 12, n. (a).

(p) The venue is transitory, Fortesc.

366.—Stra. 727.—Ld. Raym. 1455.

(q) In Middlesex the two officers constitute only one sheriff, and the declaration would be demurrable, if they be described as sheriffs. Bac. Abr. Sheriff, K. 162.—2 Ld. Raym. 1135.

(r) 4 & 5 Ann. c. 16. s. 20. See the constructions thereon in 2 Saund. 58 a. b. note 3.—Tidd, 9th edit. 297 to 301.—3 Bla. Com. 290.

(s) Although the action is by an executor of the assignee, it may be in the *debit* and *delinet*, 1 Selw. N. P. 570.

(t) This may be the *teste* of the writ, or the day it is actually issued, but the first is preferable; see infra, note (i). A bill of Middlesex has no *teste*.

(u) "The court of the bench at Westminster," means C. P. how to describe the court, see M. & S. 166.—1 J. B. Moore, 19.—7 Taunt. 271, S. C.

(w) An allegation of the court being then held at Westminster, &c. is unnecessary, and if the writ be stated to be sued out in vacation, and not under a *videlicet*, would render the declaration demurrable, 5 Burr. 2586.—3 T. R. 184. 1 Saund. 300 b, n. 7; but not so if stated under a *videlicet*, 5 J. B. Moore, 638. 2 B. & B. 659, S. C.

the county of Middlesex, against the said defendant (x), [or, if the declaration be against one of the bail, say against "one G. H."] a certain writ of our said lord the king (y), called a latitat, directed to the sheriff of — (z), [or, if a bill of Middlesex, say "a certain precept (a) called a bill of Middlesex whereby the sheriff of Middlesex was commanded to take, &c."] by which said writ our said lord the king commanded the said sheriff to take the said defendant if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, at Westminster, in the county of Middlesex, on (b) — next after —, to answer unto the said plaintiff of a plea of trespass (c), and also to a bill of the said plaintiff against the said defendant, for £— upon promises, according to the *custom of his said majesty's court, before his majesty to be exhibited, and that the said sheriff should then have there that writ [or, if a bill of Middlesex, say "precept."] Which said writ, [or, if a bill of Middlesex, say "precept,"] afterwards and before the delivery thereof to the said sheriff of the said county of —, to be executed as is hereinafter mentioned, to wit, on the (d) — day of —, in the year aforesaid, to wit, at, &c. (venue) aforesaid, was duly marked and indorsed for bail for £— (e), according to the form of the statute in such case made and provided (f); and which said writ [or, if a bill of

ON RAIL-
BONDS.

[*447]

Indorse-
ment for
bail.Delivery
to the she-
riff.

(x) The name of the person against whom the writ is stated to have been issued must be stated accurately, 2 Campb. 270.—1 Id. 14.—2 Esp. 72.—1 D. & R. 551. Where it was averred, that by a writ of latitat the sheriff was commanded to take one "F. J. by the name of J. J." an examined copy of the latitat was given in evidence, commanding the sheriff to take "J. J." The bail bond was signed by the principal, "F. J. arrested by the name of J. J." and the plaintiffs offered to prove that this person was their debtor, whom they intended to hold to bail. Lord Ellenborough said, "The writ must speak for itself. I cannot hear that, instead of A. B. mentioned in the writ, it was meant that the sheriff should arrest X. Y." and the plaintiffs were nonsuited.—Scandover v. Warne, 2 Campb. 270.—Wilks. v. Lorck, 2 Taunt. 399. Where the declaration stated that the sheriff was commanded to take the said defendant Thomas Atwood to answer the plaintiff of a plea of trespass, "and also to a bill of the said plaintiff against the said defendants," it was holden to be clearly defective, but the court gave leave to amend, on payment of costs. 1 D. & R. 551. Where a latitat against D. and two others, was stated as a latitat against D. and John Doe, it was ruled no variance, 1 T. R. 238.

(y) Where in an action for an escape, the plaintiffs declared on a writ of the king, and the writ produced in evidence was a writ of George the Third, but tested in the name of Best, C. J. and indorsed with the date of 1826, being in the reign of George the Fourth, it was held no variance, 4 Bing. 278.

(z) It may be stated to have been directed to the sheriff by name, 2 Campb. 525.

(a) A bill of Middlesex should be described as a precept,—2 Stra. 1069.

(b) The return must be stated accurately, 2 Chit. Rep. 624.

(c) *Quærs* if it be necessary to refer to more of the writ than the *ac etiam*, see 5 J. B. Moore, 538.—2 B. & B. 659, S. C.

(d) The date of the indorsement or about it.

(e) In *Williams v. Sheriff of Middlesex*, at Guildhall, A. D. 1817, 25th July, before Abbott, J. in an action for an escape, the declarations stated the writ to have been indorsed for 24l., but the writ produced was indorsed "24l. and upwards, besides, &c." and this was held to be no variance; but in an action for a false return, where the declaration, in setting out a writ off. *fa* stated the indorsement to levy 600l., together with the sheriff's poundage, officer's fees, and other legal charges and incidental expenses attending the levy, and the writ given in evidence was indorsed to levy 600l., together with the sheriff's poundage, officer's fees, &c. this was held a fatal variance, 5 Esp. Ni. Pri. Ca. 133.—1 Marsh. 214, but see R. & M. Ca. Ni. Pri. 292.

(f) 12 G. 1. c. 29. It has been usual till of late to state that the indorsement for bail was by virtue of the affidavit filed of record, but such allegation is now settled to be clearly unnecessary in an action on a bail-bond, and is therefore better omitted. See 5 Bingh. 193.—4 Bing. 501.—1 M. & P. 279.—2 M. & P. 312. But if the averment be introduced, though unnecessarily, an office copy of the affidavit will suffice to support it in evidence, 2 J. B. Moore, 60.—1 B. & P. 280.—1 Burr. 330; but the original affidavit must be produced if the declaration state it to have been made by any per-

ON BAIL-
BONDS.The ar-
rest.The bail
bond.

- Middlesex*, say "precept,"] so indorsed, afterwards, and before the said return thereof, to wit, on the — day of —, in the year aforesaid (g) to wit, at, &c. (*venue*) (h) was delivered to the said E. F. who then and from thence until and at and after the time of the arrest, and the making of the writing obligatory hereinafter mentioned, was sheriff of the said county of —, in due form of law to be executed.* By virtue of which said writ, [or "precept"] the said E. F. so being sheriff as aforesaid, afterwards, and before the said return of the said writ, [or, "precept"] to
- [*448] *wit, on the day and year last aforesaid, and within his bailiwick, as such sheriff, to wit, at —, in the county of — aforesaid (i), took and arrested (ii) the said defendant by his body (k), and then and there had and detained him in his custody, as such sheriff, at the suit of the said plaintiff for the cause aforesaid. And the said defendant being so arrested, and in custody of the said E. F. so being sheriff as aforesaid, by virtue of the said writ [or, *if a bill of Middlesex*, say "precept"] at the suit of the said plaintiff as aforesaid, the said E. F. afterwards, and before (l) the said return of the said writ, to wit, on the day and year last aforesaid (m), as such sheriff, to wit, at, &c. aforesaid (n), (*venue in action*), took bail for the appearance of the said defendant at the return of the said writ, [or "precept"] according to the form of the Statute in such case made and provided (o); and on that occasion the said defendant [or, *if the action be against one of the bail*, "the said defendant, as bail and surety for the said G. H."] then and there, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid (p), by his certain writing obligatory, commonly called a bail bond, sealed with the seal of the said defendant [or, "respective seals of the said defendant,"] and now shown to the court of our said lord the king, before the king himself here, the date whereof is (a certain day and year therein mentioned) the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said E. F. so being then sheriff of the said county of —, as aforesaid, as such sheriff, by the name, description, and addition of —, sheriff of the county of —, in the penal sum of £— of good and lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, with *and under a certain condi-
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son in particular, and there be a traverse of the averment, 1 B. & P. 281.—2 J. B. Moo. 62.

(g) This day is not material; it is usual to insert the date of the bail-bond, so as to avoid an unnecessary statement of different days.

(h) The venue in the action.

(i) Some place in the county in which the party was arrested.

(ii) (The arrest must take place whilst the writ is in force, 2 Saund. 60 a.; 1 Ld. Raym. 352; 4 M. & Sel. 338; and per Bayley, J. in *Edwards v. Brown*, 1 Tyrw. 201. Formerly, when writs had a return day, it was held that if a bail bond was executed after the return day was void, 2 Saund. 60; 1 Ld. Raym. 352.)

(k) This allegation as to the arrest is unnecessary, and is not traversable, 2 Saund. 59 b.

(l) The bond is void if taken after the return-day of the writ, 2 Saund. 60 a.—1 Lord Raym. 352, and is bad on *non est factum*, 4 M. & S. 338, but it seems more prudent to plead specially, see post, vol. iii. 981.

(m) The date of the bail bond.

(n) As a bail bond may be executed out of the county where the arrest was made, it is proper here to state the venue, and if the venue is different from the place of arrest, it is improper to aver that the bond was taken *within the sheriff's bailiwick*.

(o) 23 Hen. 6. c. 9.—2 Saund. 59, 61 c. d, n. 5.

(p) As a bond may be executed out of the county where arrest made, there can be no necessity for stating any place but the venue here.

tion (q) thereunder written, that if the said defendant [or, *if against the bail*, "if the said G. H."] should appear before our said lord the king, at Westminster (r), on — next after —, to answer the said plaintiff in a plea of trespass, and also to a bill of the said plaintiff against the said defendant for £—, upon promises (s), according to the custom of the said court of our said lord the king, before the king himself, to be exhibited, that then the said obligation should be void, otherwise should be and remain in full force and virtue; as by the said writing obligatory, and the condition thereof, reference being thereunto had, may more fully and at large appear. And the said plaintiff in fact saith, that the said defendant did not appear before our said lord the king, at Westminster, on — next after — (t), in the condition of the said writing obligatory mentioned according to the exigency of the said writ, [or, "precept"] but therein wholly failed and made default, whereby the said writing obligatory became forfeited. And the said plaintiff further saith, that the said writing obligatory being so forfeited, and the money therein specified remaining unpaid and unsatisfied to the said sheriff, he the said E. F. (u), so being sheriff of the said county of — as aforesaid, afterwards, to wit, on, &c. (w), to wit, at, &c. (*venue*) aforesaid (x), at the request and cost of the said plaintiff, the plaintiff in the said suit, by an indorsement *on the said writing obligatory, duly (y) [made and attested, in the presence of and attested by two (z) credible witnesses, and sealed with the seal of office of sheriff of the said county of —] assigned the said writ-

ON BAIL BONDS.

Breach of condition by non-appearance.

Assignment of bond to plaintiff.

(q) The condition need not be set forth *verbatim*; it is sufficient to state it according to its legal effect, 3 J. B. Moore, 214, 3 Stark. 76; what a variance, *id.*—If it appears by the declaration that the bond is void by the provisions of the stat. 20 Hen. 6. c. 9, the declaration will be bad either upon general demurrer or upon arrest of judgment, after verdict on a plea of *non est factum*, 2 T. R. 569.—4 M. & S. 338.

(r) Where the declaration stated the arrest to be by virtue of a *capias*, sued out of the court of our lord the king, before Sir W. D. B. and others, then *his Majesty's justices of the bench* at Westminster, and averred the condition of the bond to be, that if the principal should appear *according to the exigency of the said writ* in the said court, in, &c. the bond was to be void, and the breach was the non-appearance *according to the exigency of the writ*. On the production of the bond, the condition was for the appearance of the principal, "*before our sovereign lord the king, at Westminster, on, &c.*" to answer the plaintiff in a plea of trespass, and also to answer him, according to the custom of the *king's court of Common Bench*, it was held no variance, 2 M. & P. 81.—5 Bing. 32. Where the condition was, that the party should appear before the king at Westminster, and the writ was to appear before the king wheresoever, &c. it was held an immaterial variance, 9 East, 55.—3 J. B. Moore, 214, but see 1 Chit. Rep. 323. But where the writ was to appear before his Majesty's justices of the bench at Westminster, and the condition

was to appear before the king at Westminster, it was held fatal, being different courts, 6 Taunt. 551.—2 Marsh. 258, S. C.—*Sed vide* 2 Lev. 180.—T. Jones, 46. S. C.

(s) Where the condition of the bond was stated to be, to answer the plaintiff in a plea of trespass upon promise, and the words "upon promises," were not in the bond, it was held a fatal variance, R. & M. N. P. C. 93.

(t) Or, "at the return of the said writ," Morg. Prec. 179.

(u) The assignment may be made by the under sheriff in the name of the sheriff, 2 Saund. 61 a. In 4 Camp. 36, the assignment of a replevin bond, by a person acting in the sheriff's office under the seal of the office, was held sufficient.

(v) The date of the assignment, being before the title of the declaration, ante, 444, n. (m).

(x) The venue, 2 Stra. 727.—2 Ld. Raym. 1455. *Sed vide* Impey, 16.—Dalt. 22.

(y) It is sufficient to state that the sheriff assigned the bond to the plaintiff according to the Statute, without alleging that the assignment was sealed or witnessed, Willes, 408, 9, n. (a).—2 Saund. 61 b.—1 Wils. 121. The words between the brackets may therefore be omitted.

(z) *Id. ibid.* It is not necessary to state the names, 1 Wils. 121. If the assignment appear on the face of the declaration to have been attested only by one witness, it will be demurrable, Willes, 409, n. (a).

ON BAIL
BONDS.

ing obligatory to the said plaintiff, according to the form of the Statute in such case made and provided (a); as by the same assignment indorsed on the same writing obligatory as aforesaid, and to the court of our said lord the king now here shown (b), the date whereof is the day and year last aforesaid, may fully appear. By means whereof, and by force of the Statute (c) in such case made and provided, an action hath accrued to the said plaintiff (d), assignee of the said E. F. so being sheriff of the said county of — as aforesaid, to demand and have of and from the said defendant the said sum of £—above demanded. Yet the said *defendant (although often requested so to do) hath not as yet paid the said sum of £—above demanded, or any part thereof, to the said E. F. before the said assignment, or to the said plaintiff, assignee as aforesaid, or either of them, since the said assignment, but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse to pay the same or any part thereof, to the said plaintiff, assignee as aforesaid. To the damage of the said plaintiff, as assignee as aforesaid, of £—and therefore he brings his suit, &c.

Pledges, &c.

[*451] * In the Common Pleas.

On a bail
bond in C.
P. against
the principal
or bail
(e).*Michaelmas Term, I Will. 4.*

— (to wit.) C. D. was summoned to answer A. B. assignee of E. F. esq. sheriff of the county of —, according to the form of the Statute in such case made and provided, of a plea, that he render to the said A. B. as assignee as aforesaid, the sum of £—of good and lawful money of Great Britain, which he owes to and unjustly detains from him; and thereupon the said A. B. by — his attorney, complains that whereas the said plaintiff heretofore, to wit, on, &c. (*teste of writ or day of issuing it*) sued and prosecuted out of the court of our lord the now king, before the Right honorable Sir — (f), knight, and his companions, then his majesty's justices of the Bench, at Westminster, in the county of Middlesex, a certain writ of our said lord the king, called a *capias ad respondendum*, against the said defendant, directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff that he should take the said defendant, if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before the justices of our said lord the king, at Westminster, on [—] to answer to the said plaintiff in a plea (g), [wherefore with force and arms the close of the said plaintiff, at — he broke, and other wrongs to him did, to the great damage *of the said plaintiff, and

(a) 4 Anne, c. 16.

(b) This proferit is unnecessary, 1 Wils. 121.

(c) This assignee is entitled to sue by the 4 Ann. c. 16, s. 20.

(d) This must be accurate. Where the declaration concluded, "whereby an action hath accrued to the plaintiff to demand and have of the principal," (instead of the bail) and stated non-payment by the principal, it was held bad on special demurrer, 1 Bos. & P. 58.

(e) See the notes to the precedent, ante, 445 to 450, which are here in general applicable. See a form which differs from this in 2 Rich. C. P. 248. 7 Went. 530, Index.—Morg. 500, and 1 Rich. C. P. 455.

(f) the Chief Justice.

(g) It would suffice here, instead of the words between the brackets, to say, "in a plea of trespass;" there is no occasion to set out or refer to the *clausum fregit*. 5 J. B. Moore, 538.—2 B. & B. 659. S. C.

against the peace of our said lord the king, and also that the said defendant might answer to the said plaintiff, according to the custom of his said majesty's court of the Bench, in a certain plea of trespass on the case upon promises, to the damage of the said plaintiff of —*l.*, and that the said sheriff should have there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff of, &c.—[*Proceed as in the precedent, ante, 447, to the end, except in the statement of the condition of the bail bond, (which is for appearance in C. P.) and in the breach thereof, and conclude as in debt in C. P. adding the profert at the end of the declaration.*]

ON BAIL BONDS.

XIV. ON REPLEVIN BONDS.

ON REPLEVIN BONDS.

Ellenborough.

— next after — (h), in
— Term, 1 Will. 4.

— (to wit.) (i) A. B. assignee of E. F. esq. sheriff of the county of —, according to the form of the Statute in *such case made and provided, complains of C. D. being, &c. of a plea that he render to the said A. B. as assignee as aforesaid, the sum of —*l.*, of lawful, &c. which he owes to (l) and unjustly detains from him, &c. For that whereas, heretofore, to wit, on, &c. (m) at, &c. (n) the said plaintiff (o) distrained

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By the assignee of a replevin bond where proceedings in replevin were removed by *re. fa. lo.* into K. B. and the plaintiff obtained judgment there (k).

(k) As to the title of the declaration, ante, 444, n. (m).

(i) The venue may be laid in any county, ante, 445, n. (p).

(4) See forms, 3 Ld. Raym. 143.—Morg. 500. 7 Wentw. Index, 586, 7.—1 Lutw. 685; by assignee of the mayor of Canterbury, 4 M. & S. 120. See form of declaration against sheriff, for the loss of a replevin bond, and law, 5 B. & C. 284, and a form, post, 750, for not taking a replevin bond. The replevin bond may be assigned under 11 Geo. 2. c. 19. s. 22, to the avowant only, or to the person making cognizance, or to both of them jointly. 1 B. & P. 381, n.—3 M. & S. 180. Consequently they may sue jointly upon it, *id. ibid.* A declaration by such assignees, stating that they both distrained the defendant's goods for rent due to one of them is good, without stating the other to be bailiff, 3 M. & S. 180. The decisions as to bail-bonds are in general applicable. The action may in all cases be brought in one of the courts at Westminster, 5 T. R. 195.—2 Sel. Pract. 267. But it must, when the proceedings in replevin have been removed, be brought in the court in which the *re. fa. lo.* is returnable, as on a bail-bond. 2 Sel. Pract. 267, ante 445. It should be in the name of the avowant, or person making cognizance, 1 B. & P. 378. Each surety is liable to the penalty of the bond, and costs of the action against himself, 1 Taunt. 218; and as to extent of liability of surety where she-

riffs only take one, see 1 J. B. Moore, 68. As to when discharged where avowant proceeds to judgment under writ of inquiry, in pursuance of 17 Car. 2. c. 7, s. 2, 4 J. B. Moore, 606. The court will not set aside the proceedings on a replevin bond, on the ground that the action is commenced before the condition has been broken, because it will be a good defense to the action, 5 Taunt. 776; but the court will relieve where execution has been issued on the judgment, and the sum levied and paid to avowant, before the action was brought on the bond, 4 J. B. Moore, 619. The sureties are liable only for the rent due at the time of the distress and costs, and they are entitled to relief when those are paid, 1 Yo. & Jerv.—295.—And see further as to the liability of sureties, and when discharged, Tidd, 9th ed. 1078, 295.—6 Taunt. 379.—2 Marsh. 392.—7 Price, 233. When discharged by reference to arbitration, see 1 Moore & P. 285. This action is not within the 8 & 9 W. 3. c. 11. s. 8.—2 M. & S. 155.—Interest is not allowed on affirmation of judgment in the action, 4 Taunt. 30.

(l) If the plaintiff declare in the *detinet* only, it will suffice, 4 M. & S. 120.

(m) This is generally the day when in fact the distress was made, and corresponding with the proceedings therein.

(n) This should be the parish or place where the distress was made.

(o) If a distress were made by the plaintiff, as bailiff of another person, it is usual

ON REPLEVIN BONDS.

The distress for rent.

Application to the sheriff to replevy.

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The replevin bond taken.

The condition of the replevin bond (u).

the goods and chattels (p) of one G. H. hereinafter mentioned, for a certain sum of money then due to the said plaintiff for rent (q). And the said goods and chattels being so distrained, the said G. H. afterwards, and within the space of five days then next ensuing, to wit, on, &c. at, &c. (venue) aforesaid, made his plaint to the said E. F. then being sheriff of the county of —, out of the county court of *the said sheriff, of the taking and unjustly detaining of the said goods and chattels of the said G. H. by the said plaintiff, and then and there prayed the said sheriff that the said goods and chattels might be forthwith replevied by the said sheriff, and delivered to the said G. H. And thereupon the said E. F. so being sheriff of the said county of —, according to the form of the Statute in such case made and provided (r), did take from the said G. H. and from the said defendant and one I. K. as two responsible sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid, (the value of the said goods and chattels having been on that occasion first ascertained by the oath of a credible witness duly sworn, according to the form of the Statute in such case made and provided (s). And the said G. H. and the said defendant, and one I. K. on the said, &c. at, &c. (venue) aforesaid, by their certain writing obligatory (t), sealed with their respective seals, and now shown to the court of our said lord the king, before the king himself, here, the date whereof is, to wit, the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said E. F. so being sheriff of the said county of —, in the said sum of —l., above demanded, to be paid to the said sheriff; with a condition thereunder written, that if the said G. H. did appear at the then next county court for the county of —, to be holden at, &c. in the said county and should then and there prosecute his action with effect (v) against the said plaintiff, for taking and unjustly detaining of certain goods and chattels in the said condition mentioned (x), and should make return thereof, if

to say, "*as bailiff of one —, and by his command distrained,*" &c., 5 T. R. 195, but it has been held sufficient to allege, that A. B. and C. D. distrained for rent due to A. B. without averring that C. D. acted as bailiff, 3 M. & S. 180.

(p) The goods ought not to be set forth, 3 M. & S. 180.

(q) If the distress was a *rent-charge or annuity*, then say, "*for a certain sum of money then due to the said plaintiff for the arrears of a certain rent-charge issuing out of and charged upon certain lands and premises, situate, &c. in and upon which the said distress was made, and to which said distress the said goods and chattels were liable.*" A replevin bond taken under a distress for a rent-charge is assignable, 2 Bing. 349.

(r) 11 Geo. 2. c. 19. s. 23.

(s) 11 Geo. 2. c. 19. s. 23.—This allegation seems unnecessary, and in many forms is not now inserted, see Morg. 500, and 7 Wentw. 1. k. The oath need not be in writing, and as to stamp, see 4 Bing. 193.

(t) The bond must be stated accurately, but after the nonsuit on account of a vari-

ance, when the cause has not been defended, the court will permit the record to be amended, and a new trial had, 3 Taunt. 81.

(u) This must be carefully examined with the original. A variance would be fatal, unless allowed to be amended under the 9 Geo. 4. c. 15.

(v) This means with success, 5 B. & C. 296. The condition of the bond is not satisfied by a prosecution of the suit in the county court: but the plaint, if removed by *re. fa. lo.* into a superior court, must be prosecuted there with effect, and a return made, if adjudged there, 1 B. & P. 410. The condition of the bond must be carefully set forth.

(x) See Morg. 501. It is not necessary, nor indeed prudent to set forth the goods distrained, 3 M. & S. 180. A variance would be fatal, 3 Taunt. 81.—If the goods are not stated in the condition, but in an inventory, say, "*the goods and chattels mentioned in the schedule or inventory therewith annexed.*" "For taking goods and chattels mentioned in the said condition," was held sufficient, though growing crops were men-

return should be adjudged by law (y), and should well and truly keep harmless and indemnified (z) the said sheriff of — his under-sheriff, deputy, *and bailiffs, touching and concerning the replevying and delivery of the said goods and chattels, and also from and against all actions, suits, damages, losses, costs, and charges, that might arise or happen unto him in consequence or by means thereof, then the said obligation was to be void and of none effect, otherwise to be and remain in full force. And thereupon the said sheriff afterwards, to wit, on, &c. last aforesaid, at, &c. (venue) aforesaid, at the prayer of the said G. H. replevied and made deliverance of the said goods and chattels to the said G. H. according to the duty of his said office * (a). And afterwards, to wit, at the then next county court for the said county of, &c. to wit, at the county court of the said sheriff, holden at the house known, &c. at, &c. (venue) on, &c. before — and — (b), then suitors of the said court, the said G. H. did appear, and then and there in the same court, without the writ of our said lord the king, levied his plaint against the said plaintiff, for the taking and unjustly detaining of the said goods and chattels of the said G. H. and then and there found pledges, as well for prosecuting his said plaint, as for returning the said goods and chattels, if return thereof should be adjudged by law, to wit, the said defendant, and I. K. (c). Which said plaint afterwards, to wit, on, &c. (day of issuing re. fa. lo. or teste) was duly removed, at the instance of the said plaintiff, from and out of the county court of the said sheriff (d) of — into the court of our said lord the king, before the king himself, to wit, at Westminster, by virtue of his said Majesty's writ of *recordari facias loquelam*, before then duly sued and prosecuted out of the court of our said lord the king, of his Chancery, at Westminster *aforesaid, returnable before, &c. on, &c. (as in the writ of re. fa. lo.) And thereupon the said G. H. afterwards, to wit, in the — Term, in the — year of the reign of our said lord the king, in the court of our said lord the king, before the king himself, by — his attorney, declared against the said plaintiff, in the said plea of taking and unjustly detaining his said goods and chattels, and by the said declaration, he the said G. H. by the said — his attorney, complained that the said plaintiff, on, &c. aforesaid, at, &c. (venue) aforesaid, in a certain street or place there, called — took the goods and chattels of the said G. H. in the said declaration more fully and particularly described, and them unjustly detained, against sureties and pledges, &c. To the damage of the said G. H. of £— and therefore he brought his suit, &c.—[According to the note infra, the declaration may proceed to state the judgment, as post, 461, omitting the proceedings subsequent to the avowry, and for brevity the following statement between brackets,

ON REPLEVIN BONDS.

Replevin granted.

Plaint in county court.

Removal by re. fa. lo. into K. B.

[*460] Declaration in K. B.

Avowry thereto (e).

tioned in the condition,—1 Bing. 6.—7 J. be fatal.

B. Moore, 231, S. C.

(y) 7 J. B. Moore, 231, S. C.

(z) As to this part of the condition, see 1 Lutw. 687. The bond may be for indemnifying the plaintiff from all charges and damages by reason of the replevin. 2 Bing. 349.

(a) See Forms, Morg. 501, 502.—3 M. & S. 180.

(b) As to a variance in names, see 2 B. & Cres. 2.—3 D. & R. 226, S. C. it would

(c) These pledges are taken under the Statute Westm. 2 13 Ed. 1. c. 2—See Gilb. 98, and are not the pledges under the 11 Geo. 2. c. 19. s. 23.

(d) Though the party was not sheriff at the time of the removal, this would be no variance. 5 B. & Cres. 284.—7 D. & R. 709, S. C.

(e) It is usual to state the avowry or cognizance, in order to show that the plaintiff is entitled to sue under the 11 Geo. 2. c. 19.

ON REPLEVIN
BONDS.

[*461]

Judgment
for defen-
dant in re-
plevin *pro*
retorno ha-
bendo.

G. H. did
not prose-
cute with
effect, or
return the
goods.

of such proceedings, had better be omitted.—[And afterwards, to wit, in that same — Term, in the — year of the reign, &c. in the said court of our said lord the king, before the king himself, the said court then and still being holden at Westminster, in the county of Middlesex, the said plaintiff, by — his attorney, came and defended the wrong and injury, when, &c. and well avowed the taking of the said goods and chattels in the said declaration mentioned, in a certain messuage or dwelling-house, with the appurtenances, situate and being in, &c. in the said street or place there, called, &c. and justly, &c. because he said that one L. M. for a long space of time, to wit, for the space of — next before, and ending on — and from thence until and at the said time when, &c. held and enjoyed the said messuage or dwelling-house, in which, &c. with the appurtenances, as tenant thereof to the said plaintiff, by virtue of a certain demise thereof the said L. M. theretofore made, at and under the yearly rent of £— payable on, &c. in every year, and because £— part of the said sum of £— of the rent aforesaid, for the space of — ending on, &c. as aforesaid, and from thence until and at the said time when, &c. was due and in arrear from the said L. M. to the said plaintiff, the said plaintiff well avowed the taking of the said goods *and chattels in the said declaration mentioned, in the said messuage or dwelling-house, and justly, &c. as for and in the name of a distress, for the said sum of £— so due and in arrear as aforesaid, and which said sum of £— so due and in arrear to the said plaintiff, still remains wholly due and unpaid.] And such proceedings were thereupon had in the said plea in the said court of our said lord the king, before the king himself, at Westminster aforesaid (f), that afterwards, to wit, in — Term, in the — year of the reign, &c. in the said court of our said lord the king, before the king himself, it was considered and adjudged in and by the [same court (g), that (*here set out the judgment, which may be thus:*) the said G. H. should take nothing by his said plaint (h), but that he and his pledges to prosecute should be in mercy, &c. and that the said plaintiff should go thereof without day, and that the said plaintiff should have a return of the said goods and chattels;] as by the record (i) and proceedings thereof now remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears. And the said plaintiff in fact further saith, that the said G. H. did not prosecute his said action with effect against the said plaintiff for the taking and alleged unjustly detaining the said goods and chattels, or make a return of

s. 23; see 1 B. & P. 378; 5 T. R. 196; but this does not seem necessary, (1) it being sufficiently disclosed in the commencement of the declaration, that the distress was for rent, and that the condition of the bond was to proceed in an action of replevin against the plaintiff with success, or to return the goods to him; see 5 T. R. 195, 197, and 7 Wentw. 21. The declaration on the replevin bond, after stating the declaration in replevin, as above, may proceed immediately to the state of the judgment, omitting the avowry or cognizance.

(f) As to this allegation of *taliter proces-*

sum est, see 1 Saund. 92, n. 2; Carth. 53.

(g) Examine carefully with the judgment.

(h) Quære, if writ or plaint, see Com. Dig. Pleader, 3 K. 8.

(i) If the proceedings have been removed by writ of error, say, "*as by the record and proceedings thereof, which have since been removed from the said court, into the court of our said lord the king, before the king himself, for certain alleged causes of error therein, and which are now remaining in the said last-mentioned court, in all things affirmed more fully appears.*"

the said goods and chattels, or any part thereof, according to the form and effect of the said condition of the said writing obligatory (*k*), but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do. Whereby the said writing obligatory became forfeited to the said E. F. so being sheriff of the said county of — as aforesaid. And the same being so forfeited, the said sheriff afterwards, to wit, on, &c. (*date of assignment*) at, &c. (*venue*) aforesaid, at the request and costs of the said plaintiff, by an indorsement, &c.—[*The statement of the assignment and conclusion of the declaration, are precisely the same as in the precedent, ante, 449, from the asterisk to the end.*]

ON REPLEVIN BONDS.

Whereby bond forfeited to sheriff who assigns to plaintiff (l).
[*462]

[*When the declaration is for not prosecuting the action of replevin in the county court, proceed as in the last precedent, to the asterisk, 459, and then as follows:*]—And although afterwards, to wit, on, &c. the county court of the said sheriff of the said county of —, was duly holden at, &c. aforesaid, before — and —, then suitors of the said court, the same being the next county court of the said county of —, after the making of the said writing obligatory as aforesaid, to wit, at, &c. (*venue*) aforesaid. Yet the said G. H. did not appear (*n*) at the said county court, so holden next after the making of the said writing obligatory as aforesaid, and then and there prosecute his said action with effect against the said plaintiff, according to the form and effect of the said condition, but wholly omitted and neglected so to do. Whereby the said writing obligatory became forfeited, &c.—[*State the forfeiture and assignment of the bond to the plaintiff, and proceed to the end, as in the last precedent.*]

The like when the bond was forfeited, by the replevin suit not being prosecuted in the county court (m).

[*Same as ante, 459, as far as the asterisk, and then proceed as follows:*]—And the said plaintiff further saith, that afterwards, to wit, at the next county court for the said county of —, to wit, at the court of the said sheriff, held at the *[booth hall] in —, [being the common shire hall for the said county of —,] on, &c. before — and —, then suitors of the said court, the said E. F. appeared in his proper person, and then and there in the same court, without the writ of our said lord the king, levied his plaint against the said plaintiff, for the taking and unjustly detaining the said cattle, goods, and chattels of the said E. F. and then

By the assignee of a replevin bond, [*463] where the party replevying levied his plaint, but was afterwards non prosced for not declaring in the county court (o).

(k) The declaration is not double, because it alleges, that the defendant did not prosecute his suit with effect, and hath not made a return, 3 M. & S. 180; Morg. 503, 4. The declaration, however, need not negative both parts of the condition, 4 J. B. Moore, 606.—2 B. & B. 107, S. C. The breach need not be formally assigned, and the plaintiff will be entitled to recover if a sufficient breach otherwise appears. 5 Barn. & Cres. 284. When the condition is to prosecute the suit with effect and without delay, a breach in those words would suffice, and proof of two years' delay would suffice without proving a judgment of non pros. 4 Bing. 586.

The issuing of a writ of *retorno habendo* is sometimes stated. 7 Wentw. 1, but is

unnecessary (l). Willes, 6; 2 Sell. Pract. 267. The sureties are not discharged by a writ of inquiry, on the 17 Car. 2. c. 19. s. 23. and a judgment thereon, id. 5 B. & Cres. 284.

(l) An assignment by a clerk at the sheriff's office on behalf of the sheriff is sufficient, 4 Camp. 36; 2 Saund. 61.—Ante, 449.

(m) See 5 T. R. 195. (4 Bingh. 586.) As to the mode of showing a determination of the suit in the county court, where the plaintiff in replevin appeared, but was afterwards nonsuited for not declaring, see 12 East, 585, and post.

(n) See note (k), ante, 461.

(o) This was the precedent held sufficient in 3 M. & S. 180.

ON REPLE-
VIN
BONDS.

and there found pledges, as well for prosecuting his said plaintiff as for returning the said cattle, goods, and chattels, if return thereof should be adjudged by law, to wit, the said (*names of pledges*). And the said plaintiff also appeared in the said court to answer the said E. F. in the plea of his said plaintiff, and such proceedings were thereupon had in the said plea, that afterwards, to wit, at the [fifth] county court of O. L. esq. then sheriff of the said county of —, holden at the booth hall in —, [being the common shire hall of and for the said county of —], on, &c. aforesaid, and in the year of our Lord —, before — and —, gentlemen, suitors of the said court, the said E. F. did not prosecute his said action with effect, according to the condition of the said writing obligatory; and thereupon it was then and there considered in and by the said last-mentioned court, that the said E. F. should take nothing by his said plaintiff but that he and his pledges to prosecute should be in mercy, &c. and that the said plaintiff should have return of the said cattle, goods, and chattels, as by the remembrance and proceeding thereof still remaining in the said court more fully appears, which said judgment still remains in the said county court in full force and effect, in no wise reversed, satisfied, or made void (*p*); and the said plaintiff further saith, that the said E. F. hath not yet made a return of the said cattle, goods, and chattels, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, but hath wholly neglected and refused so to do, and herein failed and made default, whereby the writing became forfeited to the said O. L. (*name of sheriff*) so being sheriff of the said county of — as aforesaid, and the same being so, &c.—[*State assignment to plaintiff, and conclude as ante, 461.*]

[*464]

ON BONDS
RELATING
TO THE
CHARAC-
TER IN
WHICH
PLAINTIFF
SUES, OR
DEFEND-
ANT IS
SUED.

*XV. ON BONDS RELATING TO THE CHARACTER IN WHICH PLAINTIFF SUES,
OR THE DEFENDANT IS SUED.

The following forms will suffice to show the mode in which declarations on bonds, by and against persons suing and being sued in a particular character, are to be framed. The forms in assumpsit, by and against particular persons, ante, 91 to 115, may readily be applied to declarations on bonds.

By baron
and feme,
on bond
given to
feme be-
fore cover-
ture in K.
B. (g).

—, (to wit.) A. B. and E. F. his wife, complain of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that he render to them the sum of —l which he owes to and unjustly detains from them. For that whereas the said defendant heretofore, and whilst the said E. F. was sole and unmarried, to wit, on, &c. (*date of bond*) at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and now shown to the court of our said

(*p*) The declaration need not negative both parts of the condition, if the plaintiff was non-prossed; the breach may be, that defendant did not prosecute his suit with

effect, without stating he hath not made a return, &c. ante, 461, note (*k*).

(*g*) See a form, 2 Rich. C. P. 292.—1 Raym. 285.—1 Ventr. 119.

lord the king, before the king himself here, the date whereof is a certain day and year therein named, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound to the said E. F. in the said sum of £—above demanded, to be paid to the said E. F. Yet the said defendant (although often requested so to do) hath not as yet paid the said sum of £—above demanded, or any part thereof, to the said E. F. whilst she was sole and unmarried, or to the said plaintiffs, or either of them since their intermarriage; but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse to pay the same, or any part thereof, to the said plaintiffs; to the damage of the said plaintiffs of £10, and therefore they bring their suit, &c.

ON BONDS
RELATING
TO THE
CHARAC-
TER IN
WHICH
PLAINTIFF
SUES, OR
DEFEND-
ANT IS
SUED.

Pledges, &c.

[*Commencement as usual as in other cases.*]—For that whereas the said defendant heretofore, and in the life-time of one E. F. since deceased, to wit, on, &c. (*date of bond*) at, &c. (*venue*) by his certain writing obligatory, sealed with *his seal, and now shown to the court of our said lord the king, before the king himself here, the date whereof is a certain day and year therein named, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound to the said plaintiff, and to the said E. F. in the said sum of £—above demanded, to be paid to the said plaintiff and E. F. Yet the said defendant, (although often requested so to do) hath not as yet paid the said sum of £—above demanded, or any part thereof, to the said plaintiff and E. F. or either of them, in the life-time of the said E. F. or to the said plaintiff since the death of the said E. F. But he to do this hath hitherto wholly neglected and refused, and still neglects and refuses to pay the same, or any part thereof, to the said plaintiff; to the damage of the said plaintiff of £10; and therefore he brings his suit, &c.

By a sur-
viving
obligee
against
obligor, in
K. B. (r).
[*465]

Pledges, &c.

—, (to wit.) A. and B. assignees of the estate and effects of E. F. a bankrupt, according to the force, form, and effect of the Statute concerning bankrupts, complain of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that he render to the said A. and B. as assignees as aforesaid, the sum of £— which he owes to and unjustly detains from them as assignees as aforesaid. For that whereas the said defendant, heretofore, and before the said E. F. became bankrupt, to wit, on, &c. (*date of bond*) at, &c. (*venue*) by his certain writing obligatory sealed with the seal of the said defendant, and now shown to the court of our said lord the king, before the king himself here, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound to the said E. F. in the said sum of £—above demanded, to be paid to the said E. F. Yet the said defendant (although often requested so to do) hath not as yet paid the said sum of £—above demanded, or any part thereof, to the said E. F. before he became bankrupt, or to the said plaintiffs, assignees as aforesaid, since the

By the as-
signees
of a bank-
rupt's
obligee
against
obligor.

(r) 2 Rich. C. P. 452.—Morg. 495. The plaintiff must declare as surviving obligee, see 4 B. & Ald. 374. ante, 91.

ON BONDS
RELATING
TO THE
CHARAC-
TER IN
WHICH
PLAINTIFF
SUES, OR
DEFEND-
ANT IS
SUED.

bankruptcy of the said E. F. But to pay the same, or any part thereof, to the said E. F. before he became bankrupt, or to the said plaintiffs, assignees as aforesaid, since the bankruptcy of the said E. F. he the said defendant hath wholly neglected and refused, and still doth neglect and refuse to pay the same to the said plaintiffs, assignees as aforesaid; to the damage of the said plaintiffs, as assignees as aforesaid, of £10, and therefore they bring their suit, &c.

Pledges, &c.

Executor
of obligee
against
obligor
(s)

[*466]

— (to wit.) A. B. executor of the last will and testament of E. F. deceased, complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that he render to him the sum of £— of lawful money of Great Britain, *which he the said C. D. unjustly detains (t) from him. For that whereas the said defendant, heretofore, and in the life-time of the said E. F. since deceased, to wit, on, &c. (*date of bond*) at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and now shown to the court of our said lord the king, before the king himself here, the date whereof is a certain day and year therein mentioned, to wit, the same day and year aforesaid, acknowledged himself to be held and firmly bound to the said E. F. in the said sum of £—above demanded to be paid to the said E. F. or his certain attorney, executors, administrators, or assigns. Yet the said defendant (although often requested so to do) hath not as yet paid the said sum of £—above demanded, or any part thereof, to the said E. F. in his life-time, or to the said plaintiff, executor as aforesaid, since the death of the said E. F., but to pay the same or any part thereof to the said E. F. in his life-time, or to the said plaintiff, executor as aforesaid, since the death of the said E. F. the said defendant hath hitherto wholly refused, and still doth refuse to pay the same, or any part thereof, to the said plaintiff, executor as aforesaid; to the damage of the said plaintiff, as executor as aforesaid, of —l. and therefore he brings his suit, &c. And the said plaintiff brings into court here the letters testamentary of the said E. F. deceased, whereby it fully appears to the said court here, that the said plaintiff is executor of the last will and testament of the said E. F. deceased, and hath the execution thereof, &c.

Breach.

Profert.

Pledges, &c.

By an ad-
ministra-
tor in K.
B. (u).

— (to wit.) A. B. administrator of all and singular the goods, chattels, and credits, which were of E. F. deceased, at the time of his death, who died intestate, complains of C. D. being, &c. of a plea that he render to the said A. B. the sum of —l. which he unjustly detains from him. For that whereas, &c.—[*State the making of the bond, &c. as in last precedent, and conclude as follows:*—Nevertheless the said defendant (although often requested so to do,) hath not as yet paid the said sum of —l. above demanded, or any part thereof, to the said E. F. in his life-time, or to the said plaintiff since the decease of the said E. F. (to which said *plaintiff after the death of the said E. F. to wit, on, &c. (*date of*

Breach.

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(s) See forms, 2 Rich. C. P. 448, 294, 453. Lil. Ent. 144. See a form against executors in C. P. 2 Saund. 216; and by executor of a surviving executor, Co. Ent. 1.

(t) As to the *debit et detinet*, see ante, 384, n. (3 Dowl. 211.)

(u) See form, Lil. Ent. 167.—Plead. A. 374.

grant of administration) at, &c. (*venue*) aforesaid, administration of all and singular the goods, chattels, and credits which were of the said E. F. deceased, at the time of his death, who died intestate, by — by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan, in due form of law was granted) but he so to do hath hitherto wholly refused, and still refuses to pay the same or any part thereof, to the said plaintiff, administrator as aforesaid; to the damage of the said plaintiff as administrator as aforesaid, of —*l.* and therefore he brings his suit, &c. And the said plaintiff brings into court here the letters of administration of the said Archbishop (*or*, “bishop,” &c.) which give sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above mentioned, &c.

ON BONDS
RELATING
TO THE
CHARAC-
TER IN
WHICH
PLAINTIFF
SUES, OR
DEPEND-
ANT IS
SUED.

Grant of
letters of
adminis-
tration
(*w*).
Profert.

Pledges, &c.

— (to wit.) A. B. complains of C. D. and E. his wife, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that they render to him the sum of —*l.* of good and lawful money of Great Britain, which they owe to and unjustly detain from him. For that whereas the said E. whilst she was sole and unmarried, to wit, on, &c. (*date of bond*) at, &c. (*venue*) by her certain writing obligatory, sealed with her seal, and now shown to the court of our said lord the king, before the king himself here, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged herself to be held and firmly bound to the said plaintiff in the said sum of —*l.* above demanded, to be paid to the said plaintiff. Yet the said E. whilst she was sole and unmarried, and the said C. D. and E. his wife, since their intermarriage (although often requested so to do) have not, nor hath either of them, as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said plaintiff, but they to pay the same or any part thereof, to the said plaintiff have hitherto wholly neglected and refused and still do neglect and refuse so to do; to the damage of the said plaintiff of £10, and therefore he brings his suit, &c.

Against
baron and
feme on a
bond given
by
feme be-
fore cov-
erture.

Pledges, &c.

*[*The commencement in K. B. by original, is as ante, 9; by bill, as ante, 13; in the common pleas, as ante, 18; and in the Exchequer, as ante, 20; describing the defendant as “executor of the last will and testament of E. F. deceased,” or as “administrator of all and singular the goods, chattels and credits of E. F. deceased.”*]—For that whereas the said E. F. in his life time, to wit, on, &c. (*date of bond*) at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and now shown to the court of our said lord the king, before the king himself here, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged himself to be held and firmly bound to the

[*468]
Against an
executor
or admin-
istrator
(*z*).

(*w*) As to the statement of the grant of letters of administration, see ante, 35, 110. (4 Dowl. 169.) C. P. 2 Saund. 216.—2 Rich. C. P. 229, 245.—1 Rich. C. P. 454.—Plead. A. 366, 369, 374.

(*z*) See the form against an executor in

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said plaintiff, in the said sum of —*l.* above demanded, to be paid to the said plaintiff. Yet the said E. F. in his life-time did not pay, nor hath the said defendant, executor (or “administrator”) as aforesaid, since the death of the said E. F. as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said plaintiff (although often requested so to do), but the said E. F. in his life-time so to do wholly refused, and the said defendant, executrix as aforesaid, ever since the death of the said E. F. hitherto hath wholly refused, and still doth refuse to pay the same, or any part thereof, to the said plaintiff, to wit, at, &c. (*venue*) aforesaid, to the damage, &c.—[*Conclusion as usual.*]

Against
an heir on
the bond
of his an-
cestor (y).

[*469]

— (z). A. B. complains of C. D. heir of E. F. (a) deceased, being in the custody of the Marshal of the Marshalsea of our lord the now king, before the king himself, of a plea, that he render to him the said plaintiff the sum of —*l.* of good and lawful money of Great Britain, which he owes to (b) and unjustly detains from him. For that whereas the said E. F. in his life-time, whose heir the said defendant is, to wit, on, &c. at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and now shown, &c. [*state the proferit or excuse, as ante, 439*] acknowledged himself to be held and firmly bound to the said plaintiff in the said sum of —*l.* above demanded, to be paid to the said plaintiff whenever he the said E. F. should be thereunto afterwards requested, for which payment to be well and truly made, he the said E. F. bound himself *and his heirs* (c) firmly by the said writing obligatory. Nevertheless, the said E. F. *in his life-time, and the said defendant since the death of the said E. F. (although often requested so to do) have not, nor hath either of them, as yet paid the said sum of —*l.* or any part thereof, to the said plaintiff, but the said E. F. in his life-time, and the said defendant since his decease, have hitherto wholly refused, and the said defendant still wholly refuses so to do ; to the damage, &c.

Against
an

— A. B. complains of C. D. and E. F. which said C. D. is heir

(y) See forms, 7 Wentw. Index.—Plead. A. 363. As to the liability of an heir, and the declaration in general against him, see the valuable note, 2 Saund. 7, n. 4.—Com. Dig. Pleader, 2 E. 4.—Vin. Ab. Heir, K. 2.—Bac. Ab. Heir and Ancestor.—Plowd. 439, 440. He is not chargeable unless he be expressly named in the deed, Com. Dig. Pleader, 2 E. 2.—Vin. Ab. Heir, K. 2, or have legal assets by descent from the obligor. A reversion is legal assets, but an equity of redemption is not. *Id. ibid.*—Com. Dig. tit. Assets, A. and B.—Barnes, 164. Cro. Car. 151.—Carth. 126.—3 B. & P. 643. In the latter case the obligee must proceed in equity. 2 Saund. 7, n. 4.

(z) As to the venue, see Vin. Ab. Heir, K. 2.—Hob. 37, it appears to be transitory.

(a) The defendant must be described as heir, and in the old precedents he is so described in the body of the declaration, as well as in the commencement, see Rast. Ent. 172. In general it need not be shown how he became heir, whether as son, grandson, &c. that matter not lying in the plain-

tiff's knowledge, 2 Saund. 7, n. 4.—Com. Dig. Pleader, 2 E. 2.—1 Salk. 355.—Vin. Ab. tit. Heir, K. 2: (Vide Spotswood v. Price, 3 Hen. & Munf. 123.) but if the action be against the heir of an heir of the obligor, the declaration must state that fact specially ; for if the declaration were against him as heir generally to the obligor, and the defendant should plead *riens per descent*, the plaintiff would fail. Cro. Car. 151.—2 Saund. 7, n. 4.—Vin. Ab. Heir, K. 2, pl. 16. It need not be averred that the defendant had assets by descent. Dyer, 344 b.

(b) The declaration should be in the *debit* and *detinet*, Com. Dig. Pleader, 2 E. 2.—Vin. Ab. Heir, K. 2 ; but the omission of the *debit* will be aided by verdict. *Id. ibid.*—3 East, 2.—2 Saund. 7, n. 4.

(c) It must be shown in the declaration that the heir was expressly bound, for otherwise he is not chargeable. Com. Dig. Pleader, 2 E. 2.—Vin. Ab. Heir, K. 2.—2 Saund. 134, n. 1. 136, &c.

of G. H. deceased, and which said E. F. is devisee of the said G. H. of divers lands and tenements of the said G. H. deceased, by his last will and testament being in the custody, &c. of a plea, that they render to him the said A. B. £— of lawful, &c. which they owe to and unjustly detain from him. For that whereas the said G. H. of whom the said C. D. is heir, and the said E. F. is devisee as aforesaid, in his life-time, to wit, on, &c. at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and to the court, &c. [*profert as ante*, 464, 439] acknowledged himself to be held and firmly bound unto the said plaintiff in the said sum of £— above demanded, to be paid to the said plaintiff, when he the said G. H. should be thereunto requested, and for which payment well and truly to be made, the said G. H. did, by the said writing obligatory, bind himself and his heirs to the said plaintiff. Nevertheless, the said G. H. in his life-time, and the said defendant his heir, and the said E. F. devisee as aforesaid (although often requested so to do) have not, nor hath either of them, as yet paid the said sum of £— above demanded, or any part thereof, to the said plaintiff, but to pay the same to the *said plaintiff have wholly neglected and refused, and the said C. D. and E. F. still neglect and refuse to pay the same, or any part thereof, to the said plaintiff; to the damage, &c.

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heir and
the devisee of the obligor
(d).

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— (to wit), (*venue*). A. B. the plaintiff in this suit, and treasurer of a certain friendly society, called and known by the name of ["the Loyal Britons, in the county of — held at —, in the town of D—, in the county aforesaid,"] complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king *himself, of a plea that he render to the said plaintiff as such treasurer as aforesaid, the sum of £—, which he owes to and unjustly detains from him. For that whereas the said society was and is a society established before the passing of a certain act of parliament, made in the 33d year of the reign of his late Majesty King George the Third, intituled, "An Act for the Encouragement and Relief of Friendly Societies." And

At the suit
of the
treasurer
of a friendly
society
established
before the
10
Geo. 4. c.
56, and
not con-
formed ac-
cording to
that act
(e).

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(d) See the precedents, Clift. Ent. 243, pl. 19.—Lil. Ent. 145.—Id. 529, 530—2 Rich. C. P. 241, 297, 448—5 Wentw. 374, Index, vol. vii. 539—2 Mall. Ent. 186, 7. In some of the precedents the date and substance of the will, and that the obligor died seized, are stated, see 2 Mall. Ent. 186, 187—2 Rich. C. P. 241—Lil. Ent. 145, 529, 530; but in others these facts are not stated, see Clift. Ent. 243—5 Wentw. 374. see vol. xviii. MSS. 35, where the declaration was holden good on demurrer, and this, according to the principle in 1 Salk. 355—2 Saund. 7, n. 4, seems sufficient. The liability of the devisee depends on stat. 3 W. & M. c. 14. See the constructions on this statute, 1 Chit. Col. Stat. 1128, n.—2 Saund. 7, n. 4.—Bac. Ab. Heir.—Vin. Ab. Heir, Z. d. The devisee must be sued jointly with the heir in equity, as well as at law. Id. ibid. As to suing a devisee where no heir can be discovered, see 7 East, 128, 133.

(e) The statute now in force relative to these societies is the 10 Geo. 4. c. 56, repealing all the prior acts. The 40th sec-

tion of that act requires all societies previously enrolled to conform to that act within three years after the passing of it, viz. the 19th of June, 1829, otherwise their privileges are to cease. The act provides, that societies so previously enrolled shall have the privileges given them by the prior act during the above space of three years, or until they sooner conform themselves to the new act. The 21st section allows the action to be brought in the name of the treasurer or trustee.

When the bond was given to the plaintiff himself, whether as treasurer or otherwise, he may sue on it, as on a common money bond, as at common law; and the action is sustainable though the rules of the society have not been confirmed at the quarter sessions pursuant to the statute. 2 Chit. R. 322—5 B. & A. 769.—1 D. & R. 393, S. C. For the law and decisions on the subject, see Burn, J. tit. "Friendly Societies." See form in assumpsit on a note, ante, 138.

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whereas after the passing of the said act, and before the feast day of St. Michael, in the year of our Lord 1794, all the rules, orders, and regulations, under which the society was thereafter to be governed, had been and were duly and according to the form of the Statute, exhibited, confirmed, and filed at the general quarter sessions of the peace holden at — in the county of — to wit, on the — day of —, in the year of our Lord 1794; and whereas, after the exhibiting, confirming, and filing of the said rules, orders, and regulations as aforesaid, the said defendant heretofore, to wit, on the — day of — in the year of our Lord — at, &c. (*venue*) by his certain writing obligatory, sealed with his seal, and now shown to the court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, acknowledged himself to be held and firmly bound to one E. F. and to one G. H. (the then stewards of the said society) (*f*), as such stewards (*g*), in the said sum of —*l.* above demanded; yet the said defendant (although often requested so to do) hath not as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said E. F. and G. H. or either of them, or to the said plaintiff, so now being such treasurer as aforesaid, or to any other steward or treasurer of the said society, but to pay the same, or any part thereof, he the said defendant hath hitherto wholly refused, and still refuses so to do; to the damage of the said plaintiff, as such treasurer as aforesaid, of —*l.* and therefore he brings his suit, &c.

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*V. ON RECORDS.

ON RECOGNIZANCES
OF BAIL.

I. ON RECOGNIZANCES OF BAIL.

On a recognizance of bail, by bill in K. B. the original action having been in assumpsit. (h).

[*Commencement in debt, ante, 384, n.*]—For that whereas the said defendant, heretofore, to wit, in — Term, in the — year of the reign of our lord the now king, came into the court of our said lord the king, before the king himself here, at Westminster, in the county of Middlesex (i)

(f) Though these words are not inserted in the bond, it would be no variance, 1 B. & A. 57.

(g) See 1 Chit. Col. Stat. 395, n.

(h) As to this form, 2 Salk. 564.—2 Ld. Raym. 966.—5 East, 461. It will apply, whether or not the recognizance was taken before the court, or a judge at chambers. See a form in *scire facias*, Tidd's Forms, 6th edit. 502, 510.—2 Mod. Ent. 243.—7 Wentw. 54 to 88.—Id. Index, 549.—Morg. Prec. 537.—See a form on recognizance taken before a commissioner at Durham, 2 J. B. Moore, 66. 8 Taunt. 171, S. C. The conusee of the recognizance may have an action of debt or a *scire facias*; and he may have an action of debt upon the judgment obtained upon the recognizance, 2 Leon. 14; and although he has before obtained judgment, and has had execution awarded, he may again proceed upon the instrument

itself, for both the recognizance and judgment are matters of record and of equal degree, and one cannot be determined by the other, Cro. Eliz. 608, 817, *accord.*—1 Rol. Ab. 601, lib. 10 to 20, *contra*. If the tenor only of a recognizance taken in Chancery be removed into another court, the conusee must bring an action of debt, and cannot have a *scire facias*. A *scire facias* cannot be awarded unless the Court is in possession of the record itself. If the recognizance has been entered into in pursuance of an order of the Court of Chancery, that court will compel the conusee to sue by a *scire facias* in Chancery, 1 Vern. 313. If the bail be bound jointly and severally, the action may be brought against one of them only, Cro. Jac. 45.

(i) The venue is local, as in actions on other records, Hob. 106.—Tidd, 9th ed. 427. But there is a difference in effect be-

in his proper person, and then and there became pledge and bail for one E. F. that if it should happen that the said E. F. should be convicted at the suit of the said plaintiff (*k*), in a certain plea of trespass on the case upon promises, to the damage of the said plaintiff of —*l*. [or, *if in debt*, “in a certain plea of debt for —*l*,”] then depending in the said court by and at the suit of the said plaintiff against the said E. F. then the said defendant consented and agreed that all such damages [or, *if in debt*, “that as well the said debt, as all such damages,”] as should be adjudged unto the said plaintiff in that behalf, should be made of his lands and chattels, and levied to the use of the said plaintiff, if it should happen that the said E. F. should not pay unto the said plaintiff those damages [or, *if in debt*, “the said debt and damages,”] or render himself on that occasion to the prison of the Marshalsea of our lord the king, before the king himself (*l*); as *by the record of the said recognizance, still remaining [473] in the said court of our said lord the king, before the king himself, here, to wit, at Westminster aforesaid, more fully appears. And although the said plaintiff afterwards, that is to say, in — Term, in the — year of the reign aforesaid, in the said court of our said lord the king before the king himself, by bill, without the writ of our said lord the king, and by the consideration and judgment of the said court, recovered (*m*) in the said plea against the said E. F. —*l*. for his damages which he had sustained, as well as on occasion of not performing certain promises and undertakings (*n*), then lately made by the said E. F. to the said plaintiff, [or, *if in debt*, “the said debt, and also —*l*. for his damages which he had sustained, as well by means of the detaining of the said debt,”] as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted; as by the record and proceedings thereof, still remaining in the said court of our said lord the king, before the king himself here, to wit, at Westminster aforesaid, more fully appears (*o*).*

ON RECOGNIZANCES OF BAIL.

Judgment recovered against the principal.

tween a recognizance taken in court, and one taken before a judge at chambers, for a *scire facias* in the former case must be in the county in which the court sits, in the latter it may be either in that county, or in the county in which it is taken, Hob. 195. —2 W. Bla. 768. In an action on a recognizance of bail, taken at Durham, before a commissioner there, the venue was laid in Middlesex, and it was held properly so, because the recognizance was filed, and must be ultimately returned there, 2 J. B. Moore, 66—8 Taunt. 171, S. C.

(*k*) It should be stated at whose suit the defendant became bail, and for what sum, &c. 1 Wils. 284.—Willes, 19, n. a. Com. Dig. Pleader, 2 W. 10.—As to variance, see 11 East, 516.

(*l*) The description of the recognizance is to be taken from the entry of the recognizance by *bill*, with which it should precisely correspond. See Tidd's Prac. Forms, 107, 6th edit. Though the recognizance be taken before a judge at chambers, it is the practice to enter it as if it were taken in court, 4 B. & C. 467. Where the condition is not incorporated in the recognizance, it is not necessary to set it out in

the declaration or *scire facias*, Barnes, 93, 339. Willes, 18.—It must be stated accurately before whom and where the recognizance was taken. Where the recognizance in K. B. was stated to have been taken before a judge of chambers, as appeared by the record thereof, when on production it appeared was taken in court, the variance was held fatal, though in fact the entry in the filazer's book stated it to have been taken before a judge, 4 B. & C. 403.—6 D. & R. 483, S. C. So where a recognizance in C. P. was alleged to have been taken in court, and it appeared to have been taken before a judge at chambers, the variance was held fatal, on the plea of *nil tial record*, 6 Mod. 42.—Salk. 564, 659, S. C.

(*m*) As to variance in statement of the judgment, see 1 Taunt. 221; post, 483. The declaration need not show how judgment was obtained, it is sufficient to aver generally *taliter processum fuit*, that the plaintiff recovered, Cro. Jac. 46.

(*n*) Or if the judgment was on one count only, say, “*promise and undertaking*,” see 5 B. & C. 339.

(*o*) If the condition of the recognizance be, that the principal appear within eight

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Yet the said E. F. hath not paid to the said plaintiff the said damages, [or, *if in debt*, "debt and damages,"] or any part thereof, nor rendered himself on that occasion to the prison of the marshal of the Marshalsea of our said lord the king, before the king himself (*p*), according *to the form and effect of the said recognizance, and as well the said recognizance as the said judgment still remain in full force and effect, in no wise satisfied, vacated, or discharged. And the said plaintiff hath not as yet obtained any execution of the said judgment, whereby and according to the form and effect of the said recognizance, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of —*l.* in form aforesaid recovered [*if by original*, say "acknowledged,"] and above demanded; yet, &c.—[*Conclusion in debt, as ante*, 387.]

The like where the action against the principal was by original (*q*).

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For that whereas the said defendant, heretofore, (that is to say in — Term, in the — year of the reign of our lord the now king, came personally into the court of our said lord the king, before the king himself, at Westminster, in the county of Middlesex, and then and there in the said court, acknowledged himself to owe to the said plaintiff, the *said sum of —*l.* above demanded, and then and there, for himself and his heirs, did consent and grant that the said sum of —*l.* should be made of his lands and chattels, and levied to the use and behoof of the said plaintiff on this condition, that if judgment should happen to be given in the said court for the said plaintiff, against E. F. in a certain plea of trespass on the case upon promises, [or, *if in debt*, see the mode of stating the form throughout in the preceding precedent] then lately commenced by the said plaintiff, against the said E. F. in the said court of our said lord the king, before the king himself, to the damage of the said plaintiff of —*l.* that then the said E. F., should pay and satisfy all such damages as should be adjudged to the said plaintiff in that behalf, or render himself to the prison of the marshal of the Marshalsea of our said lord the now

days after warning, it seems necessary to aver, that the plaintiff gave the warning, since that constitutes a condition precedent, Cro. Jac. 46.

(*p*) The breach must be stated according to the terms of the recognizance. Where the condition is, that the principal should render himself or pay the money, the declaration must show that he had neither rendered nor paid the money, and if the plaintiff only aver that he did not render, it will be bad, for he may nevertheless have paid the money, Skin. 100. For if that were to be allowed, several executions might be taken out in different courts upon the same record. Dyer, 369 — Bro. Ab. tit. Record, 39 Hen. 6. p. 3. Where is an action against two, a recognizance of bail was given, "in case the said C. and D. should happen to be condemned, and should not pay or render themselves," and a *scire facias* thereon, after showing that C. was condemned, but not D., assigned a breach that C. and D. did not pay nor render, &c. it was held that the breach, though in the

words of the recognizance, was defective, since, with that allegation, it was quite consistent that C. had paid, or had rendered himself, which would have satisfied the recognizance, and as D. was not condemned, he was not bound either to pay or to render. *Wilkinson v. Thorley*, 4 M. & S. 33. But where two were sued in an action of assumpsit, and a recognizance of bail was given, in case the said C. and D. should happen to be condemned, and it was averred in the declaration that C. was condemned, but no notice taken why D. was not also, it was considered sufficient, since D. might have died, or become a certificated bankrupt, before judgment, which fact will be presumed, *ib.* 34.

(*q*) See the notes to the last precedent. The statement of the recognizance by the original must correspond with the entry of it, which varies from that by bill. The entry is the same though it was taken at chambers. See form, Tidd's Forms, 6th edit. 108. See the form, 7 Wentw. 60.—1 East, 603.

king, before the king himself, on that occasion, as by the record of the said recognizance, now remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears. And although the said plaintiff afterwards, to wit, in — Term, in the — year of the reign of our said lord the now king, in the said court of our said lord the king, before the king himself, at Westminster aforesaid, by the consideration and judgment of the same court, recovered against the said E. F. in the plea aforesaid, £— for his damages which he had sustained as well by reason of the not performing certain promises and undertakings (r), then lately made by the said E. F. to the said plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted, as by the record and proceedings thereof now remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears; yet the said E. F. &c.—[*As in the last form, from the *to the end.*]

ON RECOGNIZANCES OF BAIL.

[*Commencement in debt, as ante, 384, n.*]—For that whereas the said defendant, heretofore, to wit, in — Term, in the — year of the reign of our lord the now king, came personally into his Majesty's court, before the Right Honorable Sir — knight, and his companions, then his said Majesty's justices of the bench here, to wit, at *Westminster, in the county of Middlesex, and then and there in the said court here, acknowledged (t) himself to owe to the said plaintiff the said sum of —l. above demanded, which said sum of —l. the said defendant, for himself and his heirs, did consent and grant to be made of his lands and chattels, and levied to the use and behoof of the said plaintiff, upon this condition, that if judgment should happen in the said court here, to be given for the said plaintiff against one E. F. in a certain plea of trespass on the case, by the said plaintiff against the said E. F. in the said court brought, then that the said E. F. should satisfy all such damages which should be adjudged to the said plaintiff against the said E. F. in the same court here, in the plea aforesaid, or should render his body on that occasion, to the prison of the *Fleet*; as by the record of the said recognizance, remaining in the said court here, at Westminster aforesaid more fully appears (u). And whereas also afterwards, to wit, in that said — Term, in the — year of the reign aforesaid, judgment was given in the said court, before the said Sir — knight, and his companions, then his said Majesty's justices of the bench here, to wit, at Westminster aforesaid, for the said plaintiff against the said E. F. in the plea aforesaid; and the said plaintiff then and there, by the consideration and judgment of the same court, recovered in the said plea, against the said E. F. [*here state the judgment, and examine therewith,*] —l. which in and by the said court

On a recognizance of bail in C. B. against one of the bail (s). [**476*]

(r) Or "promise and undertaking," if the judgment was on one count only. 5 Bar. & Cres. 339.

(s) See the notes to the preceding forms.

(t) This is to be taken from the entry of the recognizance, with which it should correspond, ante, 473, n. See Imp. C. P. 537. As to the form of which, see 1 B. & P. 530.—2 B. & P. 443.—3 B. & P. 39.—

Tidd's Forms, 6th edit. 109.

(u) This is necessary, see Willes, 127. Gilb. Debt, 412.—Rast. Ent. 194, 6.—Com. Dig. Pleader, 2 W. 12.—Salk. 565. See further as to this, Lutw. 1282.—5 Mod. 9.—Ld. Raym. 216.—3 Keb. 399. Heath's Maxims, 142.—3 B. & P. 458. Com. Dig. Bail, R. 2.—Ante, vol. i. tit. Index, "*Records.*"

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were adjudged to the said plaintiff, for his damages (*w*) which he had sustained, as well by reason of the non-performance of certain promises and undertakings (*x*) before then made by the said E. F. to the said plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted; as by the record, and proceedings thereof, still remaining in the said court of the bench here, to wit, at *Westminster aforesaid more fully appears. And the said plaintiff in fact saith, that the said E. F. hath not yet satisfied the said plaintiff the damages aforesaid, by the said plaintiff so recovered against the said E. F. as aforesaid, or any part thereof, or rendered his body on that occasion to the prison of the *Fleet*, according to the form and effect of the condition of the said recognizance, and that he the said plaintiff hath not yet obtained execution of the said judgment against the said E. F. nor any execution upon the said recognizance (*y*). And the said plaintiff further saith, that the said judgment so obtained against the said E. F. still remains in full force, strength, and effect, not in any way reversed, vacated, paid off, or satisfied; whereby an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the said sum of —*l.* in form aforesaid, acknowledged and above demanded. Yet, &c. [*Usual conclusion in debt, as ante, 387.*]

On a recognizance taken before the Chief Justice of K. B. at his chambers, where the action against the principal was in assumpsit by original (*z*).

For that whereas the said defendant heretofore, to wit, in — Term, in the — year of the reign, &c. came before the Right Honorable Charles Lord Tenterden, then and still being his said majesty's chief justice of the said court of our said lord the king, before the king himself, at his chambers; situate and being in Chancery-lane, in the city of London, in his own proper person, and then and there before the said chief justice, acknowledged himself to owe the said plaintiff the said sum of —*l.* above demanded, and then and there did, for himself and his heirs, consent and grant, that the said sum of —*l.* should be made of his lands and chattels, and levied to the use and behoof of the said plaintiff, upon this condition, that if judgment should happen to be given in the said court for the said plaintiff, against one E. F. in a certain plea of trespass on the case upon promises, then lately commenced by the said plaintiff against the said E. F. in the said court of our said lord the king, before the king himself, to the damage of the said plaintiff of —*l.* that then the said E. F. should pay and satisfy all such damages *as should be adjudged to the said plaintiff in that behalf, or render himself to the prison of the marshal of the Marshalsea of our said lord the now king, before the king himself, on that occasion, which said recognizance the said chief justice, afterwards, to wit, on, &c. in — Term aforesaid, brought into the said court of our said lord the king, before the king himself, at Westminster, in the county of Middlesex, to be recorded, and the said recognizance was thereupon, at the prayer of the said plaintiff, then and there recorded in the same

(*w*) See 1 Taunt. 221.

(*z*) Or if the judgment were on one count only, say "promise and undertaking," see 5 B. & Cres. 339.

(*y*) As to stating the breach, see ante, 474, n.

(*z*) See the notes to the precedent, ante, 472. If from the entry, as is usually the

case, the recognizance appears to have been taken in court, the form should be as ante, 474, and in that case the above form would be improper, notwithstanding the bail was not taken in court, but at chambers, 4 B. & Cres. 403. 6 D. & R. 483. S. C.

court, as by the record of the said recognizance, still remaining in the said court of our said lord the king, before the king himself here, to wit, at Westminster aforesaid, more fully appears; and although the said plaintiff afterwards, that is to say, in — Term, in the year aforesaid, in the said court of our said lord the king, before the king himself, at Westminster aforesaid, by the consideration and judgment of the said court, recovered in the said plea, against the said E. F. —*l.* for his damages, which he had sustained, as well on the occasion of not performing certain promises and undertakings (a) then lately made by the said E. F. to the said plaintiff as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted, as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself here, to wit, at Westminster aforesaid, more fully appears; yet the said E. F. hath not paid to the said plaintiff the said damages, costs and charges, or any part thereof, nor rendered his body on that occasion to the prison of the marshal of the Marshalsea of our said lord the king before the king himself, according to the form and effect of the said recognizance, and as well the said recognizance as the said judgment still remain in full force and effect, in no wise satisfied, vacated, or discharged; and the said plaintiff hath not yet obtained any execution of the said judgment, whereby, and according to the form and effect of the said recognizance, an action hath accrued to the said plaintiff to demand and have, of and from the said defendant, the said sum of —*l.* above demanded; yet the said defendant (although often requested so to do) hath not as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said plaintiff, but he to do this hath hitherto wholly refused, and still doth refuse, to the damage, &c.

ON RECOGNIZANCES OF BAIL.

For that whereas the said defendant heretofore, to wit, at the session of assizes, holden at Lancaster, in the said county of Lancaster, on, &c. in the — year of the reign of our lord the now king, before Sir —, knight, one of the barons of our said lord the king, of his court of Exchequer, at Westminster, and Sir —, knight, one other of the barons of our said lord the king, of his said court of Exchequer, at Westminster, justices of the said lord the king, at Lancaster aforesaid, came in his proper person, and then and there acknowledged that he, the said defendant, owed to the said plaintiff —*l.* of lawful English money, to be paid to the said plaintiff, his executors or assigns, and that, unless he should do it, the said defendant granted that the said —*l.* should be made of his lands and chattels, and to the use of the said *plaintiff levied, as by the record of the said recognizance remaining in the said court of our said lord the king, before his justices at Lancaster aforesaid, and which is still in full force, more fully appears; yet the said defendant, (although often requested so to do) hath not yet paid the said sum of —*l.* above demanded, or any part thereof, to the said plaintiff, but he to do this hath

Debt on recognizance of bail in error, given in C. P. at Lancaster notstating the condition (b).

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(a) See 5 B. & Cres. 339, ante, 473, n. *facias*. See Barnes, 93, 339.—Willes, 18.

(b) Where the condition is not incorporated in the recognizance, it is not necessary to set it out in the declaration, or *scire* —Tidd's Prac. 9th edit. 1151. See form, 2 Mod. Ent. 243.

ON RECOGNIZANCES OF BAIL. hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff, of —l. and therefore he prays relief, &c.

Pledges, &c.

Debt on recognizance of bail in error in C. P. taken before a judge (c)

For that whereas the said defendant heretofore, to wit, on, &c. came before the Honorable Sir ———, knight, one of the justices of the court of our lord the now king, of the bench at Westminster, in the county of Middlesex, at his chambers in ———, and acknowledged himself to owe to the said plaintiff the said sum of £— to be levied of his lands and chattels, which said recognizance the said justice afterwards, to wit, on, &c. delivered with his own proper hands, in the said court of the bench at Westminster, in the county of Middlesex to be enrolled, and the same was then and there, before the Right Honorable Sir ———, knight, and his brethren, then his said majesty's justices of the bench, enrolled of record in the same court, as by the record thereof remaining in the same court manifestly appears; yet the said defendant (although often requested so to do) hath not as yet paid the said sum of £— or any part thereof, to the said plaintiff; but the said defendant to pay the same, or any part thereof, hath hitherto wholly refused, and still doth refuse. To the damage, &c.

On a recognizance of bail in error from K. B. or Exchequer.

For that whereas the defendant heretofore (d), to wit, on, &c. in [Michaelmas] Term, in the [first] year of the reign of our lord the king, before the king himself, at Westminster, in his proper person, and according to the form of the Statute in such case made and provided, acknowledged himself to owe to the said plaintiff the said sum of [£200] above demanded, to be paid to the said plaintiff, his executors or assigns; and unless he should do so, the said defendant granted and agreed that the said sum of [£200] should be made of his lands and chattels, and levied to the use of the said plaintiff, upon condition, nevertheless, reciting that the said plaintiff then lately in the court of our said lord the king, before the king himself, the said court then and still being at Westminster, in the county of Middlesex, by bill, without the writ of our said lord the king, and by the judgment of the same court, recovered against one J. M. [£100] for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings [or, *if in debt, alter the form accordingly, see forms in debt, post, 484,*] before then made by the said J. M., to the said plaintiff, as for his costs and charges by the said plaintiff in that suit in that behalf expended, whereof the said J. M. had been convicted, as appeared of record in the said court of our said lord the king, before the king himself, at Westminster, and also reciting that the said J. M. had brought a writ of error upon the judgment aforesaid, returnable before the justices of our lord the king of Common Bench, and barons of our said lord the king's Exchequer, of the decree of the court in our said lord the king's Exchequer Chamber, at Westminster, on,

(c) Willos, 18. See *sci. fā.* Tidd's Forms, 499, 6th edit.

(d) If the recognizance be taken before a Judge at Chambers, and it appears so on the entry of recognizances, here insert "to wit, on, &c. A. D. came before Sir J. L. knight,

then and still being one of the justices of our said lord the king, before the king himself, at his chambers, situate and being in Serjeant's Inn, Chancery-lane, in the city of London, in his proper person, &c."

&c. And if therefore the said J. M. should prosecute the said writ of error with effect, and should pay and satisfy the said plaintiff if the said judgment should be affirmed, or the said writ of error be discontinued on his default, or he should be nonsuited therein, as well the damages, costs, and charges aforesaid adjudged upon the said judgment, as well as such costs and charges, and damages, as should be awarded to the said plaintiff for the delay of execution of the judgment aforesaid, by pretext of presenting the said writ of error, then that recognizance was to be void, or else to be and remain in full force and virtue (e) as by the record of the said recognizance now remaining in the said court of our said lord the king, before the king himself, more fully appears, and such proceedings were thereupon had upon the said writ of error in the said court of Exchequer Chamber, before the justices of the common Bench, and barons of the exchequer aforesaid, that afterwards, &c. on, &c. in — Term, in the — year of the reign aforesaid, the said judgment was in all things affirmed, and £17. 10s. were then and there, in and by the said court of exchequer Chamber, adjudged to the said plaintiff, according to the form of the Statute in such case made and provided, for his damages, costs, and charges, which he had sustained and expended by reason of the delay of the execution of the judgment aforesaid, in pretence of prosecuting the said writ of error, as by the record and proceedings thereof, remitted by the said justices and barons, from the said court of Exchequer Chamber into the said court of our said lord the king, before the king himself, at Westminster aforesaid, according to the form of the statute in such case made and provided, and now remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears; nevertheless the said J. M. hath not as yet paid to the said plaintiff the damages, costs, and charges, so as aforesaid adjudged upon the said first mentioned judgment, or the damages, costs, and charges aforesaid, so awarded as aforesaid, or any part thereof, and as well the said recognizance as the said several judgments, still are and remain in full force, vigor, and effect, and not in any respect annulled, discharged, paid off, satisfied, or made void; and the said plaintiff hath not as yet obtained any satisfaction of or upon the said judgments, or either of them, whereby, and according to the force, form, and effect of the said recognizance, an action hath accrued to the said plaintiffs to demand, &c.—
[Conclude as usual, adding the usual breach, as ante.]

ON RECOGNIZANCES OF BAIL.

For that the said defendant heretofore, to wit, on, &c. at, &c. (venue) came in his proper person before one E. F. then and there being a commissioner, duly appointed and empowered (g) by the justices of our lord

On a recognizance taken before a commissioner in the country, where the plaintiff obtained judgment in assumpsit by original (f).

(e) If before a Judge at Chambers, here insert, "which said recognizance the said Sir K., knight, so being such justice as aforesaid, afterwards, &c. on, &c. next, after three weeks, &c. delivered with his own proper hands in the said court of our lord the king himself, at Westminster, &c. to be enrolled, and the same was then and there, before Sir C. A. and his brethren, then his majesty's justices of the same court of our lord the king, before the king himself, enrolled of record in the same

court, &c. at Westminster, &c."

(f) See 1 Wentw. 58. As to venue, see 2 J. B. Moore, 66.—8 Taunt. 171, S. C.

(g) In an action on a recognizance of bail taken before a commissioner at Durham, an averment that it was taken "before G. H. then and there being a commissioner duly appointed to take recognizances for the county of Durham," was held sufficient, of commissioners having authority, 2 J. B. Moore, 66.—8 Taunt. 171, S. C.

OF RECOGNIZANCE
OF BAIL.

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the king, of the bench at Westminster, in the county of Middlesex, to take and receive all and every such recognizance or recognizances, of bail or bails, in and for the said county of — as any person or persons should be willing to acknowledge or make before him, in any action or suit depending in the said court of our said lord the king, of the bench at Westminster, according to the form of the Statute (*h*) in such case made and provided, and then and there, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, before the said E. F. so being such commissioner as aforesaid, became pledge and bail for one G. H. and then and there acknowledged himself to owe to the said plaintiff the sum of £— which said sum of £— the said defendant, for himself and his heirs, did grant should be made of his lands and chattels, and levied to the use of the said plaintiff, upon condition that, if judgment should happen to be given for the said plaintiff against the said G. H. in the said court of our lord the king, of the bench at Westminster aforesaid, in a certain plea of trespass on the case *upon promises, to the damage of the said plaintiff of £— then the said G. H. should satisfy all such damages as should be adjudged to the said plaintiff against the said G. H. in the said court, or should render his body on that occasion to his majesty's prison of the *Fleet*, which said recognizance, afterwards, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, in, &c. aforesaid, was duly transmitted by the said E. F. so being such commissioner as aforesaid, to and filed with the honorable — then and still being one of the justices of the court of our said lord the king, of the bench, to wit, at his chambers in Sergeants' Inn, Chancery-lane, London, and was, by him the said justices, afterwards, to wit, on, &c. aforesaid, in — Term, in the — year of the reign, &c. brought into the said court of our said lord the king, of the bench at Westminster aforesaid, to be enrolled and recorded, and thereupon the said recognizance, at the request of the said plaintiff was then and there duly enrolled and recorded in the said court, as by the record thereof, still remaining in the said court of the bench at Westminster aforesaid, more fully appears. And although the said plaintiff afterwards, to wit, in the Term of — in the — year of the reign, &c. in the said court of our said lord the king, of the bench at Westminster aforesaid, in the county of M. by the consideration of the same court recovered against the said G. H. in the said plea of £— which, in and by the said court, was adjudged to the said plaintiff for his damages which he had sustained, as well by reason of the not performing certain promises and undertakings made by the said G. H. and not performed, as for his costs and charges by him about his suit in that behalf expended, whereof the said G. H. was convicted, as by the record and proceedings thereof remaining in the said court of our said lord the king, of the bench at Westminster more fully appears; yet the said G. H. (although often requested so to do) hath not as yet paid or satisfied the said damages aforesaid so as aforesaid recovered, or any part thereof, to the said plaintiff, nor rendered himself on that occasion to his majesty's said prison of the *Fleet*, according to the form and effect of the said recognizance, nor has he made any satisfaction of the said judgment; and, as well the said recognizance as the said judgment, still remain in full force and effect, in no wise reversed, set aside, or otherwise satisfied or vacated; of all

which said premises the said defendant afterwards, to wit, on, &c. at, &c. *(venue)* had notice, whereby, &c.—[*Actio accrevit, &c. as usual.*]

ON RECOGNIZANCES OF BAIL.

*II. ON JUDGMENTS.

Middlesex, (to wit.) (*k*) A. B. complains of C. D. &c.—[*Commencement in debt, ante, 384, n. and proceed as follows :*] For that whereas the said plaintiff heretofore, to wit, in — Term (*l*), in the year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, at Westminster, in the county of Middlesex, [or, if in *C. P.* say “before the Rt. Hon. Sir — —, Knt. and his companions, then and still being his Majesty’s Justices of the Bench here, to wit, at Westminster, in the county of Middlesex,”] [or, if in the *Exchequer*, say “in the court of our said lord the king, before the barons of his Exchequer, *at Westminster, in the county of Middlesex,” (*m*) by the consideration and judgment of the said court, recovered against the said defendant *the said sum of —*l.* (*n*) above demanded, which in and by the said court were then and there adjudged to the said plaintiff (*o*) for his damages, which he had sustained as well by reason of the non-performance by the said defendant of certain promises and undertakings (*p*), then lately made by the said defendant to the said plaintiff, as for his costs and charges, by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceed-

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ON JUDGMENTS. Declaration on a final judgment, in K. B. or C. P. or Exchequer, in assumpsit. (i).

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(i) Debt lies in the superior courts on a judgment obtained in the inferior courts, and *vice versa*, Gilb. Debt, 392, 3. The courts, however, discourage actions of debt on judgment, id. ibid. and by 43 Geo. 3. c. 46, s. 4, the plaintiff in such action is not entitled to costs, unless the court will make an order for that purpose. If defendant, however, instead of applying to the court to stay the proceedings, plead *nul tiel* record, or the like, for delay, the plaintiff ought to have his costs, 5 Taunt. 264.—The act also does not extend to actions on judgments of nonsuit or *non pros.* 14 East, 343. No action lies on the judgment if defendant has been once taken or charged in execution on it, and this although discharged with plaintiff’s concurrence, 7 T. R. 420.—5 M. & S. 103.—2 East, 243. Error in the judgment is no ground of objection to an action upon it, 2 Lev. 161. As to the declaration in general, Gilb. Debt, 412, &c. Com. Dig. Plead. 2 W. 12.—1 Saund. 92, n. 2, 329, n. 1, 2, 3.—Ante, vol. i. Index, tit. Debt.—Selwin, N. P. tit. Debt. See Forms, Morg. 541, 558.—1 Rich. C. P. 203, 440, post.

(*k*) The venue is local, and must be where the record is, which is now always in Middlesex, Gilb. Debt. 413.—Ante, vol. i. Index, tit. Venue.

(*l*) The Term and parties, and the sum

recovered, must be shown. Com. Dig. pleader, 2 W. 12. As to pleading a judgment in an inferior court, id. ibid. 1 Saund. 22, n. 2.—Ante, vol. i. Index, tit. Declaration.

(*m*) What a variance in this, see ante, 417, notes (i) (*k*).

(*n*) A variance in the sum would be fatal. Where there was a judgment for 388*l.* 0*s.* 1*d.* and debt was brought on it, stating the judgment was for 388*l.* omitting the penny, it was held a variance, and that it could not be cured by a remittitur of the penny. 2 Stra. 1171.

(*o*) The judgment must be set forth accurately, and a variance would be fatal. If the parties’ names be misplaced, &c. it would be bad, 7 Taunt. 271. *Sed Quare*, that was a decision in a sham plea, and see as to misnomer of parties, 1 Roll. 754, l. 40.—7 T. R. 447.—See form, post, 484, where a defendant was sued in the first action by a wrong name.

(*p*) If the judgment was on one count only (as is usual where the action is on a bill of exchange or a promissory note, and there is a reference to the Master or Prothonotary on a judgment by default,) instead of the words “promises and undertakings,” say “promise and undertaking,” otherwise there would be a variance, see 5 B. & Cres. 339.—Stra. 892. 2 Stark. 7.

ON JUDG-
MENTS. ings thereof, remaining in the said court of our said lord the king, before the king himself, [or, *if in C. P. say* "of the Bench aforesaid, at Westminster aforesaid,"] [or, *if in the Exchequer, say* "of our said lord the king, before the Barons of his Exchequer, at Westminster aforesaid,"] more fully appears (q); which said judgment still remains in full force and effect (r), not reversed, satisfied, or otherwise vacated; and the said plaintiff hath not obtained any execution or satisfaction of or upon the said judgment so recovered as aforesaid; whereby an action hath accrued to the said plaintiff to demand and have, of and from the said defendant the said sum of —l. above demanded; yet, &c.—[*Conclusion as ante, 387, and insert damages sufficient to cover interest, &c.*]

[*484] **[As in the last form, as far as the *, and then proceed as follows :]*—
The like on a judgment in debt (s). As well a certain debt of —l. as also —l. which in and by the said court of our said lord the king, before the king himself, [or, *if in C. P.* "which in and by the said court of our said lord the king of the bench,"] were then and there adjudged to the said plaintiff for his damages which he had sustained, as well by reason of the detention of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record, &c. [*As in the last precedent to the end.*]

On judgment for the defendant on verdict. [*Same as the form, ante, 483, to the *, and then proceed as follows :*]—
The sum of —l. above demanded, which in and by the said court of our said lord the king, before the king himself, were adjudged to the said plaintiff, and with his assent for his costs and charges by him laid out and expended in and about his defense of a certain action of trespass on the case on promises [or, *as the action is*] then lately prosecuted in the said court by the said defendant against the said plaintiff, whereof the said defendant was convicted, as by the record, &c. [*Same as the precedent, ante, 483, to the end.*]

The like on other judgments. [*For the description of a judgment of non pros—for not entering the issue—or as in case of a nonsuit,—or on a nonsuit see Tidd's forms, 6th edit. 169, 291, 314, 309. 7 Wentw. 120.*]

On a judgment recovered by bill in K. B. when defendant was sued by a wrong name. Middlesex, (to wit.) John Drake was summoned to answer J. W. of a plea that he render, &c. (*as usual in debt*). For that whereas the said plaintiff, heretofore, to wit, in — Term, in the — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, at Westminster, in the county of Middlesex, by the said consideration and judgment of the said court recovered against the said defendant (by the name of Charles Drach) the sum of —l. for his damage which he had sustained as well by reason of his not performing certain promises and undertakings [or, *if in debt, see the form, supra*] then lately made to the said plaintiff as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convict-

(q) This is necessary, see ante, 476, n. (r).—Co. Lit. 303 a.—1 Lord Raym. 35.—3 Salk. 565. However the omission is only cause for special demurrer, 11 East, 565.

(r) As to this allegation, see Com. Dig. Pleading, 2 W. 12. It is not necessary, 1 Saund. 330, n. 4.

(s) 2 Mall. 186.

ed by the name of Charles Drach, as by the record and proceedings thereof, and still remaining in the said court of our said lord the king, before the king himself, to wit, at Westminster aforesaid, more fully appears; which said judgment still remains in full force and effect, not in any wise reversed, satisfied, or vacated, and the said plaintiff hath not obtained any execution of or upon the said judgment, for the damages (or, "debt and damages") aforesaid, with this that the said plaintiff will verify that the said John Drake (the now defendant) and the said Charles Drach, against whom the said damages (or, "debt and damages") were so recovered as aforesaid, were and are one and the same person; and not other or different persons, whereby an action, &c. yet, &c. to the damage, &c.

ON JUDGMENTS.

For that whereas the said E. F. in his life-time, in — Term, in the — year of the reign of our lord the now king, before the Right honorable Sir — knt. and his companions, then his Majesty's justices of the bench here, to wit, at Westminster, in the county of Middlesex, by the consideration and judgment of the said court, recovered against the said G. H. in his life-time, [*here state the judgment, which, if in assumpsit, will be as in form, ante, 483, or if in debt, thus :*] as well a certain debt of £— as also — shillings, which, in and by the said court of our said lord the king of the bench, were then and there adjudged to the said E. F. for his damages, which he had sustained as well by reason of the detention of the said debt, as for his costs *and charges by him about his suit in that behalf expended, whereof the said G. H. was convicted, as by the record and proceedings thereof remaining in the said court of our lord the king of the bench aforesaid, at Westminster aforesaid, more fully appears. And thereupon afterwards, and after the death of the said E. F. and G. H. that is to say, in — Term, in the — year of the reign of our said lord the king, it was considered and adjudged in and by the said court of our said lord the king of the bench, before Sir — knt. and others, his companions of the bench, then his said majesty's justices of the bench here, to wit, at Westminster aforesaid, in the county aforesaid, that the said A. and B. administratrix as aforesaid, should have execution against the said C. and D. administratrix as aforesaid, of the debt and damages [or, *if in assumpsit, say "damages"*] aforesaid, to be levied of the goods and chattels, which were of the said G. H. at the time of his death, in the hands of the said D. administratrix as aforesaid, before her intermarriage with the said C. to be administered, or in the hands of the said C. D. in right of the said D. as such administratrix, since her in-

Debt by baron and feme, administratrix, against baron and feme, who was also an administratrix on a judgment against intestate, revived by *scire facias* suggesting a *devastavit* (1).

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(1) See other forms, Morg. Prec. 566, 568.—7 Went. 83, 112.—3 T. R. 685.—3 East, 3. The action of debt on a judgment suggesting a *devastavit* was introduced instead of the proceedings by *scire fieri* inquiry, and it is now usually adopted, 2 Sid. 102, 3.—1 Saund. 219 a. This action will not lie without a judgment previously obtained, see Carter, 2.—1 Vent. 321. The executor is precluded from setting up that he had not assets, unless he pleaded *plene administravit* to the original action, or admitted assets to a certain extent, and *rien ultra*, &c. 3 T. R. 685, 689.—1 Balk. 310.

—3 East, 2; the action may be brought without any writ of *feri facias* first taken out.—1 Sid. 397. The law upon this subject is collected by Mr. Sergeant Williams, 1 Saund. 219. The executor may be charged in the *debet* and *detinet*, 1 Saund. 216.—1 Rol Ab 603, s. 24, 5, 29, but the plaintiff may waive that right, and sue the executor in the *detinet* only, 3 East, 6. The issue upon *non detinet*, lies upon the defendant to prove the due administration of assets, 3 East, 2. The defendant may plead not guilty, or *non debet*, 2 T. R. 464.

ON JUDG-
MENTS.

termarriage, to be administered by the default of the said C. and D. his wife, administratrix as aforesaid, as by the record and proceedings thereof, remaining in the said court of our said lord the king, of the bench aforesaid, more fully appears, which said judgments still remain in full force and effect, not in the least reversed, annulled, set aside, or satisfied. And the said plaintiffs in fact say, that at the time of the said award of the said execution as aforesaid, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, divers goods and chattels, which were of the said G. H. at the time of his death of great value, to wit, of the value of the debt and damages [or, *if in assumpsit, say "damages"*] aforesaid, in form aforesaid recovered, had come to the hands of D. as administratrix as aforesaid to be administered; and which said goods and chattels the said C. and D. administratrix as aforesaid, afterwards, to wit, on the same day and year last aforesaid, at, &c. (*venue*) aforesaid, eloined (*u*) wasted, and converted and disposed of to their own use; whereby an action hath accrued to the said A. and B. as administratrix as aforesaid, to demand and have of and from the said — the sum of £— above demanded, yet neither the *said A. nor the said B. (although often requested so to do) have as yet paid the said sum of £—, or any part thereof, to the said B. before her said intermarriage (to which said B. after the death of the said E. F. and before her marriage with the said A. B. to wit, on, &c. (*date of grant*) at, &c. (*venue*) aforesaid, administration of all and singular the goods, chattels, and credits, which were of the said E. F. deceased, at the time of his death, who died intestate, by — by Divine Providence, Archbishop of Canterbury, and Primate of all England, in due form of law, was granted), or to the said plaintiffs since their intermarriage, or any or either of them, but they to do this have hitherto wholly refused, and the said C. and D. administratrix as aforesaid, still refuse to pay the same, or any part thereof, to the said A. and B. administratrix as aforesaid; whereof the said A. and B. as administratrix as aforesaid, say that they are injured, and have sustained damage to the amount of —l. and therefore they bring their suit, &c.; and the said plaintiffs bring into court here the letters of administration of the said archbishop, which give sufficient evidence to the said court here of the grant of the administration to the said B. the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above mentioned, &c.

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Grant of
adminis-
tration.On a judg-
ment ob-
tained in
the court
of Ex-
chequer
or C. P.
in Ireland
(w).

For that whereas the said plaintiff heretofore, that is to say, in — Term, in the — year of the reign of our lord the now king (x), in his majesty's court, before the barons of the Exchequer, holden at the king's courts, Dublin, in the kingdom of Ireland, to wit, at Westminster, in the county of Middlesex, by the consideration and judgment of the same court, recovered against the said defendant as well a certain debt, of —l.

(u) As to this averment, see 1 Saund. 307.

(w) An Irish judgment, whether before or since the Union, is not matter of record. 4 B. & C. 411, and cases there cited, and see notes, ante, 234 a. 414. It is best to declare in assumpsit when the original consideration for the judgment cannot be stated in an action of debt, and that plaintiff may declare in assumpsit, see ante, 243, n.

—3 Taunt. 85.

(x) If in C. P. say, "in the court of our said lord the king, of his common bench of his kingdom of Ireland, holden at the king's court in the city of Dublin, in and for the said kingdom of Ireland, to wit, at, &c. in, &c. before, &c. and his brothers, then his majesty's justices of the bench aforesaid, by the consideration and judgment, &c.

sterling money of the kingdom of Ireland, *as also £— of like sterling money, which were then and there in and by the said court adjudged to the said plaintiff, and with his assent for his damages occasioned by detaining that debt, whereof the said defendant was convicted, as by the record and proceedings thereof, remaining in the said court, before the said barons of the exchequer aforesaid, may more fully appear, which said judgment still remains in the said court in its full force and effect, not in any wise reversed, annulled, set aside, paid off, satisfied or discharged. And the said plaintiff in fact saith, that the debt and damages aforesaid, in form aforesaid recovered, at the time of the recovery thereof, were, and from thence hitherto have been, and still are of great value, to wit, of the value of £— of lawful, &c. to wit, at, &c. (*venue*) aforesaid, and that the said plaintiff hath not as yet obtained execution of the said judgment, whereby an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of £—, parcel of the said sum above demanded.—[*Add counts on the original consideration, if it be the subject of an action of debt—money count—account stated and breach.*]

ON JUDGMENTS.

For that whereas, before the recovery of the judgment hereinafter mentioned, in the ninth year, &c. at Dublin, in the kingdom of Ireland, to wit, at Westminster, a certain act of parliament was then and there duly made in and for the then kingdom of Ireland, whereby it was, amongst other things, duly enacted, “that where any conusee or conusees of a ‘judgment or judgments, statute staple or statute merchant, his, her, or their ‘executors or administrators, should assign the same to any person or persons whatsoever, such conusee or conusees, his, her, or their executors or administrators, should also perfect a memorial of such assignment, under ‘his, her, or their hand and seal, upon parchment or vellum, attested by ‘two or more credible witnesses, which memorial should contain the name ‘or names and addition of the person or persons to whom such judgment ‘or judgments, statute staple or statute merchant, should be assigned, and ‘the sum or sums of money mentioned in such assignment or assignments, ‘to be remaining due and unsatisfied upon such judgment or *judgments, ‘statute staple or statute merchant, with the day and year when such assignment or assignments was or were perfected; and that one of the ‘witnesses to such memorial, who should be a witness to the assignment ‘of such judgment or judgments, statute staple or statute merchant, should ‘make an affidavit, at the foot of such memorial, of the true perfection ‘of such assignment and memorial, before the respective officer or officers, ‘when such judgment or judgments, statute staple, or statute merchant, ‘was, were, or should be entered, his, her, or their legal deputy or deputies, or before any one of the judges of the four courts at Dublin, or before any one of the judges of his Majesty’s courts at Westminster, who ‘were respectively thereby empowered to take such affidavit or affidavits, ‘which memorial and affidavit should be lodged in the proper office ‘where such judgment or judgments, statute staple or statute merchant, ‘was, were, or should be entered; and the several officers of the said

By the conusee of an Irish judgment being assignable by the Irish Act 9 Geo. 2. c. 5. & 25 Geo. 2. c. 14. (y).

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(y) These statutes are confined to judgments by *cognovit*. The assignee may sue in this country in his own name. 3 Taunt. 82.

ON JUDG-
MENTS.

' courts were thereby required to enter such memorial of such assignment, statute staple or statute merchant, in a roll or rolls of parchment or vellum, to be kept for that purpose in such respective office or offices, where such judgment or judgments, statute staple or statute merchant, was, were, or should be entered; and such officer or officers was and were truly required to indorse on such assignment or assignments the day of the month and year, and hour of the day whereon such memorial or memorials was or were so lodged and proved, and for the more easy and speedy method of finding such assignment or assignments; which respective officers should enter the number and roll where such assignment or assignments was or were registered, at the foot of each respective judgment or judgments, statute staple or statute merchant, so assigned; for all which indorsements, entries, and affidavits upon each respective memorial, the sum of 6s. 8d. should be paid, and no more; and that from and after such time as such memorial and memorials of such assignment or assignments should be entered on such roll as aforesaid, it should and might be lawful for the assignee or assignees of such judgments, statute staple, or statute merchant, his, her, or their executors, administrators, and assigns, and for no other person or persons whatsoever, to revive such judgment or judgments, statute staple or statute merchant, from time to *time, in his or their own names, and take out one or more execution or executions on the same, in the name or names of such assignee or assignees, his, her, or their executors or administrators, and to sue forth execution or executions thereof, reciting the special matter, and also to discharge and release the same, and also in his, her, or their own proper name or names to enter satisfaction on the record of such judgment or judgments, statute staple, or statute merchant, in as full and ample a manner, to all intents and purposes, as the conusee or conusees of such judgment or judgments, statute staple, or statute merchant, his, her, or their executors or administrators, could or might do; and that the conusor or conusors of such judgment or judgments, statute staple, or statute merchant, his, her, or their executors or administrators, might, upon payment to such assignee or assignees, plead payment specially to such assignee or assignees; and that such assignee or assignees, his, her, or their executors or administrators, might from time to time assign the same over in manner aforesaid, such assignment or assignments should be proved and registered in the respective offices in the manner as aforesaid, and such assignee or assignees might revive or sue out execution in his, her, or their own name or names, and discharge or acknowledge satisfaction on such judgment or judgments, statute staple, or statute merchant, in manner aforesaid, any law, usage, or custom to the contrary in any wise notwithstanding; and it was thereby provided, that the conusor or conusors of such judgment or judgments, statute staple, or statute merchant, his, her, or their heirs, executors, or administrators, should have the same remedy and defense, both in law and equity, against the assignee or assignees of such judgment or judgments, statute staple, or statute merchant, his, her, or their representatives, which he, she, or they could or might have had against the conusee or conusees of the same, his, her, or their representatives, in case no such assignment or assignments had been made:" And the said plaintiff further saith,

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MENTS.

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that after the making of the said statute, and before the recovery of the judgment hereinafter mentioned, to wit, in the twenty-fifth year (z) of the reign of our said late sovereign lord George the Second, at Dublin aforesaid, in the said then kingdom of Ireland, to *wit, at, &c. (*venue*), a certain other act of parliament was then and there made, in and for the said kingdom of Ireland, whereby it was, amongst other things, duly enacted, "That every assignee or assignees of every judgment (a) or judgments, statute staple, or statute merchant, that were then assigned or should thereafter be assigned on record by virtue of the said first-mentioned act, his, her, or their executors, administrators, or assigns, might not only receive such judgment or judgments, statute or statutes, from time to time, in his, her, or their own name or names, and take out one or more execution or executions thereon for the recovery of his, her, or their demands thereon, as by the said act, amongst other things, was directed, but also such assignee or assignees of such judgment or judgments, statute staple, or statute merchant, then assigned, or thereafter to be assigned, by virtue of the said act, his, her, or their executors, administrators, or assigns, might bring an action of debt, or otherwise proceed or sue thereon, in his, her, or their own name or names, and be considered, to all intents and purposes, in the place, stead, and condition, either in law or equity, of the assignor or assignors." And the said plaintiff further saith, that after the making of the said statute, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, the said defendant, together with one E. F. by their certain writing obligatory, sealed with their respective seals, and bearing date the day and year last aforesaid, became jointly and severally bound unto one G. H. therein mentioned, in the sum of —*l.* of good and lawful money of Great Britain, to be paid to the said G. H. or his lawful attorney, executors, or administrators; and that for securing the payment and satisfaction of the said bond, the said defendant, together with the said E. F. afterwards, to wit, on, &c. at, &c. executed a certain warrant of attorney to M. N. and N. O. gentlemen, attornies of his Majesty's court of Exchequer in Ireland, or any of them or any other attorney of any other court of record in Great Britain or Ireland, or elsewhere; these are to authorize you, or any of you, to appear for us, C. D., and E. F. of, &c. or any or either of us, and to confess one or more judgment or judgments as of any term or time in the said court of Exchequer, or of any other court of record in *Ireland, Great Britain, or elsewhere, by —*I am not informed—He said nothing—He hath acknowledged the action*, or otherwise, upon one or more declarations, to be filed against us, or any or either of us, by himself, for the whole, at the suit of G. H. of, &c. his executors or administrators, upon a bond bearing date herewith, of, &c. indorsed for the payment of, &c. with the lawful interest, as in the said bond is mentioned, and for your or any of your so doing this shall be your sufficient warrant; and we do hereby for us, our, and each of our, heirs, executors, or administrators, jointly and severally authorize and empower you to release all errors that may be, in or about entering and obtaining the said judgment. And the said plaintiff further saith, that the said G. H. after the making of the said Statute, and after the making

Warrant
of attorney.

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(z) 25 Geo. 2. c. 14. See 3 Taunt. 83. ments obtained by *cognovit*. 3 Taunt. 82.

(a) This provision is confined to judg-

ON JUDGE-
MENTS.

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Indenture
assigning
the judg-
ment.

of the said writing obligatory, and the said warrant of attorney, to wit, in Trinity Term, in the 42d year, &c. before, &c. and his brethren, justices of our said lord the king, of his common bench of his kingdom of Ireland, under and by virtue of the said warrant of attorney, impleaded the said defendant in a certain plea of debt upon the said writing obligatory in the said warrant of attorney mentioned, the same being the said writing obligatory so made as aforesaid, and that one G. H. under and by virtue of the said warrant of attorney, as the attorney of and for the said defendant, duly appeared to the said action in the said court, and the said defendant, by the last-mentioned G. H. his attorney, came and defended the wrong and injury, when, &c. and so forth, and said he could not deny the said action of the said G. H. the said conusee, nor but that he owed him the aforesaid sum of, &c. in manner and form as the said G. H. the said conusee, had declared against him; therefore it was considered that the said G. H. the conusee should recover against the said defendant his debt and his damages, by reason of the detaining his said debt, to wit, —l. adjudged to the said G. H. the conusee, by the said court, at his request, whereof the said defendant was convicted; as by the record and proceedings thereof, remaining in the said court, before his said Majesty's justices of the bench aforesaid, more fully appears (b); by means of which said several premises, the said G. H. became and was the conusee of the said judgment, which said judgment still remains in the said court in full force and effect, not in any *wise reversed, annulled, set aside, paid off, satisfied or discharged. And whereas also afterwards, and after the recovery of the said judgment, in his said Majesty's court of the bench aforesaid, in the said kingdom of Ireland, to wit, on, &c. at, &c. (*venue*) by a certain indenture bearing date, on, &c. made between one B. G. of the first part, one P. Q. of the second part, the said G. H. of the third part, and the said A. B. of the fourth part, which said indenture, sealed with the seal of the said G. H. the said plaintiff now brings here into court, the date whereof is the day and year last above mentioned, the said G. H. the conusee of the said judgment as aforesaid, for the considerations therein mentioned, did bargain, sell, assign, transfer, and make over unto the said plaintiff the said judgment debts, and all the money then due or forever thereafter to grow due thereon, for principal, interest, and costs, to have and to hold the same unto the said A. B. his executor, administrator, or assigns, as his and their own proper goods and chattels for ever, as by the said indenture, reference, &c. And whereas also, after the making of the said indenture, to wit, on, &c. at, &c. (*venue*) the said plaintiff did, in pursuance of the said first-mentioned Statute, make a memorial of the said assignment of the said judgment, under his hand and seal, upon parchment, attested by two credible witnesses, and did then and there sign and seal the same, which said memorial did contain the name and addition of the person assigning the said judgment, to wit, of the said G. H. the conusee, and the name of the person to whom the same was so assigned, to wit, the said plaintiff, and the sums mentioned in the said assignment to be remaining due upon the said assignment; and the said plaintiff further saith, that afterwards, to wit, on &c. one of the witnesses to the said last-mentioned memorial, who was witness to the said as-

(b) See, as to this averment, Dougl. 1.—5 East, 473.

assignment, to wit, one Z. did make an affidavit at the foot of the said last-mentioned memorial, before — one of his Majesty's justices of his court of K. B. at Dublin, to wit, at, &c. as one of the judges of our said lord the king as aforesaid, in Ireland aforesaid; and the said Z. thereby made oath and swore, that he was a subscribing witness to, and saw the said deed of assignment duly executed by the said G. H. and other executing parties thereto, and also saw the memorial duly executed by the said plaintiff, and also by, &c. [*the other parties thereto*] and that the name of Z. subscribed as a witness thereto, was the said Z.'s proper name *and handwriting, and which said memorial and affidavit were afterwards, to wit, on, &c. entered in the proper office where such judgment should be entered, and the said memorial was then and there duly perfected, according to the Statute aforesaid, and which said memorial of the said assignment, afterwards, to wit, on, &c. was duly entered in the prothonotary's office of his Majesty's court of C. P. in, &c. aforesaid, in a roll of parchment kept for that purpose in the said office, and the said number and roll where the said assignment was registered, was then and there duly entered at the foot of the said judgment on the roll, where the said assignment was entered as aforesaid; by means whereof, and according to the form of the Statute in such case made and provided, he the said defendant, then and there became liable to pay to the said plaintiff, the said, &c. when he the said defendant should be thereunto afterwards requested, to wit, at, &c. (*venue*); and the said plaintiff in fact saith, that the said debt and damages aforesaid, in form aforesaid, so recovered at the time of the recovery thereof, were, and from thence hitherto have been, and still are, of great value, to wit, &c. of lawful, &c. to wit, at, &c. (*venue*) whereby, &c. (*actio accrevit*, &c.) yet, &c.

ON JUDGMENTS.

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Pledges, &c.

VI. ON STATUTES.

BY PARTY GRIEVED.

[*Commencement in debt, as ante*, 384, n.]—For that whereas the said defendant, before and at the time of the *giving of the notice and making the demand as hereinafter mentioned, and from thence until and upon the

BY PARTY GRIEVED.

Landlord against tenant on stat. 4. Geo. 2. c. 28. s. 1. for double value for not quitting in pursuance of the landlord's notice (c).
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(c) By the 4 Geo. 2 c. 28. s. 1. tenants holding over lands, &c. after the expiration of the term, and after demand made, and notice in writing given by the landlord, are to forfeit double the yearly value of the premises, to be recovered by action of debt, and it cannot be recovered by distress, 8 Burr. 1605.—Vin. Ab. Distress, E.—Bl. Rep. 533.—4 B. & Cres. 922, and see the precedents and law on this act, 5 Burr. 2694.—1 New Rep. 174.—8 East, 358. 361.—9 East, 310.—10 East, 48.—2 Campb. 453.—Selw. N. P. 628.—7 Wentw. Index, 564, and 1 Chit. Col. Stat. 666. (*Wilkinson v. Hall*, 1 Bing. N. C. 713; where it was held, that

tenants in common cannot jointly sue for double value for holding over unless there had been previously a joint demise from them.)

When the tenant gives notice to quit, and holds over, he forfeits double rent, under the 11 Geo. 2. c. 19. s. 18, recoverable either in assumpsit, or debt, or by distress, see 3 Burr. 1603. and see form in that act in assumpsit, ante, 45; in debt, post, 495; and see the notes, post, 495.

The Stat. 4 Geo. 2. c. 28, is a remedial law, and should therefore be construed liberally, 5 Burr. 2694. It has been considered that a tenant holding over under a

BY PARTY
GRIEVED.

— day of —, A. D. — (*the day when the tenancy determined*) held and enjoyed a certain messuage, and lands, tenements, and premises (*d*), with the appurtenances, situate in the county of —, as tenants thereof to the said plaintiff, that is to say, as tenant thereof from year to year (*e*) for so long as the said plaintiff and defendant should respectively please, the reversion of the said premises, with the appurtenances, during all that time belonging to the said plaintiff, to wit, at, &c. (*venue*) aforesaid; and thereupon whilst the said defendant so held and enjoyed the said tenements with the appurtenances, as tenant thereof to the said plaintiff as aforesaid, and whilst the said reversion (*f*) so belonged to the said plaintiff as aforesaid, to wit, on, &c. (*the date of the notice*) at, &c. (*venue*) he the said plaintiff gave a notice in writing (*g*) to the said defendant, and then and there demanded (*h*) and required him the said de-

fair claim of right, is not within the act, although it has been decided eventually that he has no right, 5 Esp. 203, and see 9 East, 313, but this surely is questionable. The statute extends only to tenants for life or years, and not to tenants for a less term, as a week or the like, 2 Campb. 453.—*Sed vide* Co. Lit. 54 b.

To entitle the plaintiff to recover under the act, the notice to quit must be by the landlord, and the demand in writing, 3 Burr. 1607.—1 New R. 180, n. and it must also be a valid notice, binding on each party, 7 D. & R. 411.—4 B. & C. 922, S. C. A notice to quit, stating that "or else I shall insist upon double rent," does not give the tenant an option of continuing tenant at the double rent, Dougl. 175. A second notice to quit, given before or after the expiration of the first, will not bar the landlord's right to the double rent, 1 T. & R. 53. A receiver appointed by the Court of Chancery in a suit depending, is a sufficient agent to give the notice, 5 Burr. 2694.—1 B. & P. 385.

Also to entitle the landlord to recover, he must have demanded the delivery of the possession of the premises; it seems, however, that the notice to quit in writing, is of itself a sufficient demand, 2 Bl. Rep. 1075.—5 Burr. 2694.

Though a demise be for a certain time, a demand of possession and notice in writing, &c. are necessary to entitle the landlord to double rent or value, but such demand may be made above six weeks after the expiration of the tenancy, if the landlord have done no act in the mean time to acknowledge the continuation of it; and if the tenant hold over, he will be entitled to double value from the time of such demand; but if the rent be reserved quarterly, and the demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter, 8 East, 358.

If the notice is given to a woman who afterwards marries, the action for not delivering up possession may be maintained against the husband, without any new de-

mand, and the wife need not be joined, 1 New R. 174.

An administratrix of an executor cannot sustain an action on this act, although the tenant has attorned to her without taking administration, *de bonis non*, to the first testator, 1 B. & P. 310.

In an action for double rent on the statute for holding over after notice, the jury may find for so much as the tenant appears to have over-held, without reference to the sum demanded, so that it be not more than that sum, Loft, 275. And after a landlord has recovered in ejectment against his tenant, he may maintain debt upon the above stat. 4 Geo. 2. c. 28. s. 1. for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit, 9 East, 310. In an action for double value, and also for use and occupation, the defendant paid the single rent into court upon the latter count, and the plaintiff, by taking it out, was held not to waive his right under the former, so as to be subject to nonsuit thereon, but that the case ought to have gone to the jury, 10 East, 48.

(*d*) The words of the act are, "lands, tenements, or hereditaments."

(*e*) The act does not seem to extend to a tenant for less than a year.—2 Campb. 453.—*Sed vide* Co. Lit. 54 b.

(*f*) The act mentions only reversioners, or remainder-men.

(*g*) A notice in writing is necessary, by the express words of the statute, 1 New Rep. 180, n. a.—Burr. 603. 1607.

(*h*) The precedents sometimes run, "and thereby then and there demanded," &c. founded on the decision in 5 Burr. 2694. and 1 New Rep. 174, 179, that the notice itself is a sufficient demand, and that therefore no fresh demand after the expiration of the tenancy, need be averred or proved. It may, however, be advisable, when, in fact, a demand of possession has been made after the expiration of the notice to quit, at least in one count, before the statement of the holding over, to aver as follows: "And the said plaintiff in fact saith, that,

defendant to deliver up the possession of the said tenements, with the appurtenances, to the said plaintiff, on the said, &c. on which day the term, estate, and interest of the said defendant in the said tenements, with the appurtenances, determined, to wit, at, &c. (*venue*).—Nevertheless the said defendant, not regarding the Statute in such *case made and provided, did not nor would, on the determination of the said term as aforesaid, deliver the possession of the said tenements, with the appurtenances, to the said plaintiff, according to the said notice so given, and the said demand so made as aforesaid, but wholly neglected and refused so to do, and on the contrary thereof, he the said defendant wilfully held over the said tenements, with the appurtenances, after the determination of the said Term, and after the said notice so given, and the said demand so made as aforesaid, for a long space of time, to wit, for the space of — then next following, during all which time the said defendant did keep the said plaintiff out of the possession of the said tenements, with the appurtenances (he the said plaintiff being, during all that time, entitled to the possession thereof), to wit, at, &c. aforesaid, contrary to the form of the Statute in such case made and provided (i). And the said plaintiff avers, that the said tenements, with the appurtenances, during the said time of holding over the same, and keeping the said plaintiff out of the possession thereof as aforesaid, were of great yearly value, to wit, of the yearly value of £—, of lawful, &c. and by reason of the premises, and by force of the Statute in such case made and provided, the said defendant became liable to pay to the said plaintiff a large sum of money, to wit, the sum of £— of like lawful money, being at the rate of double the yearly value of the said tenements, with the appurtenances, for so long a time as the same were so detained as aforesaid, to wit, at, &c. (*venue*) aforesaid, and thereby, and by force of the said Statute, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of £— parcel of the said sum above demanded.—[*Add a count, as suggested in 494, n. if the facts allow it, also add two counts in debt for use and occupation, the account stated, and common conclusion.*]

BY PARTY
GRIEVED.

[*495]

[*Commencement in debt, as usual, ante, 384.*—For that whereas the said defendant, before and at the time of the giving of the notice herein-after mentioned, held and enjoyed a certain messuage and premises with the appurtenances, situate in the county of S. as tenant thereof to the said plaintiff, from year to year (l), for so long a time as they the said

By landlord
against tenant, on the 11 Geo. 2. c. 19, s. 18. for double rent, for not quitting in pursuance of tenant's notice (k).

after the determination of the said tenancy of the said defendant as aforesaid, and whilst the said defendant continued in the possession of the said tenements, with the appurtenances, as aforesaid, and the said plaintiff was entitled to the possession thereof, to wit, on, &c. the said plaintiff, by a certain notice in writing, then and there made and signed by him, and delivered to the said defendant, demanded and required the said defendant to deliver the possession of the said tenements, with the appurtenances, to the said plaintiff, to wit, at, &c. aforesaid; nevertheless," &c.—8 East, 358.

(i) The forms in 5 Burr. 2694—1 New

Rep. 174, and some of those referred to in 7 Wentw. Index, 464, 5, do not conclude *contra for mam*, &c. but other forms do so conclude.—Com. Dig. "*Action on Statute*," G. Reg. Brev. 73.—Lutw. 1548.—Dyer, 85 a.—1 Saund. 135, n. 3.

(k) See the form in 7 Wentw. 133, which appears to have been hastily framed. See the form for double value where notice is given by landlord, on the 4 Geo. 2 c. 2. ante. 493.—3 Burr. 1603. (Tenant may afterwards quit without notice, and not liable after quitting. 1 B. & Adol. 904.)

(l) Any tenancy or any term, however short, seems to be within the meaning of the act of 11 Geo. 2. c. 19. s. 18.

BY PARTY
GRIEVED.

plaintiff and the said defendant should respectively please, at and under a certain yearly rent, to wit, the yearly rent of £— payable quarterly on, &c. (*stating days of payment*). The reversion of the said messuage and premises with the appurtenances, during all that time belonging to the said plaintiff, and the said defendant then and there had power to determine (m) the said tenancy by six months notice to quit the said messuage and premises so by him holden as aforesaid, to wit, at &c. (*venue*) and thereupon whilst the said defendant so held and enjoyed the said messuage and premises, with the appurtenances as aforesaid, as tenant thereof as aforesaid, to wit, on, &c. (*day when notice given*) at, &c. (*venue*) the said defendant gave notice (n) to the said plaintiff of his the said defendant's intention to quit the said messuage and premises on the, &c. (*day when notice expired*) then next. Nevertheless the said defendant not regarding the Statute in such case made and provided, did not nor would, according to the said notice, deliver up the possession of the said messuage and premises with the appurtenances, or any part thereof, at the said time so fixed and determined on by the said notice as aforesaid, that is to say, on the said, &c. (*day of expiration of notice*) although the said defendant was afterwards, to wit, on the day and year last aforesaid, at, &c. (requested (o) by the said plaintiff so to do,) but on the contrary thereof wrongfully and injuriously held over and kept and withheld the possession of the said messuage and premises with the appurtenances from the said plaintiff for a long space of time, &c. from the day and year last aforesaid, until and upon, &c. (*day when he left the premises, or if not left say "from thence," hitherto,*) &c. contrary to the said Statute in such case made and provided, by reason whereof [and by force of the Statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendant a large sum of money, to wit, the sum of £— being at the rate of double the amount of the yearly rent or sum which he the said defendant had paid to the said plaintiff before the time when he the said defendant so refused to deliver up the possession of the said messuage and premises as aforesaid, in respect of his being tenant to the said plaintiff of the said messuage and premises, and which said last-mentioned sum of money hath arisen and accrued, due and payable to the said plaintiff during the time when he the said defendant so wrongfully kept possession of the said messuage and premises as aforesaid.]—[*Add a count like that ante, 49, and the common counts for use and occupation, money had and received, account stated, and breach.*]

By land-
lord, on 11

[*Commencement in debt, as usual, ante, 384 n.*—For that whereas one

(m) See the preamble of the 18th section of 11 Geo. 2. c. 19. The statute only applies to cases where the tenant has the power of determining his tenancy by a notice, and where he has actually given a *valid* notice sufficient to determine his tenancy, or the bad notice has been assented to by landlord in writing. 7 D. & R. 411. —4 B. & C. 922, S. C.

(n) In 7 Wentw. 133, a notice in writing is stated to have been given, but according to 3 Burr. 1603, 1 Bla. Rep. 533, S. C. pa-

rol notice under the 11 Geo. 2. c. 19. s. 18, is sufficient. A notice that the tenant will quit as soon as he can get another situation does not bring a case within the act, 2 Campb. 591.

(o) Neither by the words of the act, nor according to the precedent in Wentworth, does this averment of request appear to be necessary, though it cannot vitiate, but may be rejected as surplusage, according to the principle laid down in Cowp. 683.—1 T. R. 430.—Ld. Raym. 171.

E. F. before and at the time of the committing of the grievance, and the fraudulent and clandestine removal of the goods and chattels hereinafter mentioned, held and enjoyed a certain messuage and premises, with the appurtenances, situate in the county of S. as tenant thereof to the said plaintiff from year to year. [or, *if for a less time, state it accordingly, or if under a lease for a longer term, state the tenancy, as ante, 307, &c.*] for so long a time as they the said plaintiff and the said E. F. should respectively please, at and under a certain [yearly] rent payable [quarterly] to wit, on, &c. (*stating the days of payment*) the reversion of and in the said messuage and premises, with the appurtenances, during all that time belonging to the said plaintiff, and under and by virtue of which said tenancy the said E. F. held the said messuage and premises, until at and after the time of the fraudulently conveying and carrying away of the goods and chattels

BY PARTY
GRIEVED.

Geo. 2. c. 19. s. 3. for assisting the tenant in fraudulently removing his goods to prevent a distress for rent (p).

(p) See the law, and cases on the 3d sect. of 11 Geo. 2, c. 19.—1 Chit. Col. Stat. 669.

The enactment is remedial as well as penal. To make a *third person* liable, for assisting in the fraudulent removal, it must be proved not only that he so assisted, but also that he was privy to the fraudulent intent, 8 B. & C. 537. But to make the tenant liable, it is not necessary to show an actual participation in the removal, if the removal was with his privy. 3 D. & R. 501.—1 C. & P. 121, S. C. over-ruling 3 Esp. Rep 15.

It has been considered, that to bring a case within the meaning of the enactment, the rent must be actually due at the time of the removal, see 3 Esp. 16. But this seems more than questionable, and certainly the words of the act do not warrant the opinion, and see 4 Campb. 137. 2 Saund. 284.

The enactment does not extend to the goods of a stranger, not a tenant, 5 M. & S. 33, nor to the goods of an under-tenant, though removed to avoid the distress of a ground-landlord, 1d.—2 Stra. 787.

With respect to what is a removal within the enactment, it is to be observed, that the words of it are "*fraudulently remove or carry away*," which differs from the 1st section, wherein the words are "*fraudulently or clandestinely*." The statute applies to all cases where a landlord is, by the conduct of his tenant, in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for such rent; and therefore, where a tenant openly and in face of day, and even with notice to his landlord, removed his goods, without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods; it was held, that although the removal might not be clandestine, yet, if it was fraudulent, (which was a question for the jury) the landlord was justified under the statute. 4 D. & R. 33. Nor is it necessary to show, in proof of fraudulent removal or concealment of cattle, that they were withdrawn from sight. If they have been removed to a neighbor's field, so as to

cause the landlord difficulty to find them, it is sufficient. 9 Price, 301.—Nor is it necessary to prove that a distress was in progress, or about to be put in execution, or even contemplated, 10 Price, 138.

On the other hand, a creditor, with the assent of his debtor, may take possession of the goods of the latter, and remove them from the premises for the purpose of satisfying a *bona fide* debt, without incurring the penalty inflicted by the above enactment, against persons assisting a tenant in removing his goods from the premises, although the creditor takes possession, knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord would distrain, 5 M. & S. 200.

In an action against a person for aiding and assisting a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the defendant, if by other evidence he is proved to have contributed to the facility of it, and circumstances or suspicion may be laid before the jury, to prove such a fraudulent co-operation as the legislature contemplated. 10 Price, 138.

The 4th sect. of the 11 Geo. 2. c. 19, enacts, that if the value of the goods does not exceed 50*l.* the landlord may have recourse to and have a summary remedy before two justices, but that enactment does not take away the jurisdiction of the superior courts, and the landlord may sue, see M. & M. C. N. P. 175—Holt, C. N. P. 147.—1 Stark. 169, S. C. and see 5 D. & R. 558.—3 B. & C. 649, S. C. The landlord's having, in the first instance, made his complaint before a magistrate, will not preclude him from afterwards maintaining an action, 1 Stark. 169.

See the form of plea in the avowry, justifying seizing goods, &c. under a fraudulent removal; post, vol. iii. 1053, 1137.

See a form of declaration and case, on the 12th section of the 11 Geo. 2. c. 19, against a tenant for secreting a declaration in ejectment, 2 B. & A. 652.

BY PARTY hereinafter next mentioned, off and from the same. And the said plaintiff further says, that a certain sum, to wit, the sum of [£10. 10s. (q)] of the rent aforesaid, for [one] quarter of a year, became and was due and payable to the said plaintiff, on, &c. (*when it fell due*) and was due and in arrear and unpaid from the said E. F. to the said plaintiff, at the time of the said fraudulently conveying and carrying away the said goods and chattels (r), and still is wholly in arrear and unpaid to the said plaintiff. And the said plaintiff further says, that the said tenancy so being in full force as aforesaid, thereupon, afterwards, and just before the said sum of £10 of the said rent became due and in arrear as aforesaid (s), that is to say, on, &c. (*day of removal or about it*) certain goods and chattels, to wit, &c. (*set them out shortly*) (t) of the said E. F. were upon the said messuage and premises; and the said tenancy so being in full force as aforesaid, the said E. F. during the continuance of the said tenancy, so being in full force as aforesaid, and just before the said sum of £10 so became due and payable and in arrear to the said plaintiff as aforesaid (u), that is to say, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, did fraudulently convey and carry away the same goods and chattels thereof off and from the said messuage and premises, with intent to prevent and hinder the said plaintiff from distraining the same for the said sum of £10 for the rent aforesaid, so due and payable and in arrear to the said plaintiff as aforesaid, and the said goods and chattels so fraudulently conveyed and carried away off and from the said messuage and premises, with such intent as aforesaid, from the time of so fraudulently conveying and carrying away of the same as aforesaid, hitherto kept and continued, and still keeps and continues from off the said messuage and premises, to wit, at, &c. (*venue*) aforesaid; and the said defendant, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, did wilfully and knowingly aid and assist the said E. F. in the said fraudulent conveying and carrying away of the said goods and chattels so fraudulently conveyed and carried away off and from the said messuage and premises as aforesaid, with intent to prevent and hinder the same from being distrained by the said plaintiff, for the said [£10] of the rent aforesaid, to wit, at, &c. aforesaid, contrary to the form of the Statute in such case made and provided; and plaintiff avers the said goods and chattels so fraudulently conveyed and carried away off and from the said messuage and premises aforesaid, at the time of the so carrying and conveying away the same off and from the said messuage and premises as aforesaid, were of the value, to wit, of [£25] to wit, at, &c. (*venue*) aforesaid, whereby and by force of the Statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendant, a large sum, to wit, the sum of £50, being double the value of the said goods and chattels so fraudulently conveyed and carried away as aforesaid, parcel, &c.—[*Add a count charging defendant with wilfully knowing and concealing the goods, and add the usual breach, as ante, 387.*]

(q) The precise sum due need not be stated, 3 T. R. 543.

(r) They must be the tenant's goods, 5 M. & S. 38. See note, *supra*.

(s) If the rent was not due at the time

of the removal, omit the averment "it was then due," see note, *supra*.

(t) It is not, it seems, necessary to specify the goods, and see 6 D. & R. 341.

(u) As *supra*.

[*Commencement in debt as usual, as ante, 384.*—For that the said defendant, within three months next before the commencement of this suit, to wit, on, &c. (*any day within three months before the title of the declaration*) to wit, &c. (*venue*) was indebted to the said plaintiff in the sum of [£20] of lawful money of Great Britain, by force of the Statute made and passed in the 9th year of the reign of our late Queen Anne, intituled “An act for the better preventing *of excessive and deceitful gaming,” being money then and there lost and paid by the said plaintiff to the said defendant, and by the said defendant then and there won of the said plaintiff by playing with dice at a certain unlawful game, commonly called or known by the name of [French hazard,] at one sitting, contrary to the form of the Statute in such case made and provided, whereby and by force of the Statute, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of £20, parcel of the said sum above demanded.

BY PARTY
GRIEVED.
On the 9
Ann. c. 14.
s. 2. by the
loser, for
money
lost at
play, at
one sit-
ting to re-
cover it
back from
the win-
ner (w).
[*501]

And also for that the said defendant, within three months next before the commencement of this suit, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, was indebted to the said plaintiff in the further sum of £20, for monies then and there lost and paid by the said plaintiff to the said defendant, by playing at a certain game, to wit, a game [called French hazard,] at one sitting, whereby, and according to the form of the said Statute, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of £20, residue of the said sum above demanded.—[*Add counts for money lent, and had and received, account stated, and breach, as usual.*]

Second
count.

[*Commencement in debt as usual, as ante, 384.*—For that whereas heretofore, to wit, on, &c. (*the teste or day of *issuing of the process*) [as to the mode of describing different kinds of process, see ante, 445 to

[*502]
On 32
Geo. 2. c.
28. s. 1 &
12. against
the bailiff
for extor-
tion, on
mesne
process,
with a
count on
the 23
Hen. 6. c.
9 for tre-
ble dam-
ages (z).

(w) The statute allows a general form of declaring at the suit of the party grieved.—See forms, 2 Wils. 36.—2 H. Bla. 308.—Lil. Ent. 168; but money fairly lost at play cannot be recovered back in a common law form of action of debt for money had and received, not founded on the statute, and the plaintiff must declare particularly on the act, 1 M. & S. 500.

In such an action a defendant may plead in abatement, that the money was due from others as well as himself, and that they are not, but ought to have been, made parties, 7 T. R. 257.

But a stakeholder, upon a wager on a horse-race for 20l. or other illegal wager, is liable to a common law action, for money had and received, if the money be demanded before he pays it over to the winner, 6 D. & R. 26; ante, 227.

The right to sue is a vested interest, and on bankruptcy passes to the assignees, 2 Ves. jun. 514.—2 H. Bla. 308. And in an action brought by the assignees, where the bankrupt had obtained his certificate, it was held he was a good witness to prove the loss, being (by three releases; 1st by bank-

rupt to assignees; 2d by creditors to bankrupt; 3d by assignee, who was not a creditor, to bankrupt) restored to his competency, 1 B. & C. 444.—2 D. & R. 575, S. C. In that case it was also held that such release did not destroy the assignee's right of action. Id. ib.

A bill of discovery filed against the defendant for the purpose of a former action on the former part of section 2, for the money lost, may be given in evidence, 1 Marsh. 497.—6 Taunt. 141, S. C.—2 Marsh. 125, n.

If company never part, though dinner intervenes, the loss is considered to have been at *one sitting*, within the act, 2 Bla. Rep. 1226, and see further, 1 Chit. Col. Stat. 421.—Burn. J. “Gaming” vol. ii.

(z) See precedents, 7 Wentw. 150, 153, 156, 175, 246, 328. See declaration in debt at the suit of the party grieved, on 43 Geo. 3. c. 46, and 28 Eliz. c. 4, for treble damages against the sheriff for extortion, on a writ of execution, post, 504; and see a form in case for the same offence, post, 827. See declaration in debt on the 23 Hen. 6. c. 9, for 40l. penalty for extortion, on mesne

BY PARTS
GRIEVED.

453] there issued out of the court of our said lord the king, before the king himself, a certain writ of our said lord the king, [*here set out the writ, which, if a latitat, may be thus :*] called a latitat, at the suit of one M. I. against the said plaintiff, directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff, that he should take the said plaintiff if he should be found in his bailiwick, and him safely keep, so that he the said sheriff might have his body before our said lord the king, at Westminster, on, &c. (*as in writ*) to answer to the said M. I. in a plea of trespass, and also to a bill of the said M. I. against the said plaintiff, for [£2200] of debt, according to the custom of the said court of our said lord the king, before the king himself, to be exhibited, and that the said sheriff should have there then this writ, which said writ afterwards, and before the delivery thereof to the said sheriff as hereinafter mentioned, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, was duly indorsed for bail for £— according to the form of the Statute in such case made and provided; and which said writ, so indorsed as aforesaid, afterwards, and before the return thereof, to wit, on the day and year first aforesaid, at, &c. (*venue*) was delivered to W. A. esq. who then and from thence, until, and at and after the committing of the offence hereinafter next mentioned, was sheriff of the said county of S. to be executed in due form of law: by virtue of which said writ the said W. A. so being sheriff of the said county of S. as aforesaid, afterwards, and before the return thereof, to wit, on, &c. (*date of warrant, or about it*) at, &c. (*venue*) in &c. for having execution of the said writ, duly made his warrant in writing, directed *to the said defendant, who then and from thence, until, and at and after the committing of the offence hereinafter next mentioned, was one of the bailiffs of the said sheriff of the said county of S. by which said warrant the said sheriff of the said county of S. commanded the said defendant to take the said plaintiff, if he should be found in the said sheriff's bailiwick, and him safely keep, so that the said sheriff might have his body before our said lord the king, at Westminster, at the return of the said writ, to answer to the said M. I. in the plea, and to the bill aforesaid, which said warrant was also then and

[*503]

process, by the common informer, post, 509; also a declaration in debt on the 2d Eliz. c. 4, for 40*l.* penalty for extortion on final process, post, 511 *a.*

The action may be maintained against the sheriff, 2 T. R. 154, and see a form, post, 509, at the suit of common informer.

By the common law the sheriff or bailiff has no right to take fees for the execution of process, *per* Abbott, C. J.—2 B. & A. 566.—2 Chit. Rep. 295, S. C. And by the stat. 23 H. 6. c. 9, he is only entitled to the fee of 4*d.* for issuing his warrant on meane process to arrest the defendant; (See the Statute, Chitty's Coll. Stat. tit. *Bail Bond*, p. 87; and the officer is only allowed 4*d.* for an arrest, and 4*d.* for making a *Bail Bond*, and although it is usual to pay one guinea on the arrest to the officer, if he exact it from the defendant, he incurs the penalty of 40*l.* besides the treble damages to a common informer, 1 Hodges, 193.) But when the plaintiff has paid the sum of one

guinea to the bailiff for an arrest, he has been allowed by the master or prothonotary in the taxation of costs, *per* Holroyd, J., S. C.—2 Chit. Rep. 302; and see 2 Bla. Rep. 1101.—3 T. R. 417.—2 New R. C. P. 59.—1 Stark. N. P. C. 417. In 2 C. & P. 118, it was held, a sheriff's officer may claim a guinea or half guinea against plaintiff's attorney, for a caption, it having been usually allowed. Where sheriff's officer, who arrests a defendant, demands and receives from him a larger sum than he is liable to pay as a caption fee, and for the expense of the bail-bond, &c. the court will, on motion, order it to be referred to the master, to ascertain what the officer is entitled to on that account, and order him to restore the surplus to the defendant, and to pay the costs of the application, 4 Price, 309. See the notes, post, 504. An amendment to insert counts on 23 H. 6. c. 9, at the suit of a common informer, has been refused, 5 J. B. Moore, 330.

there marked for bail, for [£1100] and which said warrant so marked for bail, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, was delivered to the said defendant, then being one of the bailiffs of the said sheriff of the said county of S. to be executed in due form of law, by virtue of which said writ and warrant, he the said defendant, as such bailiff, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, and within the bailiwick of the sheriff of the same county, took and arrested the said plaintiff by his body, and then and there had and detained him in his custody at the suit of the said M. I. for the cause aforesaid; and the said plaintiff in fact further saith, that after the said plaintiff had been so arrested, and whilst he remained in custody of the said defendant, by virtue and under color of the said writ and warrant, for the cause aforesaid, to wit, on, &c. last aforesaid, at, &c. (*venue*) aforesaid, he the said defendant, then being one of the bailiffs of the said county of S. as aforesaid, demanded, took and received, of and from the said plaintiff, a certain sum of money, to wit, the sum of [£2. 1s. 8d.] (*the precise sum taken*) of lawful money of Great Britain, for detaining the said plaintiff, until after he the said plaintiff had given bail to the said writ [or, "for having arrested the said plaintiff as aforesaid,"] which said sum of money so demanded, taken, and received, by the said defendant, of and from the said plaintiff, in manner and for the cause aforesaid, then and there was and is a greater sum of money than at the time of the taking thereof was by law allowed to be taken or demanded by the said defendant, of and from the said plaintiff, on that occasion, contrary to the form of the Statute in such case made and provided; whereby, and by force of the said Statute, the said defendant, then being one of the bailiffs of the said sheriff of the said county of S. as aforesaid, forfeited and became liable to pay for his said offence to the said plaintiff, being the party thereby aggrieved, the sum of £50, and thereby, and by force of the said Statute, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of £50, so forfeited as aforesaid, parcel of the said sum above demanded.

BY PART I
GRIEVED

And whereas, heretofore, to wit, on the said, &c. there issued out of the court of our said lord the king, before the king himself here, a certain other writ of our said lord the king, called a *latitat* [*set out the writ, as before*] at the suit of the said M. I. against the said plaintiff, directed to the sheriff of S. by which said last-mentioned writ our said lord the king commanded the said sheriff [*stating the writ, the warrant, and arrest, and that whilst the plaintiff was in the defendant's custody, under the said last-mentioned writ and warrant, as in the former count,*] he the said defendant, then being one of the bailiffs of the said sheriff of the said county of S. aforesaid, demanded, took, and received, of and from the said plaintiff a certain sum of money, to wit, the sum of £2. 1s. 8d. of lawful money of Great Britain, for waiting till the said plaintiff had given bail to the said last-mentioned writ, which said last-mentioned sum of money so demanded, taken, and received by the said defendant, of and from the said plaintiff, in manner and for the cause last aforesaid, then and there was and is a greater sum of money than, at the time of taking thereof, was by law allowed to be taken or demanded by the said defend-

Second
count.

[*504]

BY PARTY
GRIEVED.

Third
count for
treble
damages,
on 23 H.
6. c. 9.

ant, of and from the said plaintiff, on that occasion, contrary to the form of the Statute in such case made and provided, whereby and by force of the said Statute, the said defendant then being one of the bailiffs of the said sheriff of the said county of S. as aforesaid, forfeited for his said last-mentioned offence to the said plaintiff, being the party thereby aggrieved, the said sum of £50, and thereby and by force of the said Statute an action hath, &c. —[*As in preceding count.*]

And whereas heretofore, to wit, on, &c. [*as in the second count verbatim*] he the said defendant, then being one of the bailiffs of the said sheriff of the said county of S. as aforesaid, by occasion, and under color of his office as such bailiff, took of the said plaintiff a certain sum of money, to wit, the sum of two guineas, that is to say, the sum of £2. 2s of lawful money of Great Britain, for his reward and profit for letting the said plaintiff to bail [*or, "for showing ease and favor to the said plaintiff by letting him out of the custody aforesaid"*] upon the said last-mentioned writ, which said last-mentioned sum of money, so taken, &c. [*as in first and second counts*] whereby the said plaintiff sustained damages to the amount of £2. 1s. 8d. and thereby, and by force of the said Statute, an action hath, &c. &c. to demand and have of and from the said defendant the sum of £6. 5s. being treble the amount of his said damages, and other parcel of the said sum above demanded.—[*Add count for money had and received, and account stated in debt, and common conclusion.*]

On 29
Eliz. c. 4.
and 43
Geo. 3 c. 6.
s. 5.
against
the extor-
tion on
final pro-
cess (y).

[*Commencement in debt as usual, ante, 384.*—For that whereas, &c.

(y) The action may be supported against the sheriff, he being liable for his bailiff's acts, 2 T. R. 154. But where more than the sum allowed has been taken by an officer of sheriff, who kept a lock-up house, but who was not the officer to whom the warrant was directed, but to whose house the defendant was brought after the arrest, no action will lie against the sheriff. 4 Esp. 63.

An action for money had and received, may be maintained against the sheriff, to recover the surplus of excessive poundage taken. 3 B. & B. 145.—6 J. B. Moore, 338, S. C.—2 Bing. 255.—1 Stark. 345.

In that case it was also held, that a sheriff who levies under a *levari facias* for a crown debt, is not entitled to poundage under the 29 Eliz. c. 4, and, consequently, that an action against him under that act for extortion, in such a case is misconceived. Id.

Where the sheriff retained out of the proceeds of a sale under an execution, the expenses occasioned by keeping possession of the goods under an injunction out of Chancery; it was held, that this being an indirect way of taking more than the poundage allowed by the statute, he thereby incurred the penalty of this statute, 5 D. & R. 495.—3 B. & C. 688, S. C. And if it appear by the sheriff's return of a writ of execution, that greater fees have been taken for the levy than are allowed by this

statute, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. Woodgate v. Knatchbull, 2 T. R. 148. Under the statute the sheriff cannot take any other charge but for poundage. Id. ibid.

An action for money had and received at the suit of the plaintiff, who has sued out a *fi. fa.* lies against the sheriff who executed it, if he retain more in his hands than he is entitled to do, the party injured not being bound to proceed by motion in bank. 1 Stark. 345.

So if sheriff's officer takes money *colores officii* for any thing done in the course of his duty, and to which he is not entitled by law, though there is no evidence that the money came to his hands. 2 Esp. Rep. 507.

There seems no occasion to set forth the judgment in the declaration, if the plaintiff state it, and that execution was sued out on the said judgment, it must be proved, 2 Wm. Bla. 1101.—6 T. R. 498.

If the statute 28 Eliz. c. 4, be recited as the 29 Eliz. it would be a variance, 2 Bing. 255.

See the note, ante, 501, as to the mode of connecting the sheriff with his officer in an action against the sheriff.

The party grieved is enabled to recover treble the amount of damages found by the verdict. 6 D. & R. 1.—4 B. & C. 154, S. C.

[*here state the judgment recovered, the fi. fa. issued, and the levy, which may be as in form, post, 748, or if the writ was a ca. sa. it may be as in form ante, 416, 417, and then proceed thus, according to the facts:*]—Nevertheless the said defendant, not regarding his duty in that behalf, nor the Statute in such case made and provided, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, by reason and color of his said office, under and by color of the said writ, wrongfully, illegally, and oppressively, had, received, and took, of and from the said plaintiff, for the serving and executing of the said writ of execution, and for poundage fees, and expenses of the same execution, and in respect and on account thereof, a much larger sum of money, and more and other consideration and recompense than is by law allowable, limited, and appointed in that behalf, that is to say, divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of [£10] more than and over and above the legal and reasonable consideration and recompense for serving and executing the said writ of execution, and for poundage fees and expenses of the said execution, and on account thereof in that behalf demandable, due and incurred, and over and above the said sum of —*l.* so indorsed, to be levied as aforesaid, whereby the said plaintiff was and is damaged and aggrieved to the amount of the said sum of money, to wit, the sum of [£10] contrary to the form of the Statute in such case made and provided; and thereby, and by force of the said Statute, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the sum of £30, being treble the amount of the said damages, and parcel of the said sum above demanded.

BY PARTY
GRIEVED.

And whereas also heretofore, to wit, on the day [*teste of fi. fa.*] a certain other writ of our lord the king, called a *fi. fa.* was issued, &c. [*here state fi. fa. and the delivery to the sheriff, as in first count*] by virtue of which said writ so indorsed as aforesaid, afterwards, and before the return thereof to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, the said defendant, as such sheriff, seized and took in execution divers goods and chattels of the said plaintiff, there then found and being, of a large value, and then and there levied the said sum of money so indorsed on the said last-mentioned writ as aforesaid; nevertheless the said defendant, as aforesaid, not regarding his duty in that behalf, nor the Statute in such case made and provided, but contriving and wrongfully and injuriously intending to harass, oppress, and injure the said plaintiff in this behalf, heretofore to wit on the day and year last aforesaid, at, &c. (*venue*) aforesaid, wrongfully, illegally, and oppressively, took, had, and received, of the said plaintiff, for the serving and executing of the said last mentioned execution, more and other consideration and recompense than in the Statute in such case made and provided, is limited and appointed in that behalf, that is to say, the sum of £10 more than in the said act is limited and appointed, contrary to the form of the Statute in such case made and provided. By means whereof the said plaintiff saith, that he was and is damaged and aggrieved to the said last-mentioned sum of £10, contrary to the form, &c.—[*Conclude as in first count, and add the common count for money had and received, account stated, and usual breach.*]

Second
count, on
the 29
Eliz c. 4.
alone, for
treble
damages.

In an action on the 29 Eliz. plaintiff is entitled to treble costs as well as treble damages, 2 B. & A. 393.—1 Chit. Rep. 137, and note, (a).

BY PATRY
GRIEVED.
On 17 G.
2. c. 3. s.
3. against
an over-
seer for re-
fusing to
permit in-
habitant of
township
to inspect
rates, or
have a co-
py.
First
count, for
not per-
mitting to
inspect
(2).

[*505]

For that whereas the said plaintiff, before and at the time of the committing of the offence hereafter next mentioned, was and still is an inhabitant [or parishioner] of the township [or parish] of — in the parish of — in the county of — and that before and at the time of the committing of the offence hereinafter next mentioned, he the said defendant was, and still is, one of the overseers of the township of, &c. aforesaid; and the said plaintiff further says, that heretofore, to wit, on, &c. at the township [or parish] aforesaid, in the county aforesaid, the church warden and overseers of *the said township [or parish] of, &c. made a certain rate for the relief of the poor of the said township, [or parish] and which said rate so made as aforesaid, was afterwards, and before the committing of the offence hereinafter next mentioned, to wit, on, &c. (*day of allowance or about it*) at, &c. (*venue*) aforesaid, allowed by two of his majesty's justices, (one of the said justices then and there being of the quorum) assigned to keep the peace of his said majesty within the county aforesaid, and that the churchwardens and overseers of the poor of the township aforesaid, to wit, on the Sunday next after the allowance of the said rate as aforesaid, to wit, on, &c. public notice duly gave in the parochial church of — aforesaid, of that rate having been duly allowed by the two justices, to wit, at the township [or parish] aforesaid, in the county aforesaid; and the said plaintiff further says, that afterwards, and at a reasonable time, to wit, on, &c. at, &c. (*venue*) he the said plaintiff did request the said defendant as (a) such overseer of the said township [or parish] as aforesaid, to permit the said plaintiff to inspect the said rate, and then and there tendered and offered to him one shilling for the same; yet the said defendant did not, nor would, permit the said plaintiff to inspect the said rate, but then and there wholly neglected and refused so to do, contrary to the form of the Statute in such case made and provided, whereby the said defendant for-

(2) See a form of declaration, 3 B. & C. 658.—5 D. & R. 572.—7 B. & C. 586. 6 Bingham 230, S. C. In order to entitle a party to sue for the penalty, he must show that he has sustained an injury by the act of the overseer, and there must be a demand to inspect the rate made at a reasonable time and place, which it seems should be the house of the overseer.

Though copies are to be given *forthwith*, the overseer is entitled to a reasonable time for making them out. 3 B. & C. 658.—5 D. & R. 572, S. C.

In 7 B. & C. 586.—1 Man. & Ry. 482. 1 D. & R. Mag. Ca. 184, S. C. it was held, first, that a demand to inspect a rate made on the overseer by a rated inhabitant, in the presence of his attorney, was a lawful demand. Secondly, that the refusal to produce the rate upon a lawful demand, constitutes the inhabitant a party grieved within the meaning of the statute. Thirdly, that a notice in this form, "This is to give notice that a rate or assessment of one shilling in the pound, will be collected forthwith," was a good publication of the rate, although it was not stated that it had been allowed by the justices. Fourthly, that a demand to see "the rate" was sufficiently specific, there being only one rate in esse

at the time. Fifthly, that the overseer, by refusing to show the rate, and referring the party to the select vestry as the place where he would be allowed to inspect it, incurred the penalty imposed by 17 Geo. 2. c. 3.

In 6 Bingham 230, in error, being the same case as in 7 B. & C. 586.—1 M. & R. 482, it was held *first*, that an assistant overseer appointed under 59 Geo. 3. c. 12 s. 9. and having, by virtue of his office, the poor rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant when lawfully demanded, according to the 17 Geo. 2. c. 3. and *secondly*, the declaration having alleged that defendant was assistant overseer; that a rate for the relief of the poor was made and duly allowed; and although defendant, as such assistant overseer, had the rate in his possession, and although plaintiff had at a reasonable time demanded an inspection of it, and tendered one shilling, yet defendant refused to produce it, whereby he forfeited 20l., it was held, on motion in arrest of judgment, that the count was sufficient, for if the defendant had the rate in his custody, as assistant overseer, it might be presumed it was his duty to produce it when lawfully demanded.

(a) As to these words, see 6 Bingham 230.—Ante, 504 b.

feited, for his said offence, the sum of £20, and whereby, and by force of the said Statute, an action hath accrued to the said plaintiff, being the party aggrieved, to demand and have of and from the said defendant the said sum of £— parcel of the said sum above demanded.

BY PARTY
GRIEVED.

And whereas also the said plaintiff being such inhabitant, [or parishioner] and the said defendant being such overseer of the poor of the said township [or parish] of, &c. in the county aforesaid, and the said rate being so made, assessed, allowed, and notified, as aforesaid, he the said plaintiff afterwards, and at a reasonable time, to wit, on, &c. at &c. (*venue*) demanded of the said defendant, being such overseer of the poor of the said township [or parish] as aforesaid, a copy of the said rate so assessed, made, allowed, and notified, as aforesaid, and was then and there ready to have paid, and offered to pay to the said defendant for the same, *at and after the rate of sixpence for every twenty-four names thereof, according to the form of the Statute in such case made and provided; yet the said defendant did not then, nor hath he at any time since, hitherto delivered or given to the said plaintiff a copy of the said rate, or any part thereof, but hath hitherto wholly refused so to do, contrary to the form, &c. whereby, and by force, &c.—[*Conclude as in the first count.*]

Second
count, for
refusing to
give a copy.

[*506]

And whereas also the said plaintiff being such inhabitant, [or parishioner] and the said defendant being such overseer of the poor of the said township [or parish] as aforesaid, on, &c. at, &c. (*venue*) aforesaid, demanded of the said defendant a copy of the said rate, so assessed, made, allowed, and notified as aforesaid; and was then and there ready to have paid, and offered to pay to the said defendant for the same, at and after the rate of sixpence for every twenty-four names thereof, according to the form of the Statute in such case made and provided; yet the said defendant did not then, nor hath he any time since, delivered or given to the said plaintiff a copy of the said rate, or any part thereof, but hath hitherto altogether neglected so to do, contrary, &c. whereby, &c. residue, &c.—[*Conclude as in the first count, and add the usual breach.*]

Third
count for
neglect-
ing to give
a copy.

(1) [*The commencement is as ante, 384, n. (a) the penalty being given entirely to the plaintiff by 2 Geo. 3. c. 19. s. 5. When the plaintiff sues qui tam, the commencement is different; see ante, 13. 18.*]

BY COM-
MON IN-
FORMER.

*[Commencement *qui tam*, for king and informer, as ante, 13.]—For that whereas heretofore, to wit, on, &c. at, &c. he the said A. B. was taken and arrested by the said C. D. (the said C. D. then and there being sheriff of the county of *——,) by virtue of a certain writ of our said lord the now king, of a *capias ad respondendum*, before then sued

[*509]
Declara-
tion in
debt *qui*
[*510]

(1) Where a statute gives a form of declaring to the party grieved, in a suit by a common informer, the plaintiff must notwithstanding, state his cause of action specially, 4 Johns. 193. 197. The provision of the statute must be set forth, and there must be a direct allegation that the offence was committed against the form of the statute, 10 Mass. 39.

BY COM-
MON IN-
FORMER.

—
tarn
against the
sheriff, on
the 23
Hen. 6 c.
9. And
first count
for 40*l*.
penalty
for refus-
ing to take
bail, sec-
ond count,
for 40*l*. for
extortion.
(b).

and prosecuted out of his said majesty's court of common bench, at Westminster, at the suit of E. F. directed to the sheriff of the said county of, &c. by which said writ the said sheriff was commanded that he should take the said A. B. if he should be found in his bailiwick, and safely keep him so that he might have his body before the justices of the said lord the king, at Westminster, on, &c. to answer the said E. F. in a plea of trespass in the said writ mentioned; and also that the said A. B. might answer to the said E. F. according to the custom of his majesty's court of the bench, in a certain plea of trespass on the case upon promises, to the damage of the said E. F. of £—, and that the said sheriff should have there then that writ; which said writ was duly marked and indorsed for bail for £—, according to the form of the statute in that case made and provided; and the said A. B. further saith, that he the said A. B. being so arrested as aforesaid, continued and remained in the custody of the said C. D. so being such sheriff as aforesaid, for the cause aforesaid, by virtue of the said writ, until he the said A. B. afterwards, to wit, on, &c. at, &c. aforesaid, tendered and offered to the said sheriff, sufficient sureties, to wit, I. K. and L. M. two good and lawful men of the said county, they the said I. K. and L. M. having sufficient within the bailiwick of the said sheriff of the said county of — aforesaid, who then and there were willing, and offered to become bail or sureties, for the appearance of the said A. B. at the return of the said writ, according to the exigency of the said writ; yet the said C. D. not regarding the statute in such case made and provided, nor fearing the penalties therein contained, did not take the said bail or sureties, or any other bail or sureties, but wholly refused so to do, and detained him the said A. B. so in custody as aforesaid, under color and pretence of the said writ, and on no other account whatsoever, for a long space of time, to wit, for the space of five days, after the said A. B. had so tendered bail and sureties to him as aforesaid, contrary to the form of the said statute in such case made and provided; whereby and by force of the said statute in such case made and provided, an action hath accrued to the said A. B. who sues as aforesaid, to demand and have of the said C. D. for our said lord the king and himself the said A. B. the sum of £40, parcel of the said sum above demanded.

[*511]
Second
count.

*And the said A. B. who sues as aforesaid, further says, that the said C. D. again disregarding the statute in such case made and provided, nor fearing the penalties therein contained, after the said A. B. was so taken and arrested as aforesaid, under and by virtue of the said writ, to wit, on, &c. at, &c. aforesaid, did by force and color of his said office of sheriff, take, of and from the said A. B. a certain fee for his reward and profit, other than and different from what is mentioned and allowed in the said act of parliament in that case made and provided in that respect (that is to say,) a large sum of money, to wit, 2*s*. 6*d*. of lawful, &c. under pretence of a fee, then and there claimed and taken by him for searching the office of the said sheriff before he would let the said A. B. out on

(b) See debt for extortion, at suit of party grieved, ante, 501, and see a modern precedent in case at suit of party grieved, for refusing sufficient bail, post. It is more usual to state the issuing of in the process,

as ante, 445 to 453, and as declarations on bail bonds. When sufficient evidence to connect sheriff with act of extortion of his officer, in an action against sheriff for extortion, see 5 J. B. Moore, 183.

bail as aforesaid, contrary to the form of the statute in that case made and provided; whereby, and by force of the said statute, an action hath accrued to the said A. B. who sues as aforesaid, to demand and have as well for our said lord the king as for himself, of the said C. D. other £40 further parcel of the said sum above demanded.

BY COM-
MON IN-
FORMER.

And the said A. B. who sues as aforesaid, further saith, that the said C. D. again disregarding the statute in such case made and provided nor fearing the penalties therein contained, after the said A. B. was so taken and arrested as aforesaid, and was and remained in custody as aforesaid, under and by virtue of the said writ, to wit, on, &c. at, &c. aforesaid, did, by force and color of his said office of sheriff, take, of and from the said A. B. for fee, and letting the said A. B. to bail, a much larger reward and profit than such as were in and by the said act of parliament in that case made and provided, and allowed in that respect (that is to say, the sum of —l. of lawful, &c.) contrary to the form of the statute in such case made and provided, whereby, and by force of the statute, an action hath accrued to the said A. B. who sues as aforesaid, to demand and have, as well for our said lord the king, as for himself, of the said C. D. other —l. residue of the said sum above demanded; yet the said C. D. (although often requested) hath not paid to our said lord the king, and the said A. B. who sues as aforesaid, or either of them, the said £120 above demanded or any part thereof, but to pay the same to them, or either of them, he the said C. D. hath wholly refused, and still doth refuse, and therefore, as well for our said lord the king, as for himself, the said A. B. brings his suit, &c.

Third
count.

*For that, after the 29th day of September, which was in the year of our Lord 1714, and before the making of the corrupt and unlawful agreement hereafter next mentioned, to wit, on, &c. at, &c. one E. F. made his certain note in writing, commonly called a promissory note, with his own proper hand, bearing date the day and year last aforesaid, and then and there delivered the said note to one G. H. by which said note he the said E. F. then and there promised to pay, three months after the date thereof, to the said G. H. by the name and addition of, &c. or order, —l. value received, and the said G. H. to whom, or to whose order, the payment of the said sum of money in the said note specified, was by the said note to be made, afterwards, and before the making of the corrupt and unlawful agreement hereafter next mentioned, to wit, on, &c. last aforesaid, at &c. aforesaid, indorsed the said note, by which said indorsement he the said G. H. then and there ordered and appointed the said sum of money, in the said note specified, to be paid to the said A. B. or his order, and

[*512]
On 12
Anne, st.
2. c. 16,
for usury,
in taking
more than
5l. per
cent on
discount
of a note,
part in
money
and part
in goods,
overchar-
ged (c).

(c) In this action the venue is local, and should be laid where the usurious interest is received, because the offence is not complete till such interest is received, *Pearson v. M'Gowan*, Hilary Term, 5 Geo. 4. How to frame the declaration, see 1 Saund. 295, 5th edit. It suffices to set forth the corrupt contract generally and not specially, as in a plea of usury, see 3 Term Rep. 108. If the agreement was for the forbearance of

money till one or the other of two days, at the option of the borrower, it should be so stated, 3 Term Rep. 531. Where the declaration stated a specific sum to have been lent, but the evidence was of a loan, part in money and part in gold, of a known definite value, which the party borrowing had agreed to take as cash, the court held the evidence supported the declaration, 1 H. Black. 283.—5 Taunt. 288.—1 Marsh. 33.

BY COM-
MON IN-
FORMER.

then and there, delivered the said note, so indorsed as aforesaid, to the said A. B. [then another indorsement by A. B. to I. K. was stated;] and the said note being so made and indorsed, as aforesaid, afterwards, and after the said 29th day of September, in the year of our Lord 1714 aforesaid, and before the exhibiting of the bill of the said A. B. who sues as aforesaid, against the said C. D. to wit, on, &c. at, &c. aforesaid, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said C. D. and the said I. K. that the said C. D. should lend and advance to the said I. K. the sum of —*l.* of lawful, &c. and that the said C. D. should forbear and give day of payment thereof unto the said I. K. from the lending and advancing thereof until the said promissory note should become due and payable, according to the tenor and effect thereof, and that the said I. K. should buy of the said C. D. and that the said C. D. should sell and deliver to the said I. K. divers, to wit, 20 casks of butter, being then and there of small value, to wit, of the value of —*l.* of lawful, &c. as he the said C. D. then and there knew, for which said casks of butter the said I. K. should pay to the said C. D. a much larger sum of money than the said real value of the said casks of butter, and the said sum of —*l.* to wit, the sum of —*l.* of like lawful money; and that, for the forbearing and giving day of payment *of the said sum of —*l.* by the said C. D. to the said I. K. as aforesaid, the said C. D. should take, accept, and receive, of and from the said I. K. a certain sum of money, to wit, the sum of —*l.* of lawful, &c. being the difference between the real value of the said casks of butter and the said sum of —*l.* so as aforesaid to be paid for the same, and that the said C. D. should also take, accept, and receive for such forbearance, the further sum of —*l.* of like lawful money, and that for securing the payment of the said sum of —*l.* so to be lent and advanced by the said C. D. as aforesaid, and of the said sum of —*l.* the said I. K. should deliver to the said C. D. the said promissory note, so made and indorsed as aforesaid; and the said A. B. who sues as aforesaid, avers, that, in pursuance of the said corrupt and unlawful agreement, he the said C. D. did afterwards, to wit, on, &c. (d) and on divers other days and times, between that day and the 22d day of November then next following, at, &c. aforesaid, lent and advanced to the said I. K. divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* of lawful, &c. and did forbear and give day of payment thereof to the said I. K. from the lending and advancing thereof, until the said promissory note did become due and payable according to the tenor and effect thereof; and that, in further pursuance of the said corrupt and unlawful agreement, the said I. K. on the said, &c. at, &c. aforesaid, did buy of the said C. D. and the said C. D. did then and there sell and deliver to the said I. K. divers, to wit, twenty casks of butter, being then and there of small value, to wit, of the value of the said sum of —*l.* of lawful, &c. as he the said C. D. then and there well knew, for which said casks of butter the said I. K. did afterwards, to wit, on, &c. at, &c. aforesaid, pay to the said C. D. a much larger sum of money than the real value of the said casks of butter, and much more than

(d) The day on which the money is av- Esp. 152.—1 Campb. 445.
red to have been advanced, is material. 4

BY COM-
MON IN-
FORMER.

the said sum of —*l.*, to wit, the sum of —*l.*, of like, &c. And the said A. B. who sues as aforesaid, further says, that for the forbearing and giving day of payment of the said sum of —*l.*, by the said C. D. to the said I. K. as aforesaid, the said C. D. in further pursuance of the said corrupt and unlawful agreement, did then and there, to wit, on, &c. last aforesaid, at, &c. aforesaid, take, accept, and receive, of and from the said I. K. a certain sum of money, to wit, the sum of —*l.*, of lawful, &c. being the difference between the real value of the said casks of butter, and the said sum of —*l.*, so as aforesaid paid for the same; and that afterwards, to wit, on, &c. at, &c. *aforesaid, the said C. D. in further pursuance of the said corrupt and unlawful agreement, did take, accept, and receive, for such forbearance, of and from the said A. B. the further sum of —*l.*, of like lawful, &c.; and that for securing the payment of the said sum of —*l.*, so lent and advanced by the said C. D. to the said I. K. as aforesaid, and of the said last-mentioned sum of —*l.*, the said I. K. in further pursuance of the said corrupt and unlawful agreement, did, on the said, &c. at, &c. aforesaid, deliver to the said C. D. the said promissory note, made and indorsed as aforesaid, and which said promissory note he the said C. D. then and there accepted and received, of and from the said I. K. according to the said corrupt and unlawful agreement, and upon the terms thereof; and the said A. B. who sues as aforesaid, further saith, that the said sum of —*l.*, being the difference between the real value of the said casks of butter, and the said sum of —*l.*, so as aforesaid paid for the same, together with the said sum of —*l.*, so taken, accepted, and received by the said C. D. of and from the said A. B. in manner and for the cause aforesaid, exceed the rate of £5 the forbearing of £100 for a year, contrary to the form of the statute in such case made and provided, whereby, and by force of the statute in such case made and provided, the said C. D. forfeited for his said offence the sum of —*l.*, being treble the value of the said sum of —*l.*, so lent and advanced by the said C. D. to the said I. K. and so forborne as aforesaid, and thereby, and by force of the statute in such case made and provided, an action hath accrued to the said A. B. who sued as aforesaid, to demand and have, for our said lord the king, and for himself, in this behalf, of and from the said C. D. the said sum of —*l.*, so forfeited as aforesaid, parcel of the said sum above demanded —[*Common count for usury, as in the next precedent.*]

[*514]

For that the said C. D. after the 29th day of September, in the year of our Lord 1714, and before the exhibiting of the bill of the said A. B. who sues as aforesaid, against the said C. D. to wit, on, &c. at, &c. upon a certain corrupt contract, made after the said 29th day of September, which was in the year of our Lord 1714 aforesaid, to wit, on, &c. at, &c. aforesaid, between the said C. D. and one E. F. took, accepted, and received, of and from the said E. F. a certain sum of money, to wit, the sum of —*l.*, of lawful, &c. by way of corrupt bargain and loan, for the said C. D. forbearing and giving, and having forborne *and given day for payment of a certain sum of money, to wit, the sum of —*l.* of like lawful money, theretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, lent and advanced by the said C. D. to the said E. F. (or “due and owing from the said E. F. to the said C. D.”) from the said, &c.

Common
count, for
usury, on
12 Anne,
st. 2. c. 16.

[*515]

BY COM-
MON IN-
FORMER.

until and upon the said — day of, &c. then next following, which said sum of — £ so taken, accepted, and received, by the said C. D. of and from the said E. F. in manner and for the cause aforesaid, exceeds the rate of $\text{£}5$, for the forbearing of $\text{£}100$ for a year, contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute the said C. D. forfeited for the said offence, the sum of — £ ., being treble and value of the said sum of — £ ., so lent and advanced by the said E. F. to the said C. D. and so forborne as aforesaid; and thereby, and by force of the said statute, an action hath accrued to the said A. B. who sues as aforesaid, to demand and have, for our said lord the king, and for himself, in this behalf of and from the said C. D. the said sum of — £ ., parcel of the said sum above demanded.

The like
for usury
where the
sum for-
borne was
paid at
different
times.

[*516]

For that the said C. D. after the 20th day of September, which was in the year of our Lord 1714, and before the exhibiting of the bill of the said A. B. who sues as aforesaid, against the said C. D. to wit, on, &c. at, &c. upon a certain corrupt contract, made after the said 29th day of September, which was in the year of our Lord 1714 aforesaid, to wit, on, &c. aforesaid, at, &c. aforesaid between the said C. D. and one E. F. took, accepted, and received, of and from the said E. F. a certain sum of money, to wit, the sum of $\text{£}1. 1\text{s.}$ of lawful money of Great Britain, by way of corrupt bargain and loan, for the said C. D.'s forbearing and giving, and having forborne and given day of payment of a certain sum of money, to wit, the sum of $\text{£}22$, of like lawful money, heretofore, to wit, on, &c. at, &c. aforesaid, lent and advanced by the said C. D. to the said E. F. from the time of lending and advancing the same, until and upon, &c. when a part of the said sum of $\text{£}22$, to wit, the sum of $\text{£}15. 11\text{s.}$ part thereof was paid and satisfied, and also for the forbearing and giving, and having forborne and given, day of payment, of the sum of $\text{£}6. 9\text{s.}$ of like lawful money, residue of the said sum of $\text{£}22$, upon, and from the day and year last aforesaid, until and upon, &c. when a part of the said sum of $\text{£}6. 9\text{s.}$ to wit, the sum of $\text{£}3$, part thereof was paid and satisfied, and also for the forbearing *and giving, and having forborne and given, day of payment of the sum of $\text{£}3. 9\text{s.}$ of like lawful money, residue of the said sum of $\text{£}6. 9\text{s.}$ upon and from the day and year last aforesaid, until and upon, &c. which said sum of $\text{£}1. 1\text{s.}$ so taken, accepted, and received by the said C. D. of and from the said E. F. in manner and for the cause aforesaid, exceeds the rate of $\text{£}5$, for the forbearing of $\text{£}100$ for a year, contrary to the form of the statute, in such case made and provided; whereby, and by force of the statute, the said C. D. forfeited for his said offence, the sum of $\text{£}66$, of like lawful money, being treble the value of the said sum of $\text{£}22$, so lent and advanced by the said C. D. to the said E. F. and so forborne as aforesaid, and thereby and by force of the said statute in such case made and provided, an action hath accrued to the said A. B. who sues as aforesaid, to demand and to have for our said lord the king, and for himself in this behalf, of and for the said C. D. the said sum of $\text{£}66$, so forfeited as aforesaid, parcel of the said sum above demanded.

*DECLARATIONS IN COVENANT.

I. ON APPRENTICE DEEDS.

BY MAS-
TER
AGAINST
FATHER
OF AP-
PRENTICE.
Against
the father
of an ap-
prentice
for the ap-
prentice
absenting
himself.
(e).

[*518]

Ellenborough.

— Term, — Will. 4. (f).

—, to wit. A. B. complains of C. D. being in the custody of the marshal of the Marshalsea (g) of our lord the now king, before the king himself, of a plea of breach of covenant. For that whereas, heretofore, to wit, on, &c. (h) at, &c. (venue) by a certain indenture of apprenticeship (i) then and there made, (one part of which said indenture (k), sealed *with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid,) one E. F. did put himself apprentice to the said plaintiff to learn his art, trade, and mystery of a — and with him (after the manner of an apprentice) to serve from the date thereof unto the full end and term of [seven] years from thence next following, to be fully complete and ended, during which term it was thereby covenanted and agreed, that the said apprentice his said master faithfully should serve, his secrets keep, his lawful commands every where gladly do, and that he should not haunt taverns or playhouses, nor absent himself from his said master's service day or night unlawfully, but in all things as a faithful apprentice should behave himself towards his said master, and all his, during the said term. And for the true perform-

(e) See forms of declaration, by and against apprentices, Morg. 480, 550.—Pl. A. 316; and other forms, indexed in 5 Wentw. 112, 132. See the law in general, 1 Burn, J. 26th edit. tit. "Apprentices." A father cannot, against his infant son's consent, bind him as an apprentice, 3 B. & A. 584. An action of covenant cannot be supported against an infant apprentice. Cro. Car. 179.—6 T. R. 557.—It should therefore be against the party who covenanted for the infant's due performance of the indenture. The usual words of the indenture amount to a covenant. Doug. 518.—8 Mod. 190.—Com. Dig. tit. "Covenant." A. 2. It is no defense that the defendant's son, after becoming of age, avoided the indenture, though he properly served till that time. 3 B. & A. 59. The master cannot dismiss apprentice from his service, though the apprentice misbehave himself. 1 B. & C. 460.—2 D. & R. 465, S. C. But if the apprentice quit the service, and refuse to return, or prevents himself from returning,

and the master is not requested to receive him back, the master is not liable for not receiving and taking care of him, 6 B. & C. 680; and see the pleadings there.

(f) As to title, see ante, 12, note, (a).

(g) See forms by original, &c. ante, 10, 18, 20.

(h) A deed may be stated in pleading to have been made on a day different from its date, omitting the words "bearing date, &c." 4 East, 477; but it is most usual to insert the date.

(i) As to the binding by indenture, see 1 Nolan's Poor Laws, 311.—Co. Lit. 145 b. Burn, J. tit. "Apprentice."

(k) A profert, or an excuse for the want of it must in general be stated, or the declaration will be bad on special demurrer, 4 Anne, c. 16. If a profert be stated, and the deed cannot be produced, plaintiff will be nonsuited on the plea of *non est factum*, 4 East, 585. As to proferts in general, see 1 Saund. 9. note 1.—Ante, 439.—Index, vol. i. tit. "Profert."

BY MASTER
AGAINST
FATHER
OF AP-
PRENTICE.
Reference
to inden-
ture.
Entry of
appren-
tice into
service.

General
perform-
ance by
plaintiff.

Breach.
[*519]

Usual con-
clusion.

BY AP-
PRENTICE
AGAINST
MASTER.
Covenant
by the ap-
prentice
on his in-
denture.
(p).

ance by the said E. F. of all and every the covenants and agreements therein contained on the part and behalf of the said E. F. to be performed and fulfilled, the said defendant thereby *bound* himself unto the said plaintiff (l). As by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which said indenture the said E. F. afterwards, to wit, on the said, &c. at, &c. (*venue*) aforesaid, entered, and was then and there received into the service of the said plaintiff as such apprentice as aforesaid, and remained and continued in such service, under and by virtue of the said indenture, for a long space of time, to wit, from the day and year last aforesaid, until, and upon, &c. [or, from thence hitherto] to wit, at, &c. (*venue*) aforesaid. And although he (m), the said plaintiff, hath always, from the time of the making of the said indenture, hitherto well and truly performed, fulfilled, and kept all things therein mentioned and contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof, the said plaintiff in fact saith, that the said E. F. did not nor would faithfully serve the said plaintiff according to the tenor and effect, true intent and meaning of the said indenture; but on the contrary thereof, he the said E. F. during the said term, to wit, on, &c. at, &c. (*venue*) *aforesaid, did unlawfully absent himself, and hath, from thence, hitherto remained and continued absent from the service of the said plaintiff contrary to the tenor and effect of the said indenture, and of the said covenant of the said defendant in that behalf made as aforesaid. And so, the plaintiff in fact saith (n), that the said defendant (although often requested so to do) hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of £— (o), and therefore he brings his suit, &c.

[See commencement in covenant, as ante, 517.] For that whereas, heretofore, to wit, on, &c. at, &c. (*venue*) by a certain indenture tripartite, then and there made between O. S. of, &c. gentleman, of the first part, the said plaintiff by the name of S. the son of the said O. S. of the second part, and the said defendant by the name of, &c. of the parish of P. in the said county, apothecary, of the third part (one part of which said indenture, sealed with the seal of the said defendant, he the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid), he the said plaintiff of his own free will, and by and with the consent and approbation of his said father, testified by his being made a party thereto, and by his signing and sealing thereof, did put and bind

(l) Ante, 517, note (e). This amounts to a covenant, Dougl. 518—8 Mod. 190.

(m) This general averment of performance by the plaintiff is unnecessary. 1 Saund. 235, n. 5.—Rep. temp. Hardw. 343. 4,—2 Mod. 309.

(n) This statement is unnecessary, there being a breach of covenant alleged before, it is holden unnecessary to make a repetition of it in the conclusion, 1 Saund. 235, n. 7.

(o) In all declarations in covenant, a

sum should be inserted sufficient to cover the real demand and interest till the time of final judgment.

(p) See this form, Pl. A. 316. It is not framed precisely according to the modern language of pleading, but may readily be adapted. See other precedents, by apprentices, 3 Wentw. 324, 312, 419, 427, 433. See a form of declaration by the father against the master, 6 B. & Cres. 680. As to the validity of the deed, see 16 East, 13, and Chitty's Law of Apprentices.

BY AP-
PRENTICE
AGAINST
MASTER.

[*520]

himself an apprentice to and with the said defendant to learn his art, and with him, after the manner of an apprentice, to serve from the day and year aforesaid, for and during, and until the full end and term of seven years from thence next ensuing, and fully to be complete and ended; during which said term, the said apprentice his master should and would faithfully serve, his secrets *keep, all his lawful and honest commands every where gladly do, he should do no damage to his said master, nor see it to be done by others, but to his power should prevent, or forthwith give notice to his said master of the same; the goods of his said master he should not waste, nor lend them unlawfully to any; hurt to his said master he should not do, or cause or procure to be done; he should neither buy or sell without his master's leave; tarverns, inns, or ale-houses, he should not haunt; at cards, dice, tables, or any other unlawful game, he should not play; matrimony he should not contract; nor from the service of his said master, day or night, absent himself, but in all things, like an honest, diligent, and faithful apprentice, should and would demean and behave himself towards his said master, and all his, during the said term; and the said O. S. for and in consideration of the covenants and agreements on the said defendant's part and behalf to be done and performed, for himself, his heirs, executors, and administrators, did covenant, promise, and agree, to and with the said defendant, his executors and administrators, by the said indenture, in manner and form following, that is to say, that the said plaintiff should and would well, truly, and faithfully serve the said defendant, during all the term of his said apprenticeship, according to the purport, true intent, and meaning, of all and singular the articles above mentioned, without any fraud, deceit, damage, or departure; and also that he the said O. S. should and would find, allow, provide, and deliver unto the said plaintiff, during the term of his said apprenticeship, sufficient and decent apparel, of all sorts, both of linen and woollen, so often as need should require, and thereof should and would save harmless and indemnify the said defendant, his executors and administrators, and likewise should and would cause the said apparel to be repaired and amended so often as the same should want and stand in need of being repaired and amended; and the said defendant, for and in consideration of the sum of £60, of lawful money of Great Britain, to him in hand paid, at or before the ensealing and delivering thereof by the said O. S. the receipt whereof the said defendant did thereby acknowledge, and thereof, and of every part and parcel thereof, did acquit and discharge the said O. S. his executors and administrators forever, by the said indenture; and also for and in consideration of the service of the said plaintiff as aforesaid, for himself, his heirs, executors, and administrators, *did covenant, promise and agree, to and with the said plaintiff, his executors and administrators, by the said indenture, in manner and form following, that is to say, that he the said defendant should and would teach and instruct, or cause the said plaintiff to be taught and instructed, the best way and manner that he could in the art and mystery of an apothecary, which he then used, and also should, and would find, allow, and provide, unto and for the said plaintiff sufficient wholesome meat, drink, washing, lodging, and all other necessaries (except apparel and mending the same, as above mentioned), both in sickness and in health, during all the said term of his apprenticeship, as by the said indenture now brought here into court, rela-

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PRENTICE
AGAINST
MASTER.

Averment

tion being thereunto had, may more fully appear. And the said plaintiff in fact saith, that he the said plaintiff forthwith, after the making the said indenture, to wit, upon the said, &c. at, &c. (*venue*) aforesaid, entered into his said service, to serve the said defendant, as his apprentice, for the term aforesaid, according to the true intent and meaning of the said indenture, and hath always in all things well and truly observed, performed, and fulfilled all things in the said indenture contained, on his part and behalf to be performed and fulfilled, to wit, at, &c. (*venue*) aforesaid; nevertheless the said plaintiff in fact saith, that the said defendant, from the making of the said indenture, and from the time of his the said O. S.'s entering into the said service, hitherto hath not taught nor instructed him the said plaintiff, nor caused the said plaintiff to be taught and instructed in the said art and mystery of an apothecary, as he ought to have done, according to the form and effect of his said covenant in that behalf so made as aforesaid, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid; and the said plaintiff further saith, that the said defendant, from the making the said indenture, and from the time of the said plaintiff's entering into the said service, hitherto hath not found, allowed, nor provided, unto or for the said plaintiff meat, drink, washing, lodging, or any other necessities (apparel and mending thereof excepted, as is above mentioned), as he ought to have done, according to the form and effect of his said covenant in that behalf so made as aforesaid, but hath hitherto wholly neglected and refused so to do, contrary to the said indenture and the said covenant of the said defendant, in that behalf made as aforesaid, to wit, at, &c. (*venue*) aforesaid, and so, &c.—
[Common conclusion, as ante, 519, and as in next precedent.]

[*522]
Indenture
of appren-
ticeship to
a mariner,
by appren-
tice,
against ex-
ecutors of
master for
not provid-
ing meat,
board, &c.
(9).

*For that whereas, heretofore, to wit, on the, &c. at, &c. (*venue*) by a certain indenture of apprenticeship, then and there made between the said plaintiff and the said I. A. deceased, which said indenture was and is sealed with the seal of the said R. M. (but being in the possession of the said defendant, the said plaintiff cannot produce the same to the said court here (r),) the said plaintiff did put himself apprentice to the said I. A. to learn his art and mystery with him, after the manner of an apprentice, to serve from the day of the date of the said indenture, until the full end and term of three years from thence next following, to be fully complete and ended, and the said I. A. thereby covenanted and agreed, his said apprentice in the art of a mariner, which he used, by the best means that he could, to teach and instruct, or cause to be taught and instructed, finding unto his said apprentice sufficient meat, drink, and lodging, and in lieu of all other necessities during the said term, should and would pay unto him £14 for the first year, £16 for the second, and £20 for the third year, and of £5 more if he served his term out faithfully; and for the true performance of all and every the covenants and agreements therein contained both the said parties bound himself to the other by the said indenture, as by the said indenture, reference being thereunto had, will more fully and at large appear; by virtue and in pursuance of which said indenture, the said plaintiff afterwards, to wit, on the day and

(9) As to mariner's apprentice inden- s. 12.—Burn, J. tit. "Apprentice."
tures, see 1 Bott, 630 to 633.—5 Eliz. c. 5. (r) Let this be according to the fact.

BY AP-
PRENTICE
AGAINST
MASTER.

year aforesaid, at &c. aforesaid, entered, and was then and there received into the service of the said I. A. in his lifetime, as such apprentice as aforesaid, and remained and continued in such service, under and by virtue of the said indenture, for a long space of time, to wit, from the day and year aforesaid, until and upon the [25th] day of [August,] in the year of our Lord [1814] to wit, at, &c. (*venue*); and the said plaintiff did always, from the time of the making of the said indenture, until the day and year last aforesaid, hitherto well and truly perform, fulfill and keep, all things therein contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof, to wit, at, &c. aforesaid; and although the said plaintiff was always ready and willing, from the said [25th] day of [August,] in the *year of our Lord [1814] aforesaid, until the expiration of the said term of three years, to continue faithfully and duly to serve the said I. A. in his life-time, and his executors since his decease, to wit, at, &c. (*venue*) aforesaid, whereof the said I. A. in his life-time, and the said defendant as executor as aforesaid, after his decease, always there had notice; yet neither the said I. A. in his life-time, nor the said defendant, executor as aforesaid, since the death of the said I. A. although they were requested by the said plaintiff so to do, afterwards, and during the said term, to wit, on the said [25th] day of [August,] in the year of our Lord [1814] aforesaid, to wit, at, &c. (*venue*) aforesaid, did or would, during the residue of the said term, find unto the said plaintiff sufficient meat, drink, and lodging, and in lieu of all other necessities during the said term, pay unto him the said plaintiff £14 for the said first year, £16 for the second year, and £20 for the third year; but the said I. A. in his life-time, and the said defendant, as executor as aforesaid, since the death of the said I. A. have hitherto wholly neglected and refused so to do, to wit, at, &c. (*venue*) aforesaid, and by means of the premises the said plaintiff hath lost and been deprived of all the profits, benefits, and advantages, which he might and would have derived and acquired from the performance of the said covenant of the said I. A. to wit, at, &c. (*venue*) aforesaid; and so the said plaintiff in fact saith, that the said I. A. in his life-time, and the said defendant executor as aforesaid, after the death of the said I. A. have not, nor hath either of them, kept the said covenant so made by the said I. A. as aforesaid, but have broken the same and to keep the same with the said plaintiff have, and each of them hath, wholly neglected and refused, and the said R. M. executor as aforesaid, still doth neglect and refuse, to the damage of the said plaintiff of £100; and therefore he brings his suit, &c.

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II. ON ARTICLES OF AGREEMENT BETWEEN PARTNERS.

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) by certain articles of agreement, then and there made, concluded, *and agreed upon, between the said plaintiff of the one part, and the said defendant of the other part, one part of which said articles of agreement, sealed with the

ON ARTI-
CLES OF
AGREE-
MENT BE-
TWEEN
PARTNERS.
On articles
[*524]

ON ARTICLES OF AGREEMENT BETWEEN PARTNERS.

of agreement by co-partners in trade (s).

First breach.

[*525]

Second breach.

seal of the said defendant the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid, after reciting (t) the said plaintiff and defendant had used, exercised, and carried on the trade or business of pawnbrokers for several years then last past, and for the better understanding each other's intentions in a more clear and better way and manner in future, it was agreed, by and between the said parties that, &c.—[*Here state the agreement, according to the terms of the agreement, and which stipulated that either party making default should forfeit three guineas for each default. Proceed thus :*—]—And for the due performance and satisfaction of the said agreement, each of the said parties did thereby, for himself, his executors and administrators, covenant and agree with the other his executors and administrators, well and truly to observe and perform all the agreements therein mentioned, and in default of any one article, well and truly to pay such penalty, forfeiture, sum and sums of money, to the other, as in and by the said agreement as mentioned, and expressed to be paid by the defaulter, as by the said articles of agreement reference being thereunto had, will (amongst other things) more fully and at large appear; and although the said plaintiff hath well and truly performed and fulfilled all and singular the covenants and agreements in the said articles of agreement mentioned on his part and behalf to be done and performed; yet protesting (tt) that the said defendant hath not performed or fulfilled any thing in the said articles of agreement mentioned on his part and behalf to be done and performed, the said plaintiff in fact says, that after the making of the said articles, and whilst the said plaintiff and defendant used, exercised, and carried on the said trade or business of pawnbrokers, to wit, on, &c. at, &c. (*venue*) the said defendant took, from and out of the said shop and premises, in the said *articles of agreement mentioned, where the said plaintiff and defendant so used, exercised, and carried on their said business, a certain hat, to wit, of the value of five shillings, being part of the goods belonging to and in the custody of the said plaintiff and defendant as copartners in the said trade or business as aforesaid; and did not set down the same upon a slate or book kept for that purpose, nor did duly account for the same, according to the form and effect of the said articles of agreement, but on the contrary thereof, the said defendant made default in setting down the same as aforesaid, and did not duly account for the same as aforesaid, contrary to the force, form, and effect of the said articles of agreement, whereby the said defendant forfeited and became liable to pay to the said plaintiff the sum of £3. 3s. for such neglect or default; and the said plaintiff further says, that after the making of the said articles, and whilst the said plaintiff and defendant used, exercised, and carried on the said trade or business of pawnbrokers, to wit. on &c. at, &c. (*venue*) the said defend-

(s) See a form, 3 Wentw. 333. One partner may sue another for the breach of an express covenant. See 13 East, 8, 538. Ante, vol. i. 29; but *semble*, that on the breach of a covenant to account, only nominal damages can be recovered, and the plaintiff must resort to equity for his share of profits, if there had been no balance struck.

See other precedents on articles of agreement, 1 Saund. 40 to 45.—3 Wentw. 298,

326, 328.—Plead. Assist. 321, 330, 335, 340, 343.

(t) If the statement of the recitals is not material to the assignment of the breach, say "after reciting as therein recited, it was agreed, &c. and the said C. D. covenanted, that, &c."

((tt) This protest of general non-performance is not unusual, but being unnecessary should be omitted.)

ON ARTICLES OF AGREEMENT BETWEEN PARTNERS.

ant took, from out of the said shop and premises, in the said articles of agreement mentioned, where the said plaintiff and defendant so used, exercised, and carried on their said business, certain plates, to wit, twelve pewter plates, to wit, of the value of six shillings, being part of the goods belonging to and in the custody of the said plaintiff and defendant as copartners in the said trade or business as aforesaid, and did not set down the same upon a slate or book kept for that purpose, nor did duly account for the same, according to the form and effect of the said articles of agreement, but on the contrary thereof, the said defendant made default in setting down the same as aforesaid, and did not duly account for the same as aforesaid, contrary to the force, form, and effect, of the said articles of agreement, whereby the said defendant forfeited and became liable to pay to the said plaintiff the further sum of £3. 3s. for such neglect or default. And the said plaintiff further says, that after the making of the said articles, and whilst the said plaintiff and defendant used, exercised, and carried on the said trade or business of pawnbrokers, to wit, on the said, &c. at, &c. (*venue*) the said defendant took, from out of the said shop and premises, in the said articles of agreement mentioned, where the said plaintiff and defendant so used, exercised, and carried on their said business, a certain metal snuff-box, to wit, of the value of three shillings, being part of the goods belonging to and in the custody of the said plaintiff and defendant as copartners in the said trade or *business as aforesaid, and did not set down the same upon a slate or book kept for that purpose, nor did duly account for the same, according to the form and effect of the said articles of agreement, but on the contrary thereof, the said defendant made default in setting down the same as aforesaid, and did not duly account for the same as aforesaid, contrary to the force, form, and effect of the said articles of agreement, whereby the said defendant forfeited and became liable to pay the said plaintiff the further sum of £3. 3s. for such neglect or default.—[*State several other breaches to the amount of £75. 12s.*].—Yet the said defendant hath not yet paid to the said plaintiff the said sum of £75. 12s. or any part thereof, according to, the form and effect of the said articles of agreement, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, contrary to the said articles of agreement, and the said covenant of the said defendant by him in that behalf made as aforesaid, to wit, at, &c. (*venue*) aforesaid; and so the said plaintiff saith, that he the said defendant hath not kept with him the covenants so made between them as aforesaid, but hath broken the same, and to keep the same with the said plaintiff the said defendant hath hitherto wholly refused, and still doth refuse; to the damage of the said plaintiff of £100; and therefore, &c.

Third breach.

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III. ON DEEDS OF SEPARATE MAINTENANCE.

ON DEEDS OF SEPARATE MAINTENANCE. By the trustee for

For that whereas, heretofore, to wit, on, &c. at, &c. (*venue*) by a certain indenture then and there made between the said defendant, of the first part, one I. J. wife of the said defendant, of the second part, and the

ON DEEDS
OF
SEPARATE
MAINTENANCE.

a married
woman
against
her hus-
band, for
not paying
money for
her sepa-
rate main-
tenance

(*)

[*527]

said plaintiff, of the third part, one part of which said indenture, sealed with the seal of the said defendant, he the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid, after reciting, as in the said indenture was and is recited, it was witnessed, that it was thereby *declared and agreed upon, by and between the said defendant, and I. J. his wife, that the said I. J. should and might, from time to time, and at all times thereafter, at her own free will and pleasure, live separate and apart from the said defendant, and that he the said defendant, should and would, during such time as the said I. J. should live separate from the said defendant, pay unto the said plaintiff, the sum of £500 yearly, and every year, and in like proportion for any lesser time than a year, for and towards the support and maintenance of the said I. J. by four equal quarterly payments, the first payment thereof to commence from the day and year aforesaid; and the said defendant did thereby covenant, promise and agree, to and with the said plaintiff, his executors, administrators, and assigns, that he the said defendant, his executors and administrators, should and would, during such time as she the said I. J. should live separate and apart from the said defendant, pay unto the said plaintiff, the sum of £500 yearly, and every year, and in like proportion for any lesser time than a year, for and towards the support and maintenance of the said I. J. and that it should and might be lawful for the said I. J. at all times thereafter, at her own free will and pleasure, to live separate and apart from the said defendant, as if the said I. J. was sole and unmarried, free from the power, command, restraint, and control of the said defendant, at such place and in such manner as he should think proper; and in and by the said indenture it was provided, that the cohabitation of the said I. J. at any time with the said defendant should not be considered as a relinquishment on the part of the said plaintiff, and I. J. or either of them, of their right to the performance of the covenants and agreements on the part of the said defendant, his executors and administrators, therein contained, nor in any respect prejudice, annul, or make void such covenants or agreements, or either of them, but the same should, notwithstanding such cohabitation, at any time, be and remain in full force and effect, any thing therein contained to the contrary in any wise notwithstanding, as in and by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. And the said plaintiff in fact says, that afterwards, and after making the said indenture, to wit, on the — of — A. D. — the said I. J. in the said indenture mentioned,

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did choose, and was willing, and did actually live separate from the said defendant, her said husband, and for *a long space of time, to wit, from thence hitherto hath continued, and still doth continue, to live separate and apart from the said defendant, her said husband, to wit, at, &c. (venue) aforesaid, and although, from the time of making the said indenture hitherto, the said plaintiff hath, &c.—[*Plaintiff's general performance*

(*) As to the general liabilities of husband and wife, in case of separation, see 3 Chit. Com. Law, 45.—1 T. R. 5.—8 T. R. 545.—Nurse v. Craig, 2 N. R. 148.—1 Hen. Bla. 334 to 351.—3 Esp. Rep. 250, 255.—6 Campb. 120. And see another precedent, 3 Wentw. 318.—1 Taunt. 417. (It seems that in general, deeds of sepa-

ration are at law valid unless they have been so framed as to invite or improperly facilitate separation. Waite v. Jones, 1 Bing. N. C. 656; see the cases collected, 1 Chit. Gen. Pract. 58, 59. When declaration, sufficient, and when adultery of wife cannot be pleaded to an action on separation deed. 8 Bing. 256.)

of the indenture.].—The Protesting, &c.—[*Defendant's general non-performance.*].—The said plaintiff in fact saith that, &c.—[*State the arrear, and general conclusion, as in declaration in covenant for rent, post, 551.*]

ON DEEDS
OF SEPA-
RATE
MAINTEN-
ANCE.

IV. ON CHARTER-PARTIES.

BY OWNER
AGAINST
FREIGHT-
ER.

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) by a certain charter-party of affreightment, then and there indebted, made and concluded, between the said plaintiff, by the name and description of, &c. master of the good brig or vessel called, &c. of the burthen of — tons (x) per register, or thereabouts, then riding in the river Thames, of the one part, and the said defendant, by the name and addition of, &c. merchant, and freighter of the said vessel, of the other part, (one part of which said charter-party, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid) it was witnessed, that the said plaintiff, for the considerations thereafter mentioned, did thereby covenant, *promise and agree, to and with the said defendant, his executors, administrators, and assigns, that the said vessel being tight, staunch, and strong, &c. [*here set out the charter-party verbatim, in the proper tense,*] as by the said charter-party, reference being thereunto had, will, amongst other things, more fully and at large appear, to wit, at, &c. (*venue*) aforesaid. And the said plaintiff in fact saith, that afterwards, to wit, on, &c. the said vessel being then and there tight, staunch, and strong, and every way properly fitted and manned for the voyage in the said charter-party mentioned, the said master did then and there take, load, and receive, on board of the said vessel, a full and complete cargo of lawful goods, which, having received, and being despatched, did then and there, wind and weather permitting, immediately set sail and proceed to the island of Heligoland, where, being afterwards, to wit, on, &c. arrived, did then and there make a right and true delivery of the whole of the said cargo to the agents or assigns of the said freighter, agreeably to bills of lading that were signed for the same, to wit, &c. (*venue*) aforesaid, which cargo being then and there so delivered, the said master of the said vessel did afterwards, to wit, on, &c. take on board the said vessel another full and complete cargo of law-

By owner
against
freighter,
on char-
ter-party,
to recover
freight,
and de-
murrage,
and dam-
ages, for
not load-
ing within
lay days
(w).

[*529]
Reference
to charter-
party.
Ship be-
ing made
fit for voy-
age, re-
ceives
cargo,
sails and
arrives
and deliv-
ers out-
ward car-
go.

Ship takes
in home-
ward car-
go, ar-
rives, and
delivers
same.

(w) See other forms by master or owner, 3 Wentw. 341, 344, 350, 352, 355, 358, 362, 364, 372. — Pl. A. 324. For forms at the suit of the freighter, see 3 Wentw. 357; and forms in assumption, ante, 221; and in Debt, ante, 426. When the contract is under seal, the declaration must, in general be framed upon it, and state the terms of the deed. See 1 N. B. 104.—Abbott on Shipping, 4th edit. 185.—1 M. & S. 573.—2 M. & S. 303, when the plaintiff should not sue on the [charter-party, see 3 Chit. Com. Law, 430.—2 Chit. Rep. 570.—4 Camp. 131.—12 East, 179.—2 Camp. 616.—6 J. B. Moore, 415, 425. As to the demurrage, see Abbott, 196.—3 Chit. Com. Law, 426,

ante, 64. When not recoverable, as in case of hostile occupation of the port to which the ship is bound. 10 East, 526.—3 Chit. Com. Law, 429.—As to what is a condition precedent in a charter-party, and what need not be averred, see 4 East, 477.—2 Chit. Rep. 705.—3 Chit. Com. Law, 391.

(See a form of declaration against master of a ship for not sailing in ballast direct to a named port, but improperly making an intermediate voyage for his own purposes, *Andrews v. Adams*, 1 Bing. N. C. 29.)

(x) The owner may give evidence of actual burthen, and is not restricted to the precise burthen mentioned in charter-party, if there is no fraud.—2 Stark. 2, 452.

BY OWNER
AGAINST
FREIGHT-
ER.

Notice to
defend-
ant.
General
perform-
ance by
plaintiff.
First
breach, for
not ship-
ping in
due time,
and with-
in lay
days.

[*530]

Non pay-
ment of
freight by
bills of ex-
change.

Third
breach
non pay-

ful goods, not exceeding what she could reasonably carry and stow, and being so laden and despatched as last aforesaid, the said vessel did afterwards, to wit, on, &c. set sail and proceed direct from thence to London, where, being afterwards, to wit, on &c. arrived, she did then and there make a right and true delivery of the whole of the said homeward cargo to the said defendant or his agents, agreeably to bills of lading that were signed for the same, and so ended the said voyage, according to the form and effect of the aforesaid charter-party, to wit, at, &c. (*venue*) aforesaid, of which said several premises the said defendant then and there had notice. And although the said plaintiff hath always, since the making of the said charter-party, well and truly performed, fulfilled, and kept, all things in the said charter-party contained on his part and behalf to be performed, fulfilled, and kept, to wit, at &c. (*venue*) aforesaid; yet protesting that the said defendant hath not performed, fulfilled, or kept any thing therein contained on his part and behalf to be performed, fulfilled, and kept, the said plaintiff in fact saith, that the said defendant did not nor would send, or cause to be sent, alongside of the said vessel in the river Thames, such goods as he thought proper to ship, *and receive the same from alongside of her at Heligoland, and sent alongside of her at Heligoland such goods as he thought fit, and receive the same from alongside of her at London, within the time limited for those purposes, and days of demurrage in the said charter-party mentioned, but wholly refused and neglected so to do, and on the contrary thereof, kept and detained the said vessel for a much longer space of time, to wit, the space of ten days, over and above the time limited for the purpose last aforesaid, and the days of demurrage as aforesaid, contrary to the form and effect of the said charter-party, and of the covenant of the said defendant so made as aforesaid, to wit, at, &c. (*venue*) aforesaid. And the said plaintiff further saith, that on delivery of the said homeward cargo at London as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, a large sum of money, to wit, as well the sum of £— in the said charter-party mentioned, as another sum of money, to wit, the sum of —*l.* being £5 *per centum* on the amount of the freight aforesaid, in lieu of port charges, and two guineas hat money to the master, amounting in the whole to a large sum of money, to wit, the sum —*l.* became and was due and payable from the said defendant to the said plaintiff, according to the form and effect of the said charter-party, and of the said covenant of the said defendant, so by him made as aforesaid, yet the said defendant did not nor would (although often requested so to do) pay to the said plaintiff the said sum of money last-mentioned, in manner directed by the said charter-party, to wit, the sum of —*l.* being one-half in money, or any part thereof, on the delivery of the homeward-bound cargo at London as aforesaid, or before or since, nor did or would pay the other half, or any part thereof, by the said defendant's accepted bill, payable in London aforesaid, at two months after the date of the said delivery of the said homeward cargo, or otherwise however, but wholly refused and neglected so to do, contrary to the form and effect of the said charter-party, and of the said covenant of the said defendant, so made as aforesaid, and the said sum of —*l.* is still in arrear and unpaid. And the said plaintiff further saith, that the said defendant did keep the said vessel on demurrage during divers, to wit, —

days (y) over and above the said lay days in the said charter-party mentioned; yet the *said defendant did not nor would (although often requested) pay for the said — days to the said plaintiff, the said sum of £— per day, day by day, as the same became due and payable, according to the tenor and effect of the said charter-party, but wholly refused so to do; and the sum of —l. for the said last-mentioned — days, at and after the rate aforesaid, became and was due and owing from the said defendant to the said plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said charter-party, and of the said covenant of the said defendant, so by him made as aforesaid, to wit, at, &c. aforesaid. And so the said plaintiff in fact saith.—[*Common conclusion in covenant, as ante*, 519.]

BY OWNER
AGAINST
FREIGHT-
ER.
—
ment of
demur-
rage.

For that whereas, heretofore, to wit, on, &c. at, &c. (*venue*) by a certain charter-party of affreightment, then and there indented, made, concluded, and fully agreed upon between the said plaintiff, (by the name and addition of, &c.) of the one part, and the said defendant, (by the style, firm, and addition of, &c.) of the other part, one part of which said charter-party, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid, it was witnessed, that the said plaintiff, for the consideration therein and hereinafter mentioned, had granted, &c. [*Here set out the charter-party.*] —As by the said charter-party of affreightment (reference being thereunto had) will (amongst other things) more fully and at large appear. And the said plaintiff in fact saith, that after the making of the said charter-party of affreightment, and before the said 20th day of June, in the year aforesaid, to wit, on, &c. the said brigantine being tight, staunch, and strong, and well and sufficiently manned, victualled, tackled, and provided with all things necessary and proper for the said vessel, for her said intended voyage, did set sail and depart from the river Thames aforesaid, and proceed direct to the town of Riga, aforesaid, and afterwards, to wit, on, &c. did arrive at the said town of Riga, and was then and there ready to take on board and load from the factors or assigns of the said defendant, the said 1000 quarters of wheat, in bulk, separate from the other part of the cargo, according to the form and effect of the said charter-party of affreightment in that behalf; and the said master did then and there give notice thereof to the correspondents of the said defendant, and for the purpose of *loading the said 1000 quarters of wheat, at Riga aforesaid, the said brigantine did stay and lie there the aforesaid thirty-five running days (z), commencing the next day following that on which the said master did so give notice to the correspondents of the said defendant as aforesaid, and was, during all that time, there ready to take on board and load, from the factors or assigns of the said defendant, the said 1000 quarters of wheat, in bulk, as aforesaid, to wit, at, &c. (*venue*) aforesaid, of all which premises the said defendant there had notice; and although the said plaintiff hath always, from the time of making the said charter-party of affreightment, hitherto well and truly performed, &c.—[*General performance by*

The like
for not
loading in
lay days,
and non-
payment
of pilot-
age.

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(y) As to the construction of the word the custom of merchants in London. 3
"days," see 3 Chit. Com. Law, 426. Esp. Ni. Pri. Cas. 121.—Abbott, 4th edit.
(z) When the word "days," is used 194. See 3 Chit. Com. Law, 426.
alone, it is said to mean working days by

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AGAINST
FREIGHT-
ER.

plaintiff, and non-performance by defendant of the charter-party, as ante, 529.]—The said plaintiff saith, that the said defendant (although often requested so to do) did not nor would, within the said space of thirty-five running days, or at any time afterwards, load, or cause to be loaded the said 1000 quarters of wheat on board the said brigantine, at the town of Riga aforesaid, but wholly neglected and refused so to do, and therein failed and made default, contrary to the form and effect of the said charter-party, and of the said covenant of the said defendant by him in that behalf made as aforesaid. And the said plaintiff in fact saith, that the pilotage and port-charges in the said charter-party of affreightment mentioned, amounting to a large sum of money, to wit, the sum of —£ of like lawful money, whereof the said defendant afterwards, to wit, on, &c. at, &c. (*venue*) had notice; nevertheless the said defendant (although often requested so to do) hath not paid or caused to be paid to the said master or his order, two-thirds of the said pilotage and port-charges, or any part thereof, but hath hitherto wholly neglected and refused so to do and therein failed and made default, and the same and every part thereof still remains due and unpaid to the said plaintiff, contrary to the form and effect of the said charter-party of affreightment, and of the said covenant of the said defendant by him in that behalf made as aforesaid, to wit, at, &c. (*venue*) aforesaid, and so the said plaintiff in fact saith, &c.— [*Conclude as ante, 519.*]

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By the
freighter
against
the owner
of a ship
on a char-
ter-party,
stating
part per-
formance
of the co-
venants,
and
breach as
to residue,
with spe-
cial dam-
age (a).

*For that whereas, heretofore, to wit, on, &c. at, &c. (*venue*) by a certain charter-party of affreightment then and there made, concluded, and fully agreed upon between the said defendant (by the name, addition, and description of, &c.) sole owner of the good ship or vessel called, &c. and of the burthen of — tons or thereabouts, (of which E. F. was master) of the one part, and the said plaintiff (by the name and addition of, &c.) of the other part, (one part of which said charter-party of affreightment, sealed with the seal of the said defendant the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid,) it was witnessed, (amongst other things) that the said defendant, for the considerations thereafter mentioned, had granted, and to freight letten, and by the said charter-party did grant, and to freight let, unto the said plaintiff, his executors, administrators, and assigns, all that the said ship or vessel, and the whole use and benefit of the tonage, stowage, and burthen thereof, with the use of her boats and appurtenances, (the master and mariners, customary privileges of the cabin, gun-decks, and steerage only excepted.) And the said plaintiff had accordingly hired the same for the voyage therein and hereinafter mentioned, and therefore the said defendant did thereby, for himself, his executors and administrators, covenant, promise, and agree, to and with the said plaintiff, his executors, administrators, and assigns, (amongst other things) that the said ship should be made ready and provided in all respects for such a voyage; that the said ship's crew should consist of — men and boys, exclusive of the master; and that she should be got about to the port of, &c. as soon as possible, where the master thereof should take into and on board of her, all

(a) See other precedents referred to, ante, action on the case where there has been a 528, note.—How far freighter may sue in charter-party, see 6 J. B. Moore, 412, 425.

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such goods, wares, and merchandize, not exceeding her burthen, as the said plaintiff, his factors or agents should think fit to load or tender to be put on board thereof, (contraband goods only excepted) and should therewith, with all possible dispatch, without convoy proceed with her outwards to the part of, &c. aforesaid, to, &c. and from thence to — and should then discharge and deliver the same to such person or persons as the said plaintiff, his factors or agents should direct; which done, the said charter-party should be considered to *be performed; as by the said charter-party, reference being thereunto had, will, amongst other things, more fully and at large appear. And the said plaintiff in fact saith, that after the making of the said charter-party, to wit, on, &c. the said ship or vessel, called, &c. in the said charter-party mentioned, had been and was arrived at, &c. (*venue*) aforesaid, and that the said E. F. so being master thereof, did then and there take into and on board of the said ship or vessel, of and from the said plaintiff, a certain cargo of goods, wares, and merchandize, to be carried and conveyed therein, from, &c. aforesaid, to, &c. aforesaid. And the said plaintiff further saith, that the said E. F. so being master of the said ship or vessel as aforesaid, was then and there, to wit, on, &c. at, &c. (*venue*) ordered and directed by the said plaintiff to proceed accordingly with the said ship or vessel and the said cargo on board thereof, from, &c. aforesaid, to, &c. aforesaid, and there, to wit, at, &c. (*venue*) aforesaid, to land the said cargo, and to take another cargo on board of the said ship or vessel, that is to say, to receive wines on board thereof, to the address of the said plaintiff and divers other persons; and that when the said E. F. should have completed his loading at, &c. (*venue*) aforesaid, he was to proceed from thence to — in the West Indies, and there, to wit, at, &c. to deliver to certain persons there, carrying on trade and commerce, by and under the name, style, and firm of, &c. all the goods to the address of the said plaintiff, and also his, the said E. F.'s bills of lading, that they might receive the freight there. And the said plaintiff further saith, that the said E. F. master of the ship or vessel as aforesaid, and having received the orders and directions aforesaid, afterwards, to wit, on, &c. set sail and proceeded accordingly with the said ship or vessel, and the said cargo on board thereof, from the port of, &c. aforesaid, to, &c. aforesaid, and afterwards, to wit, on, &c. arrived at, &c. (*venue*) aforesaid, and there landed the said first-mentioned cargo, except a certain box of muslins, part thereof, and that the said E. F. so being master of the said ship or vessel as aforesaid, did there take and receive on board thereof, divers, to wit, — pipes of wine, being part of the cargo which he was so ordered and directed to take on board of the said ship as aforesaid; and that the residue of the said last-mentioned cargo, consisting of divers, to wit, — pipes of wine, to the address of the said plaintiff, and divers, to wit, — pipes of wine, to the address of divers other persons, were then ready *and intended to be loaded in and on board of the said ship or vessel to be carried and conveyed therein, from, &c. aforesaid, to, &c. aforesaid, pursuant to the orders and directions aforesaid, whereof the said E. F. then had notice; but that afterwards, and before the said E. F. could receive or take the said residue of the said last-mentioned cargo, in and on board of the said ship or vessel, for the purpose aforesaid, to wit, on, &c. the said ship or vessel was, by the violence of the winds, and stormy and tempestuous weather, forced and obliged to,

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and did depart from and out of the harbor of — aforesaid, without receiving or taking the said residue of the said last-mentioned cargo on board thereof; and although the said E. F. so being master of the said ship or vessel as aforesaid, afterwards, to wit, on, &c. did return with the said ship or vessel near to — aforesaid, and could and might, and ought to have returned therewith, into the said harbor of — and to have there received and taken on board thereof, the said residue of the said last-mentioned cargo, and to have proceeded with the said last-mentioned cargo from, &c. aforesaid, to, &c. aforesaid, pursuant to the orders and directions aforesaid; and although the said plaintiff hath always from the time of the making of the said charter-party of affreightment, hitherto well and truly performed, fulfilled, and kept, all things therein contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof, to wit, at, &c. (*venue*) aforesaid, yet protesting that the said defendant hath not performed, fulfilled, or kept any thing in the said charter-party of affreightment contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof, the said plaintiff in fact saith, that the said E. F. so being master of the said ship or vessel as aforesaid, did not nor would (although often requested so to do) return with the said ship or vessel into the harbor of, &c. aforesaid, and there receive and take on board the said ship or vessel, the said residue of the said last-mentioned cargo, and proceed therewith from, &c. aforesaid, to, &c. aforesaid, pursuant to the orders and directions aforesaid, but wholly neglected and refused so to do; and on the contrary thereof, he the said E. F. so being master of the said ship or vessel as aforesaid, afterwards, to wit, on, &c. wrongfully set sail and proceeded with the said ship or vessel from, &c. aforesaid, without receiving, or taking, nor did, nor would he *receive or take on board thereof, the said residue of the said last-mentioned cargo, but wholly refused and neglected so to do, contrary to the form and effect of the said charter-party of affreightment, and of the said covenant of the said defendant so by him in that behalf made as aforesaid, to wit, at, &c. (*venue*) aforesaid, whereby the said plaintiff not only lost and was deprived of divers great gains and profits, which might and would otherwise have arisen and accrued to him from the said wines that were so ready and intended to be loaded on board of the said ship or vessel to the address of him the said plaintiff as aforesaid, and was forced and obliged to and did freight another ship or vessel at a great and heavy expense to carry and convey the said last-mentioned wines from, &c. aforesaid, to, &c. aforesaid, but also thereby, he the said plaintiff lost and was deprived of divers other great gains and profits, which might and would otherwise have arisen and accrued to him from the freight of the said wines that were so ready, and intended to be loaded on board the said ship or vessel to the address of the said other persons, and was and is, by means of the premises, otherwise greatly injured and damaged, to wit, at, &c. (*venue*) aforesaid, and so, &c.—[*Usual conclusion in covenant, ante*, 519.]

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(Declaration for breach of covenant of captain of ship to do all acts essential for comfort and convenience of passengers, and law, *Corbin v. Leader*, 10, Bingh. 275.)

VIII. ON POLICIES AGAINST FIRE.

ON POLI-
CIES
AGAINST
FIRE.

[Commencement in covenant against the secretary, stating him to be such, see ante, 36.]—For that whereas, heretofore, to wit, on, &c. (date of policy) at, &c. (venue) by a certain deed poll or policy of insurance, then and there made, and sealed with the respective seals of C. D. and *E. F. directors of, and acting and duly authorized for and on the behalf of the society of the British Fire-office, in London (and which said deed poll or policy, so sealed, the said plaintiffs now bring here into court, bearing date, to wit, the same day and year aforesaid) after reciting that the said J. H. (now deceased) by the name and description of J. H. of, &c. sugar refiner, had paid the sum of £— to the society of the British Fire-office, in London, and had agreed to pay, or cause to be paid, to the said society, at their said office, the sum of £—, on the — day of —, A. D. —, and the like sum of —l. yearly, on, &c. during the continuance of the said policy, assuring from loss or damage by fire, the sum of —l. on household goods and linen, wearing apparel, printed books, and plate, in his dwelling-house, brick-built, situate, &c. and being next to his sugar-house, but warranted not to communicate therewith, —l. on his said sugar-house, only having two pans therein, and —l. on stock in trade and utensils therein, —l. on utensils and stock in trade in the mill-house, and rooms over, —l. on utensils and stock in trade in the stove at the end of the said mill-house and the three last-mentioned adjoined and communicated brick-built buildings were warranted to have arched stoves with iron doors, and no *coakels*, except what were in the stoves or inclosed in brick, and to have no metal pipes from the pan chimnies; it was declared that the said last-mentioned policy was to be void in case any Muscovado or clayed sugars should be dried in baskets in any stove or stoves on the premises aforesaid; and it was made known by the said last-mentioned deed poll or policy, that from the date of the said policy until the — day of —, and so long afterwards as the said J. H. should duly pay or cause to be paid the sum of —l. yearly, at the time and place aforesaid, and the directors of the said society for the time being should agree to accept the same, the stock and fund of the said society should be subject and liable to pay or make good to the said J. H. his executors and administrators, all such damage and loss which the said J. H. should suffer by fire happening to the aforesaid premises, not exceeding the sum of £—, in the whole, or respectively as aforesaid; nevertheless it was thereby declared, that the said assurance was made and granted, subject to the several articles, stipulations, and conditions, specified in the printed proposals of the said society, dated the, &c. and to two acts of parliament of the 22d and 37th Geo. 3. charging a duty on

By executors of insurer against the Secretary to British Fire office, upon a policy on house and stock in trade on loss by fire after the death (b).
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(b) The 54 Geo. 3. c. 178. directs the action against this office to be against the secretary. For other forms on policies on loss by fire, see 3 Wentw. 386, 388, 403, 410, 411. On policies on ships and goods, see 3 Wentw. 578, 380; and see forms in assumpsit, ante, 178 to 208. For cases on this head, and exceptions taken in favor of the fire-offices, see 2 Hen. Bla. 577.—1 Hen.

Bla. 254. 6 T. R. 710.—2 Marsh. on Insur. 601, n. a. A general form of declarations in debt is given against the two public incorporated companies, by the 6 Geo. 1. c. 18. s. 4. 11 Geo. 1. c. 30. s. 43. and 2 Marsh. 601, and see note, ante, 178. See precedent and cases collected in 6 J. B. Moore, 199, 201, n. As to when covenant will not lie. Id.

AGAINST
FIRE.

Reference
to policy.
Statement
of the pro-
posals re-
ferred to
in the pol-
icy (c).
Interest of
the insur-
er.

[*538]

The will
and death
of insurer.

Plaintiffs
prove the
will.

Indorse-
ment on
policy of
plaintiffs
having be-
come in-
terested.

Loss by
fire.

[*539]

property assured against loss by fire, which duty the said society had received to the — day of —, as by the said deed poll or policy of assurance, reference being thereunto had, will more fully appear; and the said plaintiff in fact says, that the said printed proposals, in and by the said deed poll or policy of assurance mentioned and alluded to, are as follows, that is to say; common insurance, articles 1, buildings, the whole external walls, &c.—[*Here insert such parts of the articles and conditions mentioned in the printed proposals, as constitute a condition precedent, verbatim.*] And the said plaintiffs in fact further say that the said J. H. in his life-time, at the time of making the said policy of insurance, and from thence until the death of him the said *J. H. hereinafter mentioned, was interested in the said insured premises, goods, chattels, utensils, stock in trade, and other effects, in the said policy of insurance mentioned, and thereby intended to be insured to a large amount, to wit, to the amount of —l. to wit, at, &c. (*venue*) aforesaid, and remained and continued so interested therein, from the making of the said deed or policy of insurance, until the death of the said J. H. hereinafter mentioned; and that the said J. H. being so interested in the said insured premises, goods, chattels, utensils, stock in trade, and other effects, after the making the said policy of insurance, to wit, on, &c. (*day of death or about it*) died so interested therein, to wit, at, &c. (*venue*) aforesaid, having first duly made and published his last will and testament in writing, whereby he constituted and appointed the said plaintiffs executors thereof; and the said plaintiffs further in fact say, that after the decease of the said J. H. to wit, on, &c. the day and year last aforesaid, at &c. (*venue*) aforesaid, they the said plaintiffs duly proved the said last will and testament of the said J. H. deceased, and took upon themselves the burthen and execution thereof, and thereby and then and there became, and were possessed of and interested in the premises, goods, chattels, utensils, stock in trade, and effects, so insured as aforesaid, as the personal representatives of the said J. H. deceased; and being so possessed thereof and interested therein, the interest in the said policy was afterwards, by a certain memorandum or indorsement, duly made on the said deed or policy of insurance, on &c. duly declared to have become the property (d) of the said plaintiffs, as the personal representatives of the said J. H. deceased, as by the said deed poll or policy of insurance, with the said indorsement thereon, reference being thereunto had, will more fully appear; and the said plaintiffs further say, that they the said plaintiffs, after the decease of the said J. H. and after the making of the said indorsement on the said policy as aforesaid, and from thence until the loss and damage hereinafter mentioned, were interested in the said insured premises, goods, chattels, utensils, stock in trade, and effects, in the said policy mentioned, and thereby intended to be insured, to a large amount, to wit, to the amount of £—, to wit, at &c. (*venue*) and that the said household goods, linen, wearing apparel, printed books, and plate, in the said *dwelling-house and the said sugar-house, and pans, stock in trade, and utensils therein, and the said utensils and stock in trade in the said mill-house and

(c) As to the necessity for stating these, see 3 Bingh. 315.

(d) This is a stipulation in the printed proposals of all the insurance offices. But,

strictly, as a policy is a *chose in action*, it is not assignable. See 2 Marsh. 696. The plaintiff would, as executor, have the interest.

rooms over, and the said utensils and stock in trade in the said stove at the end of the said mill-house in the said deed or policy mentioned, afterwards, to wit, on &c. (*day of fire or about it*) to wit, at, &c. (*venue*) aforesaid, were burnt down and consumed and destroyed by fire, which did not happen by invasion, foreign enemy, riot, tumult, civil commotion, or any military or usurped power, whereby the said plaintiffs then and there sustained damage and loss to a large amount, to wit, to the amount of the said sum of —*l.*, so assured on the said premises, goods, chattels, utensils, stock in trade, and effects, so burnt and consumed; and the said plaintiffs further say, that the said premises, buildings, goods, chattels, utensils, stock in trade, and effects, in the said deed or policy mentioned, at the time of making the said deed, were not, nor at any time since, have been insured in any other office, except the said building of the said sugar-house, to the amount of £—; and the said utensils and stock in trade, to the amount £—, in the Imperial Fire-office, by virtue of a certain policy of insurance made, heretofore, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid; and the said plaintiffs further say, that afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, the said C. D. and E. F. and the said society wholly waived, relinquished, released, and discharged the said plaintiffs from the observance and the performance of the said second condition of the said insurance; and the said plaintiffs in fact further say, that the said premises, buildings, goods, chattels, utensils, stock in trade and effects, in the said deed, or policy mentioned, were duly described, and not otherwise than they really were, or so as to cause the said insurance to be effected upon a lower premium than ought to have been; and that the said plaintiffs did forthwith, after the loss and damage, to wit, on the — day of — aforesaid, at, &c. (*venue*) aforesaid, give notice thereof to the said society, at the said British Fire-office, in London; and also as soon after as possible, to wit, on &c. at, &c. (*venue*) aforesaid, did deliver in an account, stating the particulars of such loss on their oath, and were ready and willing to prove the same by the production of their books, and such other documents and vouchers as the said board of directors should reasonably require, and did afterwards, and within the space of *three months next after such loss and damage, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, claim of and from the said society, the amount of such loss and damage; and the said plaintiffs further in fact say, that the premium or sums of money, and duty in the said deed or policy of assurance mentioned, were from the time of making this deed and policy, until the time of the loss hereinbefore mentioned, duly paid to, and accepted by the said society, at the time and place, and in manner and form in the said deed or policy in that behalf mentioned; and that the said deed or policy, at the time of the said loss, was and remained in full force, to wit, at, &c. (*venue*) aforesaid; and the said plaintiffs in fact further say, that the said dwelling-house in the said last-mentioned deed or policy of assurance mentioned, did not, at any time whilst the said deed or policy remained in force, communicate with the said sugar-house and street; the said sugar-house, during that time, had only two pans therein; and that no Muscovado or clayed sugars were, during that time, dried in bas-

AGAINST
FIRE.

The premises not insured at any other office, except, &c.

Defendants waive performance of second condition (e).
Averment that property insured was duly described.
Plaintiffs gave notice of loss, and delivered an account of loss and claims.

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Premium duly paid.

Other averments.

(e) As to a waiver by parol, see 8 T. R. 280.

AGAINST
FIRE.

Plaintiff's
general
perform-
ance.

Funds of
society
sufficient
to pay
plaintiffs.

Breach,
non-pay-
ment of
amount of
loss.

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kets in any stove or stoves on the said premises ; and the said plaintiffs in fact further say, that the said *three* buildings in the said deed or policy last-mentioned, at the time of the making thereof, and while the same continued in force, had arched stoves with iron doors, to wit, at &c. (*venue*) aforesaid, and had no coakels, except what were, at the time of the making of the deed or policy, in the said stoves, or inclosed in brick, nor any metal pipes from the pan chimnies ; and the said plaintiffs further say, that although they the said plaintiffs have, in all things, conformed themselves to and observed all and singular the said articles, stipulations, conditions, matters and things, which on their part, were to be observed and performed according to the form and effect of the said deed or policy, and of the said proposals ; and that although the said stock and fund of the said society always, from the time of the making of the said deed or policy, hitherto have been, and yet are sufficient to pay to the said plaintiffs the said damage and loss sustained by the said fire, to wit, at, &c. (*venue*) aforesaid ; yet the said plaintiffs further say, that they have not, out of the stock and fund of the said society, or in any other manner, been paid or made good their said damage and loss, or any part thereof, but the same, and every part thereof, are wholly unpaid and unsatisfied to them, to wit, at, &c. (*venue*) contrary to the force and effect of the said deed or policy, and of the covenant of the said C. D. and E. F. and the said society, therein, in that behalf, made as aforesaid, to wit, at, &c. (*venue*) aforesaid ; and so the said plaintiffs say, that the said C. D. and E. F. and the said society (although *often requested), to wit, at, &c. (*venue*) aforesaid, have not kept with them the said plaintiffs the covenant made between them and the said J. H. deceased, in that behalf as aforesaid, but that the said C. D. and E. F. and the said society, have broken the same, and to keep the same with the said plaintiffs, have hitherto wholly refused, and still doth refuse, to the damage, &c.

ON POLI-
CIES ON
LIVES.

Covenant
on a poli-
cy on a
life,
against
Royal Ex-
change
Company
(f).

IX. ON POLICIES ON LIVES.

That whereas heretofore, to wit, on, &c. at, &c. (*venue*) by a certain instrument or policy of assurance then and there made (one part of which instrument or policy of assurance, sealed with the common seal of the said corporation, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid,) it was witnessed, that the said corporation of the Royal Exchange Assurance in London, in consideration of the sum of £48, of lawful, &c. paid into their treasury by the said plaintiff, the receipt whereof was thereby acknowledged, did for themselves, their successors and assigns, agree to pay to the said plaintiff,

(f) It is best in general to declare in debt, ante, 429. See forms in *assumpsit*, ante, 208. As to the legality of this species of insurance, see 2 Marsh. 665, 666. The insured must have an interest in the life of the persons insured, or such insurance will be void, 14 Geo. 3. c. 48. s. 1.

What interest is sufficient, see 2 Marsh. 672 to 676—Hughes on Insurance. If a creditor, who has insured, be paid a debt by the executor of his debtor, the policy, which was only a contract of indemnity to the creditor, ceases to be operative, 9 East. 72.

her executors, administrators and assigns, the sum of —l. within three months, after good and sufficient proof should be made upon oath or otherwise, to the satisfaction of the said Royal Exchange Assurance, of the death of the said W. B. of the town and county of P. aforesaid, then warranted in good health (*g*), and not exceeding the age of thirty-five years; in case the said W. B. should die before twelve of the clock at night, on the — day of — which should be in the year — provided the said plaintiff, or her executors, administrators, or assigns, should continue to pay yearly and every year during the term of that assurance, the like sum of —l. on or before the — day of — in every year; provided always, that if the said W. B. should at any time or times before the expiration of that policy, depart beyond the limits of Europe, or should die upon the seas, that policy should cease and be of no effect, unless such departure should be with the previous consent of the said Royal Exchange Assurance Company, signified in writing by indorsement thereon; provided also, that if the said W. B. should at any time during the continuance of that assurance, enter into or engage in any military or naval service whatsoever, without the previous consent of the said Royal Exchange Assurance Company, signified as aforesaid, that then in every such case the said policy should from thenceforth cease and be void to all intents and purposes whatsoever, as by the said instrument or policy of assurance (relation being thereunto had) will (amongst other things) more fully and at large appear; and the said plaintiff in fact saith, that at the *time of making the said instrument or policy, and from thence until the time of the death of the said W. B. hereafter mentioned, she the said plaintiff was interested in the life of the said W. B. to a large amount, to wit, the amount of all the monies by her ever insured, or caused to be insured thereon, to wit, at, &c. (*venue*) aforesaid; and the said plaintiff further saith, that at the time of making the said instrument or policy of assurance, the said W. B. was in good health, and did not exceed the age of — years, and that afterwards, and within the space of one year next after the making of the said instrument or policy of assurance, to wit, on, &c. at, &c. (*venue*) aforesaid, he the said W. B. died, and that he the said W. B. in his life-time did not depart beyond the limits of Europe, or upon the seas, nor did he the said W. B. in his life-time enter into or engage in any military or naval service whatsoever, of all which said several premises the said corporation of the Royal Exchange Assurance, afterwards, to wit, on, &c. (*venue*) last aforesaid, had notice; and although good and sufficient proof was then and there made to the satisfaction of the said Royal Exchange Assurance of the death of the said W. B. and the said plaintiff hath always from the time of making the said instrument or policy of insurance, performed and fulfilled all things contained on her part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof, the said plaintiff in fact saith, that the said corporation of the said Royal Exchange Assurance, (although often requested so to do) did not nor would,

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(*g*) This warranty is not falsified by proof of the insured having labored under a particular infirmity, provided it did not tend to shorten life, 2 Marsh. 667. See the latter cases as to what is fraud and concealment, 8 B. & C. 586.—5 Bing. 503.—9 B. & C. 693. If there be no warranty, the insurer takes all risks upon himself, unless there be fraud or concealment, *Ibid.* 670.—Park. 437.—Hughes on Insurance.

AGAINST
FIRE.

Plaintiff's
general
performance.

Funds of
society
sufficient
to pay
plaintiffs.

Breach,
non-pay-
ment of
amount of
loss.

[*541]

kets in any stove or stoves on the said premises ; and the said plaintiffs in fact further say, that the said *three* buildings in the said deed or policy last-mentioned, at the time of the making thereof, and while the same continued in force, had arched stoves with iron doors, to wit, at &c. (*venue*) aforesaid, and had no coakels, except what were, at the time of the making of the deed or policy, in the said stoves, or inclosed in brick, nor any metal pipes from the pan chimnies ; and the said plaintiffs further say, that although they the said plaintiffs have, in all things, conformed themselves to and observed all and singular the said articles, stipulations, conditions, matters and things, which on their part, were to be observed and performed according to the form and effect of the said deed or policy, and of the said proposals ; and that although the said stock and fund of the said society always, from the time of the making of the said deed or policy, hitherto have been, and yet are sufficient to pay to the said plaintiffs the said damage and loss sustained by the said fire, to wit, at, &c. (*venue*) aforesaid ; yet the said plaintiffs further say, that they have not, out of the stock and fund of the said society, or in any other manner, been paid or made good their said damage and loss, or any part thereof, but the same, and every part thereof, are wholly unpaid and unsatisfied to them, to wit, at, &c. (*venue*) contrary to the force and effect of the said deed or policy, and of the covenant of the said C. D. and E. F. and the said society, therein, in that behalf, made as aforesaid, to wit, at, &c. (*venue*) aforesaid ; and so the said plaintiffs say, that the said C. D. and E. F. and the said society (although *often requested), to wit, at, &c. (*venue*) aforesaid, have not kept with them the said plaintiffs the covenant made between them and the said J. H. deceased, in that behalf as aforesaid, but that the said C. D. and E. F. and the said society, have broken the same, and to keep the same with the said plaintiffs, have hitherto wholly refused, and still doth refuse, to the damage, &c.

ON POLI-
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LIVES.

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IX. ON POLICIES ON LIVES.

That whereas heretofore, to wit, on, &c. at, &c. (*venue*) by a certain instrument or policy of assurance then and there made (one part of which instrument or policy of assurance, sealed with the common seal of the said corporation, the said plaintiff now brings here into court, the date whereof is the same day and year aforesaid,) it was witnessed, that the said corporation of the Royal Exchange Assurance in London, in consideration of the sum of £48, of lawful, &c. paid into their treasury by the said plaintiff, the receipt whereof was thereby acknowledged, did for themselves, their successors and assigns, agree to pay to the said plaintiff.

(f) It is best in general to declare in debt, ante, 429. See forms in assumpsit, ante, 208. As to the legality of this species of insurance, see 2 Marsh. 665, 666. The insured must have an interest in the life of the persons insured, or such insurance will be void, 14 Geo. 3. c. 48. s. 1.

What interest is sufficient, see 2 Marsh. 672 to 676—Hughes on Insurance. If a creditor, who has insured, be paid a debt by the executor of his debtor, the policy, which was only a contract of indemnity to the creditor, ceases to be operative, 9 East. 72.

her executors, administrators and assigns, the sum of —*l.* within three OR LIVES. months, after good and sufficient proof should be made upon oath or otherwise, to the satisfaction of the said Royal Exchange Assurance, of the death of the said W. B. of the town and county of P. aforesaid, then warranted in good health (*g*), and not exceeding the age of thirty-five years; in case the said W. B. should die before twelve of the clock at night, on the — day of — which should be in the year — provided the said plaintiff, or her executors, administrators, or assigns, should continue to pay yearly and every year during the term of that assurance, the like sum of —*l.* on or before the — day of — in every year; provided always, that if the said W. B. should at any time or times before the expiration of that policy, depart beyond the limits of Europe, or should die upon the seas, that policy should cease and be of no effect, unless such departure should be with the previous consent of the said Royal Exchange Assurance Company, signified in writing by indorsement thereon; provided also, that if the said W. B. should at any time during the continuance of that assurance, enter into or engage in any military or naval service whatsoever, without the previous consent of the said Royal Exchange Assurance Company, signified as aforesaid, that then in every such case the said policy should from thenceforth cease and be void to all intents and purposes whatsoever, as by the said instrument or policy of assurance (relation being thereunto had) will (amongst other things) more fully and at large appear; and the said plaintiff in fact saith, that at the *time of making the said instrument or policy, and from thence until the time of the death of the said W. B. hereafter mentioned, she the said plaintiff was interested in the life of the said W. B. to a large amount, to wit, the amount of all the monies by her ever insured, or caused to be insured thereon, to wit, at, &c. (*venue*) aforesaid; and the said plaintiff further saith, that at the time of making the said instrument or policy of assurance, the said W. B. was in good health, and did not exceed the age of — years, and that afterwards, and within the space of one year next after the making of the said instrument or policy of assurance, to wit, on, &c. at, &c. (*venue*) aforesaid, he the said W. B. died, and that he the said W. B. in his life-time did not depart beyond the limits of Europe, or upon the seas, nor did he the said W. B. in his life-time enter into or engage in any military or naval service whatsoever, of all which said several premises the said corporation of the Royal Exchange Assurance, afterwards, to wit, on, &c. (*venue*) last aforesaid, had notice; and although good and sufficient proof was then and there made to the satisfaction of the said Royal Exchange Assurance of the death of the said W. B. and the said plaintiff hath always from the time of making the said instrument or policy of insurance, performed and fulfilled all things contained on her part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof, the said plaintiff in fact saith, that the said corporation of the said Royal Exchange Assurance, (although often requested so to do) did not nor would,

[*542]

(*g*) This warranty is not falsified by proof of the insured having labored under a particular infirmity, provided it did not tend to shorten life, 2 Marsh. 667. See the latter cases as to what is fraud and concealment, 8 B. & C. 586.—5 Bing. 503.—9 B. & C. 693. If there be no warranty, the insurer takes all risks upon himself, unless there be fraud or concealment, *Ibid.* 670.—Park, 437.—Hughes on Insurance.

ON LIFE. within three months after such proof was so made as aforesaid, of the death of the said W. B. or at any time afterwards; pay to the said plaintiff the said sum of £— or any part thereof, but hath hitherto wholly refused and neglected so to do, and therein failed and made default, contrary to the form and effect of the said instrument or policy of assurance, and of their said covenant by them in that behalf made as aforesaid, to wit, at, &c. (*venue*) and so, &c.—[*Usual conclusion, as ante.* 519.]

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AGAINST
VENDOR.

Covenant by heir of purchaser from husband and wife, of land of the wife, against the executor of the husband, on the covenant for further assurance and that the vendor and wife would levy a fine. (p).

*X. ON DEEDS OF SALE.

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) by a certain indenture then and there made between one T. W. of the first part, the said defendant and M. his wife, of the second part, and the said A. B. now deceased, of the third part, which said indenture, sealed with the seal of the said T. W. defendant and M. his wife, the said plaintiff now brings here into court, the date whereof is, to wit, the day and year aforesaid, (after reciting as therein recited) it was witnessed, that in consideration of the sum of £300 paid by the said plaintiff, at the request of the said defendant and M. his wife to the said T. W. on discharge of a certain mortgage debt of £300 and of £855, paid to the said defendant and M. his wife the said T. W. by the direction and appointment of the said defendant and M. his wife, did bargain, sell, assign, alien, and release, and the said defendant and M. his wife, did grant, bargain, sell, alien, release, and confirm unto the said A. B. deceased, and his heirs and assigns, a certain messuage or tenements, closes, lands, grounds, hereditaments, and premises, with the appurtenances, situate and being in the parish of, &c. and in the said indenture particularly mentioned and described, to have and to hold the same unto and to the use of the said A. B. his heirs and assigns forever; and the said defendant, for himself and for the said M. his wife, and for their and each of their heirs, executors, and administrators, did, in and by the said indenture, covenant, promise, grant and agree, to and with the said A. B. now deceased, his heirs, and assigns, (amongst other things) in manner following; (that is to say) that they the said defendant and M. his wife, and their heirs, and all and every other person or persons having or lawfully claiming, or who should or might at any time thereafter have, or lawfully claim, any estate, right, title, trust, interest, at law or in equity, of, into, or out of the said messuage or tenement, closes, lands, ground, hereditaments, *and premises thereby granted and released, or any part thereof, should and would, from time to time, and at all times thereafter, upon every reasonable request, and at the proper costs and charges in the law of the said A. B. his heirs or assigns, make, do, and execute, or cause and procure to be made, done, and ex-

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(p) Though the breach of covenant for further assurance happened in the time of the testator, yet the damages having accrued to the heir, he has a preferable title to the executor to bring the action of cove-

nant, see this case, 1 Marsh. 107.—1 M. & S. 335; as he, in respect of the real estate, represents his ancestor just as the executor does with regard to the personal property.

AGAINST
VENDOR.

ecuted, all and every such further and other lawful and reasonable act and acts, thing and things, conveyances, and assurances in law whatsoever, for the further, better, more perfect, and absolute granting, conveying, and assuring of the said messuage or tenement, closes, lands, and grounds, hereditaments, and premises therein before mentioned, to be thereby granted and released and confirmed, with their and every of their appurtenances, unto and to the use of the said A. B. (deceased) his heirs and assigns for ever as by the said A. B. (deceased) his heirs or assigns, or his or their council learned in the law, should be reasonably devised or advised and required, so as such further assurances should contain in them no further or other warranty or covenant then against the person or persons, and his and their heirs, who should make or do the same, and so as the party or parties who should be so requested to make such further assurances should not be compelled or compellable for the making or doing thereof, to go or travel from his, her, or their respective places of abode or dwelling; as by the said indenture (reference being thereunto had) will (amongst other things) more fully and at large appear; by virtue of which said grant and conveyance the said A. B. deceased in his life-time, afterwards, to wit, on, &c. at, &c. entered into the said messuage or tenement, closes, lands, grounds, hereditaments, and premises, with the appurtenances, and became and was seised thereof in his demesne as of fee, and being so possessed thereof as aforesaid, he the said A. B. deceased, afterwards, to wit, on, &c. at, &c. died so seised of the said premises, with the appurtenances as aforesaid, whereupon and whereby all the estate and interest of the said A. B. deceased, of and in the said messuage, tenement, closes, lands, grounds, hereditaments, and premises, with the appurtenances, then and there descended and came to the said plaintiff as son and heir of the said A. B. deceased, and thereby he the said plaintiff then and there became and was seised of the said tenements, with the appurtenances, in his demesne as of fee, and so remained and continued so seised thereof, until the time of his being disseised and dispossessed thereof, as hereinafter mentioned; *and although, &c. [*state plaintiff's general performance, and defendant's general non-performance,*] saith that the said I. K. in the said indenture mentioned, and now deceased, in his life-time, for the better, more perfect, and absolute granting, conveying, and assuring of the said messuage or tenements, closes, lands, grounds, hereditaments, and premises, in the said indenture mentioned, did afterwards, to wit, on, &c. at, &c. request the said defendant and M. his wife, at the proper costs and charges in the law of the said A. B. to levy a fine to pass the estate of the said M. his wife legally, to the said A. B. deceased, his heirs and assigns; yet the said defendant and M. his wife, before their decease, did not nor would, at the proper costs and charges in the law of the said plaintiff, or otherwise, when they were so requested, or at any time before or afterwards, levy a fine for the purpose aforesaid, but wholly refused and neglected so to do, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of the said defendant in that behalf so made as aforesaid, to wit, at, &c. (*venue*) aforesaid; by means whereof, afterwards, and after the death of the said A. B. deceased, and before the commencement of this suit, to wit, on the, &c. at, &c. (*venue*) one I. J. the devisee of the said M. by reason of no such fine having been levied as aforesaid, having a lawful right and

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AGAINST
VENDOR.

title to the said tenements and hereditaments, with the appurtenances, (and not a title derived by or from either the said I. K. deceased, or from the said plaintiff,) entered into the same, in and upon the possession of the said plaintiff, against his will, by due process of law, from the possession and occupation of the aforesaid tenements and lands, and hath from thence hitherto lawfully kept and continued, and still lawfully keeps and continues, the said plaintiff so expelled from his possession thereof, contrary to the said covenant of the said defendant by him above made, for himself and the said M. his wife, their and each of their executors, administrators, and assigns, with the said A. B. deceased; and so the said plaintiff in fact says, that, &c.—[*Common conclusion as ante*, 518.]

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Vendee
against
vendor,
for breach
of cove-
nant for
good title,
stating
that plain-
tiff was
ejected by
third per-
son, and
incurred
great ex-
pense (i).
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*For that whereas, in the life-time of the said E. F. to wit, on, &c. at, &c. (*venue*) by a certain indenture made between one G. H. and I. K. his wife, the said defendant, and D. R. of the first part, one I. L. of the second part, and the said E. F. of the third part, one part of which said indenture, sealed, &c. (*profert*) the said G. H. and I. K. his wife, defendant, and D. R. for the consideration therein mentioned, did grant and release to the said E. F. (in his actual possession then being, by virtue of a certain bargain and sale to him thereof made by the said G. H. and I. K. his wife, defendant, and D. R. in consideration of 5s. apiece, by indenture bearing date the day next before the day of the date of the said indenture brought into court for one whole year, and by virtue of the Statute made for transferring uses into possession,) and to his heirs and assigns, certain messuages, tenements, and lands, with the appurtenances, *commonly called or known, &c. situate &c. and all other the messuages, tenements, lands, hereditaments, and premises whatsoever, of them the said G. H. and I. K. his wife, defendant, and D. R. or any or either of them situate and being, &c. together with all and singular the houses, out-houses, &c.

(i) As to the construction of covenants for good title, and what a breach, see 2 Saund. 175 to 180, and notes.—11 East, 633.—15 East, 530.—Dyer, 240.—2 B. & P. 13.—3 J. B. Moore, 703.—3 B. & C. 459, 29.—2 J. B. Moore, 592.—8 Taunt. 543, S. C.—3 B. & A. 392. As to what is a breach of quiet enjoyment, see 4 B. & Cres. 261; see precedent, and as to who may sue, 3 J. B. Moore, 35; see also precedent and law, M'L. & Y. 647. The plaintiff must state in his declaration in some manner that the person evicting had a lawful title before or at the time of the date of the grant to the plaintiff, and an averment that he had a lawful title without those additional words is too general. But there is no necessity to set out such title, it is sufficient to allege that "he had a lawful title at the time of the conveyance to the plaintiff," see 2 Saund. 180, 177.—1 Show. 70.—2 Lev. 37.—3 Lev. 325.—Hardr. 172.—4 T. R. 617.—8 T. R. 278, &c.—Cro. Jac. 315.—1 Sid. 466.—M'L. & Y. 647. (Webb v. Alexander, 7 Wend. Rep. 281, and the cases there cited.) It is not necessary to state that plaintiff was evicted by legal process, 4 T. R. 617, 620; though some lawful eviction or disturbance

must be shown if done by a stranger. Hob. 12.—Cro. Eliz. 914, &c. But where the covenant is that the grantee, lessee, &c. shall quietly enjoy, without the let or interruption of the covenantor himself, his heirs or executors, it is sufficient to allege that he or his heirs or executors entered, without showing it to be a lawful entry, or setting forth his title to enter. 2 Roll. Rep. 21.—Fitz. Nat. Br. 342.—Cro. Jac. 383.—1 T. R. 671. However, some particular act must be shown by which the plaintiff is interrupted, for otherwise the breach of covenant or condition for quiet enjoyment is not well assigned. Com. Rep. 228.—8 Rep. 91 a. b.—2 Saund. 181. b. But in action of covenant "that the grantor has good right, full power, and lawful authority to grant," it was held that the breach might be as general as the covenant, namely, "that he had not good right, full power, and lawful authority to grant, without stating any eviction or interruption." 9 Rep. 60 b. and see 2 Saund. 181 b. c. As to the mode of alleging the stranger's title, see 1 Show. 70.—2 Lev. 37.—3 Lev. 325. 4 T. R. 617, &c.—2 B. & P. 14 n. b.

AGAINST
VENDOR.

hereditaments, and premises whatsoever, to the said messuages, lands, tenements, and hereditaments, and premises thereby granted or released, or thereby meant, mentioned, or intended so to be, belonging or in anywise appertaining to the same, then, or at any time or times theretofore usually held, used, occupied, enjoyed or accepted, reputed or known, or taken for part, parcel, or member thereof, or as belonging thereto, to have and to hold the said premises, with their and every of their appurtenances, unto and to the use of the said E. F. his heirs and assigns for ever; and the said defendant did, by the said indenture now brought into court here, for himself, his heirs, executors, and administrators, covenant, promise and agree, to and with the said E. F. his heirs and assigns, amongst other things, in manner following, that is to say; that the said E. F. his heirs and assigns, should and might, from time to time, and at all times forever thereafter, peaceably and quietly enter into, have, hold, use, occupy, possess, and enjoy all and singular the said purchased hereditaments and premises, therein before mentioned to be thereby granted and released as aforesaid, or meant or intended so to be, and every part and parcel thereof, with the appurtenances, and the rents, issues, and profits thereof, and of every part thereof, should and might, from time to time, and at all times thereafter, have, receive, and take, to and for his and their use and benefit, without the lawful let, suit, trouble, claim or demand, entry, eviction, ejectment, molestation, hindrance, interruption, or disturbance, whatsoever, of or by the said G. H. and I. K. his wife, defendant, and D. R. or any or either of their heirs or assigns, or for or by any other person or persons whatsoever; and that free and clear, and freely and clearly, and absolutely acquitted, exonerated, released and discharged, or otherwise by the said G. H. and I. K. his wife, defendant, and D. R. and each of them, their and each of their heirs, executors, and administrators, well and sufficiently saved, defended, and kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, settlements, jointures, dowers, right and title of dower, thirds at common law, entries, uses, tenements, wills, legacies, statutes merchant, and of the staple, recognizances, judgments, executions, elegits, extents, rents, arrears of rent, annuities, sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts upon bonds, and of record, debts due to the king's majesty, and of, from, and against all other estates, titles, troubles, charges, and incumbrances whatsoever, save and except the chief rent issuing out of, or payable for the said premises to the lord or lords, fee or fees of the same, if any such should be due; as by the said indenture, relation being thereunto had, may more fully appear. And the said plaintiff further says, that the said E. F. in his life-time, and the said plaintiff, from the time of the death of the said E. F.—[*Plaintiff's general performance. Averment of defendant's general non-performance.*].—The said plaintiff in fact saith, that he the said plaintiff, so being the heir of the said E. F. as aforesaid, hath not been permitted, neither hath he been able, from time to time, and at all times, from the death of the said E. F. peaceably and quietly to have, hold, use, occupy, possess, and enjoy the said hereditaments and premises in the said indenture mentioned, and thereby intended to be granted and released, or any part thereof, nor hath he been permitted or been able, from time to time, and at all times since the death of

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the said E. F. to have, receive, and take the rents, issues and profits of the said premises, to and for his own proper use and benefit, without lawful let, suit, trouble, entry, eviction, and ejection of any person, but on the contrary thereof, after the death of the said E. F. one M. H. widow, who, at the time of making the said indenture thereinbefore set forth, and continually from thence until and at the time of the eviction, ejection, and expulsion herein after mentioned, had, and who still hath, lawful right and title (k) to the said premises, with the appurtenances, did enter into the same, in and upon the possession of the said tenements, and ejected, expelled and removed the said plaintiff, against the will of the said plaintiff, by due process of law, from the possession and occupation of all and every the premises, with the appurtenances, and every part thereof, and kept and held out, and still keeps and holds out to him the said plaintiff, so thereof expelled from his possession and occupation thereof, to wit, at, &c. contrary to the form and effect *of the said indenture, and of the said covenant of the said defendant, so by him made in that behalf as aforesaid; by reason of all which said premises the said plaintiff hath not only entirely lost and been deprived of the said messuage, tenement, and land, with the appurtenances, in the said indenture particularly mentioned, and of divers large sums of money, amounting in the whole to a large sum of money, to wit, &c. by him the said plaintiff, laid out and expended in and upon the said premises, in repairing, amending, and improving the same, but hath also been obliged to pay the costs and charges sustained by the said M. H. widow, in prosecuting a certain action of ejectment for the recovery thereof, which amounted to a large sum of money, to wit, &c. and hath been further compelled and obliged to sustain and undergo, and hath actually sustained and undergone the payment of divers large sums of money, amounting in the whole to £— in and about the endeavoring to defend such action of ejectment, to wit, at, &c. (venue) aforesaid. And so, &c. [*Add usual conclusion as ante*, 519.]

ON
LEASES.

XI. ON LEASES.

By lessor
against
lessee for
rent (l).

[*For the commencement, see ante*, 517.]—For that whereas, heretofore, to wit, on the — day of — A. D. — (m) at, &c. (venue) (n) by a certain indenture then and there made between the said plaintiff of the one part, and the said defendant, of the other part (o), [*state the*

(k) See *ante*, 546.

(l) See other forms of declarations on leases, Lil. Ent. 139, 135, 138, 139, 141, 143, 132.—2 Rich. C. P. 181, 189.—Pl. Ass. 313, 340. As to the parties to the action, see *ante*, vol. i. Index, "*Lease*." In action by lessor the plaintiff need not state any inducement of his title to the premises, and if it be stated it would be rejected as surplussage, but such inducement is necessary and traversable in an action by the assignee of lessor, 4 J. B. Moore, 303; see also 1 D. & R. Ni. Pri. Rep. 1.—Post, 552.

(m) A deed may be stated in pleading to have been made on a day different from its date, omitting the words "bearing date, &c." 4 East, 477, but it is most usual to insert the date.

(n) As to the venue in covenant on leases in general, see *ante*, vol. i. Index, tit. "*Declaration*," "*Venue*." In covenant by lessor against lessee, the venue is always transitory, but it is local, against the assignee of the lessee.

(o) It is not necessary or advisable to state the addition of the parties.

parties to the indenture, according to the fact] (the counterpart (*p*) of which said indenture, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid,) the said plaintiff (*q*) did demise (*r*) lease, set, and to farm let, [*according to the words in the lease*] unto the said defendant, his executors, administrators, and assigns, a certain messuage or dwelling-house, tenements, and premises, with the appurtenances, particularly mentioned and described in the said indenture, situate in the county of M. (*s*), (except as in the said indenture is excepted) to have and to hold the said messuage or dwelling-house, tenements, and premises, with the appurtenances, (except as aforesaid) unto the said defendant, his executors, administrators, and assigns, from the — day of — then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended [*let this be according to the words of the lease.*] Yielding and paying (*t*) theretofore, yearly and every year, to the said plaintiff, his heirs, [*or, "executors, administrators," as in indenture*] or assigns, the clear yearly rent or sum of £— payable quarterly, at the four most usual feasts or days of payment of rent in the year, (that is to say) on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, by even and equal portions [*let this be according to the words in the lease.*] And the said defendant did therefor by himself (*t*), his executors, administrators, and assigns, covenant,

ON
LEASES.
Profert.

The demise.

The premises.

The habendum.

The redendum
(*q*).

The covenant to pay rent
(*t*).

(*p*) If both parts of the deed be originals, that is, signed by all the contracting parties, say, "one part of which said indenture, &c." (It is no variance if the plaintiff make profert of the said *Indenture*, and at the trial produce the counterpart executed only by the *lesses*. 3 B. & Adol. 396.) A profert or an excuse for the want of it, must in general be stated, or the declaration will be bad on special demurrer, 4 Afhe, c. 16. If a profert be stated and the deed cannot be produced, the plaintiff will be nonsuited, on the plea of *non est factum*, 4 East, 585. As to proferts in general, see 1 Saund. 9. n. 1.—Ante, 439—Index, vol. i. tit. "Profert."

(*q*) If the plaintiff will unnecessarily state any part of the consideration, he must state the whole, 2 B. & A. 765.—1 Chit. Rep. 518, S. C.

(*r*) The lease generally runs, "hath demised," &c. and "doth demise," &c.; the last words only are to be stated in the past tense, and every other part of the lease necessary to be stated, is to be set forth in general in the past tense, and according to the legal effect; in a declaration—"the *testatum existit*," or, "it is witnessed, &c. that A. B. demised," is sufficiently certain, though not in a plea; see ante, vol. i. Index, tit. *Testatum Existit*; 1 Saund. 274, n. 1.—Lord Raym. 1539.—1 B. & C. 358.

(*s*) It is proper if the description of the premises be very long, to say, "*certain tenements, with the appurtenances, particularly mentioned and described in the said in-*

denture, situate, &c." and in order to avoid variance, it is advisable not to state the abutments, or any other very particular description, 1 Saund. 233, n. 2.—2 Saund. 366, n. 1. 9 East, 188.—4 Taunt. 700. The court will censure the statement of any superfluous matter, Cowp. 665, 727.—Doug. 667. If however, the action is for not repairing buildings, ditches, &c. it is not unusual to state all the premises, as set forth in the indenture. A declaration stating the demise to have been of "a certain *farm and buildings*, and certain pieces and parcels of land, particularly mentioned and described in the said indenture," supports a demise "of all that farm or land, and buildings," &c. enumerating the parcels; 1 Yo. & Jerv. 2; and a declaration stating the demise to have been of lands, supports a demise of one piece of land only, 6 M. & S. 115. As the rent issues out of the realty, if the demise be of a house and *furniture*, the latter need not be noticed, 5 B. & C. 251; and see 11 Price, 19, as to fixtures.

(*t*) If a declaration profess to set out the terms of a reservation of rent, in an action of debt for the rent, it is a variance to omit an exception referring to a subsequent proviso, by which a deduction is to be made if a certain event happen, although that event have not happened, 6 B. & C. 431. As to when covenants are conditional only, in consequence of another distinct covenant, restraining the general covenant to pay, see 6 M. & S. 9.

ON
LEASES.

Reference
to lease.
Lessee's
entry.

Plaintiff's
general
perform-
ance.

Defend-
ant's gen-
eral per-
formance.
[*552]
Particular
breach;
non-pay-
ment of
rent.

promise, and agree, to and with the said plaintiff, his heirs, (u) [or, "executors, administrators," *as in indenture*] and assigns, that he the said defendant, his executors, *administrators, or assigns, should and would well and truly pay, or cause to be paid, to the said plaintiff, his heirs [or, "executors, administrators," *as in indenture*] or assigns, the said yearly rent or sum of £— at the several days and times aforesaid [*let this be according to the words of the covenant*] (w). As by the said indenture, reference being thereunto had, will, (amongst other things) more fully and at large appear (x). By virtue of which said demise, the said defendant afterwards, to wit, on, &c. entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted as aforesaid (y). And although the said plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled, and kept all things in the said indenture contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture, to wit, at, &c. (*venue*) aforesaid (z); yet protesting that the said defendant hath not performed, fulfilled, or kept any thing in the said indenture contained on his part and *behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof (a), the said plaintiff saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on (b), &c. at, &c. (*venue*) aforesaid, a large sum of money, to wit, the sum of £— (c) of the rent aforesaid, for — years and a half of the said term, ending on the day and year last aforesaid, and then last elapsed (d) became and was due and still is in arrear and unpaid to the

(w) The words of the lease and covenant are in general to be set out *verbatim*, though indeed the legal effect of those words would suffice. When the lessor is seized in fee, the covenants are with him and "his heirs and assigns;" but if it be only a termor, they are with him and "his executors, administrators, and assigns."

(v) No unnecessary covenant or other irrelevant parts of the deed should be stated, 1 Saund. 233, n. 2—2 Saund. 366, n. 1.—Pl. Ass. 314. Ante, 550. n. (d).

(x) The reference to the lease is not necessary.

(y) In an action against a lessee for years, it is not necessary to allege an entry. 1 Saund. 203, n. 1.—Com. Dig. Pleader, 2 W. 14. Dougl. 455 7 East, 341.—11 Co. 52 b.; and even against the assignee of the lessee, such averment seems unnecessary.—1 Lord Raym. 367—3 J. B. Moore, 526.—1 B. & B. 238, S. C.; see Woodfall's Law of Landl. & Ten. by Harrison.—7 East, 340, n. a. When stated it should be alleged that the entry was after the right to occupy commenced. An entry of a tenant at will must be stated, 1 Ld. Raym. 171; and see 3 J. B. Moore, 527, as to the necessity of stating an entry.

(z) This averment of general performance by the plaintiff is unnecessary; but it may be advisable to insert it, as it might after verdict cure an omission of averment of

performance of a condition precedent, 1 Saund. 235, n. 5.—Rep. temp. Hardw. 343, 344—2 Mod. 309. If there be a condition precedent, performance must be specially shown, as in the form, post, 552; see ante, vol. i Index, tit. "Declaration."

(a) There is no occasion for this *protestation* or allegation of the *general* non-performance of covenants by the defendant; the declaration may proceed at once to the material averments, and the particular breach for which the action is brought.

(b) The day on which the rent fell due. It does not seem necessary, in an action of *covenant* for rent, to show when it fell due, and a mistake in the statement would, it seems, be immaterial; see 4 B. & C. 157, infra. In A. D. 1826, the court of King's Bench, on special demurrer, held, that a mistake in the way was not material. *In debt* on a demise, it is necessary to state when the rent fell due, Gilb. Debt, 407.—Show. 8.—Vin. Ab. Covenant, L. a. pl. 12.

(c) The plaintiff is not bound to prove the precise sum stated to be due.

(d) That there is no occasion to say, "then *last* elapsed," see 4 B. & C. 157. 6 D. & R. 72, S. C. In that case, where one of five tenants in common brought covenant on a lease for rent payable on the four most usual days of payment in the year, and the breach was, that on the 24th day of June, 1824, a large sum of money, to

said plaintiff, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant (e) of the said defendant, by him in that behalf so made as aforesaid, to wit, at &c. (venue) aforesaid. And so the said plaintiff in fact saith (f).—[*Conclusion as ante* 519.]

ON
LEASES.

Usual
conclu-
sion.

[*Commencement in covenant as usual, in K. B. as ante, 549 in C. P. as ante, 18; in Exchequer, as ante, 20.*]—For that whereas, heretofore, to wit, on, &c. (date of lease) at, &c. (venue) by a certain indenture then and there made, between the said plaintiff of the one part, and the said defendant of the other part [*state the parties to the indenture according to the fact*] the counter part (h) of which said indenture, sealed with the seal of the said defendant, the said plaintiff now brings here into court, the date whereof is a certain day and year therein named, to wit, the same day and year aforesaid, the said plaintiff for the considerations therein mentioned, did demise, lease set and to farm let, (as in the lease) unto the said defendant, his executors, administrators, and assigns, a certain messuage, tenements and premises, with the appurtenances more particularly mentioned and described in the said indenture (i).—[*Then proceed to set out the covenants broken, taking care to set out any covenant constituting a condition precedent to defendant's performance of his covenant, and afterwards averring a performance of it, and which may be as in the form, 552 d, post. The following is the usual form of covenant to repair, but it should be made to agree with the covenant in the indenture declared on.*] And the said defendant did, in and by the said indenture, for himself and his executors, administrators, and assigns, covenant, promise, and agree, to and with the said plaintiff, his heirs, (or "executors, administrators," as in indenture) and assigns, (amongst other things) in manner following, (that is to say) that he the said defendant, his executors, administrators and assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain, and keep the said messuage or tenements, and buildings, gates, stiles, &c. (as in the covenant) in good and tenantable repair, order, and condition, and the same premises, and every part thereof, should and would leave in such good repair, order, and condition, at the end, or other sooner determination of the said term, and should and would peaceably and quietly quit, yield, and deliver up to the said plaintiff, his heirs (or "executors, administrators," as in indenture) or assigns, without doing, committing, or suffering to be done or committed, any waste, spoil, or damage of the same, or any part thereof (k). As by the said indenture reference being thereunto had, will amongst other

Lessor
against
lessee for
not repair-
ing (g).

Covenant
to repair,
and be al-
lowed
rough
timber.

Covenant
to leave in
repair.

Reference
to the
lease.

wit, the sum of 21l. 15s. one-fifth part of the rent for three quarters of a year of the term then elapsed, became due from the defendant to the plaintiff, and still was in arrear; it was held good upon special demurrer.

(e) The breach may be in the negative of the covenant generally, 3 T. R. 307; or according to the legal effect, 1 Saund. 235, n. 6. As to the averments, and the statement of the breach in general, see ante, vol. i. Index, tit. "*Declaration*."

"*Breach*."

(f) See ante, 519.—1 Saund. 235, n. 7.

(g) See the notes to the preceding form. See notes to form, post, 552 c.

(h) See ante, 549, n.

(i) See ante, 550, n.

(k) If there be any proviso or exception in the covenant as to damage by fire, &c. it must be stated, and also that the damage, &c. did not arise therefrom, see 4 Campb. 20.—2 B. & B. 395.—5 J. B. Moore, 164, S. C.

ON
LEASES.
Defend-
ant's
entry.

General
perform-
ance by
plaintiff
(m).

Defend-
ant's gen-
eral non-
perform-
ance.

First
breach in
not repair-
ing and
leaving
out of
repair.

things) more fully and at large appear. By virtue of which said demise the said defendant then and there entered (l) into and upon all and singular the said demised premises, with the appurtenances, and became and was thereof possessed, and continued so thereof possessed, from thence until the — day of — A. D. — when the said demise ended and determined, to wit, at, &c. (*venue*) aforesaid. And although the said plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled, and kept, all things therein contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning thereof, to wit, at, &c. (*venue*) aforesaid. Yet protesting that the said defendant hath not performed, fulfilled, or kept any thing in the said indenture contained, on his part and behalf, as aforesaid, to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture, the said plaintiff in fact saith, that the said defendant did not nor would, during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, at his own costs and charges, support, uphold, maintain, and keep, all and every the said messuage or tenements, and buildings, gates, &c. (*as in the covenant*) of the said demised premises, in good tenantable repair, order, and condition, (*as in the covenant*) nor did nor would leave the same premises in such good repair, order, and condition, at the determination of the said term, according to the form and effect of the said indenture in that behalf, but on the contrary thereof, he the said defendant, after the making of the said indenture, as aforesaid, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, to wit, on the day and year first aforesaid, and from thence for a long space of time, to wit, from thence until the determination of the said term, suffered and permitted the said messuage, tenements, buildings, gates, &c. (*as in the covenant*) to be and continue, and the same were, for and during all that time, ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary maintaining, supporting, upholding, and keeping the same (n); and the said defendant at the determination of the said term left the same premises in such bad repair, order, and condition as last aforesaid, contrary to the form and effect of the said indenture, and of the covenant so made by the said defendant as aforesaid, to wit, at, &c. (*venue*) aforesaid.—[*See other breach assigned, in form, post, 552 a.*] And so the said plaintiff in fact saith, &c.—[*Conclude as usual, as ante, 519.*]

By assign-
ee, exec-
utor, or
heir, &c
of lessor
against
lessee.
By lessor
against as-
signee of
lessee for
rent (o).

[*The form of declaring at the suit of an assignee of the lessor, will be found, post, 564, 575, 578; at the suit of an executor of the lessor, post, 565; at the suit of a devisee, post, 591, 592; at the suit of an heir, post, 571.*]

[*Venue local, 1 Saund. 241. Commencement in covenant as usual in K. B. as ante, 549; in C. P. as ante, 18; in exchequer, as ante, 20.*]

(l) As to this averment being necessary, see ante, 551, n.

(m) As to this averment, see ante, 551, n.

(n) See ante, 552 a. n. (k) as to excep-
tion against fire, &c.

(o) See forms, Morg. 416.—Lil. Ent. 134. As to the liability of assignees, see ante, vol. i. Index, "*Assignees*." Most of the notes to the form, ante, 549, are applicable to this. An heir, (4 T. R. 75.) an execu-

—For that whereas heretofore, to wit, on, &c. (*date of lease*) at, &c. (*venue*) by a certain indenture then and there made between the said plaintiff of the one part, and one C. D. of the other part (*p*), (the counter part (*q*) of which said indenture, sealed with the seal of the said C. D. the said plaintiff now brings here into court, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid,) the said plaintiff did demise, lease, set, and to farm let, (*this is to correspond with the indenture*) unto the said C. D. his executors, administrators, and assigns, a certain messuage, tenements, and premises, with the appurtenances, in the said indenture more particularly mentioned and described (*r*), (except as in the said indenture is excepted) to have and to hold the said demised premises, with the appurtenances (except as aforesaid) unto the said C. D. his executors, administrators, and assigns, from the — day of — then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended (*as in indenture.*) Yielding and paying therefore yearly and every year, to the said plaintiff, his heirs (*or*, “executors, administrators,”) or assigns, the clear yearly rent or sum of £—payable quarterly, at the four most usual feasts or days of payment of rent in the year, (that is to say) on the 25th day of March the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, by even and equal payments (*as in indenture.*) And the said C. D. did thereby for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said plaintiff, his heirs [*or*, “executors, administrators,” *as in indenture,*] and assigns, that he the said C. D. his executors, administrators, or assigns, should and would well and truly pay, or cause to be paid, to the said plaintiff, his heirs [*or*, “executors, administrators,”] or assigns, the said yearly rent or sum of £—at the several days and times aforesaid. As by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear (*s*). By virtue of which said demise, the said C. D. afterwards, to wit, on, &c. entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted as aforesaid (*t*). And the said plaintiff in fact saith, that after the making the said indenture, and during the said term thereby granted, to wit, on, &c. (*day of assignment, or any day about the time*) at, &c. (*venue*) aforesaid, all (*u*) the estate, right, title, interest, and term of years,

ON
LEASES.The demise.
The premises.

The habendum.

The redendum.

The covenant to pay rent.

Reference to lease.

Lessee's entry.

Assignment to defendant.

tor, (1 Salk. 316, 317,) may be declared against as assignee, for a breach of covenant after he became interested. An under-lessee cannot be sued by the lessor in covenant or debt on the lease, *Holford v. Hatch*, Dougl. 183, 445.—Cowp. 766. As to what is *prima facie* evidence of defendant's being assignee, see Peake's Law of Evid. 266, 7.—2 Stark. Evid. 437.

(*p*) It is not necessary nor advisable to state the addition of the parties.

(*q*) If both parts of the deeds be originals, that is, signed by all the contracting parties, say, “*one part of which said indenture,*” &c. See ante, 549 *a*, n. as to the profit.

(*r*) See ante, 550, n.

(*s*) The reference to the lease is not necessary.

(*t*) In an action against a lessee for years, it is not necessary to allege an entry, 1 Saund. 203, n. 1—Com. Dig. Pleader, 2 W. 14.—Dougl. 445; and even against the assignee of the lessee, such averment seems unnecessary, see Woodfall's Law of Landlord and Tenant, by Harrison.—7 East, 340, n. a.—Ante, 551, n.

(*u*) In an action by the assignee of the reversion, he must set forth in the declaration the operative part of the deed, &c. by virtue of which he is entitled to the reversion, 1 Saund. 112 b. n. 1. 234, n. 3; though an assignee of a term in an action against the lessor, need not show the assignment

ON LEASES. then to come and unexpired, property, profit, claim, and demand whatsoever, of the said C. D. of and in the said demised premises, with the appurtenances, by assignment thereof then and there made, legally came to and vested in the said defendant. And although the said plaintiff hath always, from the time of the making the said indenture, hitherto well and truly performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture, to wit, at, &c. aforesaid, (w). Yet protesting that the said defendant hath not performed, fulfilled, or kept any thing in the said indenture contained on his part and behalf, as assignee as aforesaid, to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof, (x), the said plaintiff saith, that after the making of the said indenture, and during the said term thereby granted, and after the said defendant became such assignee as aforesaid, and while he continued such assignee, to wit, on, &c. (y) at, &c. (venue) aforesaid, a large sum of money, to wit, the sum of £— of the rent aforesaid, for — years (y) of the said term then elapsed, became and was, and still is in arrear and unpaid to the said plaintiff, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant so made as aforesaid, to wit, at, &c. (venue) aforesaid. And so the said plaintiff in fact saith, that the said defendant (although often requested so to do) hath not kept the said covenant so by the said C. D. for himself and his assigns made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of £— (insert enough) and therefore he brings his suit, &c.

Plaintiff's general performance.

Breach; non-payment of rent.

Conclusion.

Pledges &c.

Lessor against assignee of lessee, for not repairing, with averment of plaintiff's performance of a condition precedent.

[The commencement in *K. B.* by bill, is as ante, 517; by original, as ante, 10; in *C. P.* as ante, 18; in *Exchequer*, as ante, 20; and then proceed as follows:]—For that whereas heretofore, to wit, on, &c. (date of lease) at, &c. (venue) by a certain indenture then and there made between the said plaintiff of the one part, and one E. F. of the other part, (the counterpart (a) of which said indenture, sealed with the seal of the said E. F. the said plaintiff now brings here *into court, the date whereof is a certain day and year therein named, to wit, the same day and year

(2). to have been by deed, 1 Saund. 234, n. 3, 276, notes 1 and 2. In an action against the assignee of the lessee, &c. the above concise statement is in all cases sufficient, though there may have been intermediate assignments, see ante, vol. i. Index, tit. "Declaration." Covenant, 1 Saund. 112 b. n. 1.—6 Mod. 72. And it suffices though the defendant be assignee of part only of the premises; defendant, in that case, being at liberty to plead in abatement, or plead in bar as to the part only, see 5 B. & C. 482. If the plaintiff profess to set out the title of the assignee, he will, on a traverse of it, have to prove it as stated, 3 B. & P. 461. See mode of pleading an assignment of a term to commence *in futuro*, 1 Saund. 253; and this form will suffice even against an heir, when declared against, as he may be as assignee.—4 T. R. 75.

(w) As to this averment of general performance, see ante, 551; it is not necessary.

(x) There is no occasion for this protesting or allegation of the general non-performance of covenants by the defendant;—the declaration may proceed at once to the material averments, and the particular breach for which the action is brought, see ante, 551.

(y) See ante, 552. The plaintiff is not fixed in evidence as to the precise time or sum stated in the declaration.

(z) See the notes to the preceding form.

(a) See ante, 449, note (y).

[*553]

aforesaid,) the said plaintiff for the considerations therein mentioned, did demise, lease, set, and to farm let unto the said E. F. his executors, administrators, and assigns, a certain messuage, farm, tenements, and premises, in the said indenture more particularly mentioned.—[*Here set out the premises shortly, see ante, 450, n.—1 Saund. 233, n. 2.—2 Saund. 366, n. 1. and then state the covenants in the indenture, which perhaps may be as follows:*] — And the said E. F. did, in and by the said indenture, for himself and his executors, administrators, and assigns, covenant, promise, and agree, to and with the said plaintiff, his heirs (or, “executors or administrators,” *as in indenture*) and assigns, (amongst other things) in manner following, (that is to say) that he the said E. F. and his assigns from and after the said messuage, &c. (*as in indenture*) should have been put in good and tenantable repair by and at the expense of the said plaintiff his heirs and assigns, should and would at all times, during the continuance of the said demise, at his and their own costs and charges support, uphold, maintain, and keep (*b*) the said messuage or tenement and buildings, gates, stiles, &c. (*as in the covenant*) (*c*) in good and tenantable repair, order, and condition, (being allowed timber in the rough sufficient and proper for such repair, from time to time to be provided and set out by the said plaintiff, his heirs or assigns); and the same premises and every part thereof, should and would leave in such good repair, order, and condition, at the end or other sooner determination of the said term and should and would peaceably and quietly quit, yield, and deliver up to the said plaintiff, his heirs (or, “executors, administrators,” *as in indenture*) or assigns, without doing, committing, or suffering to be done or committed, any waste, spoil, or damage to the same, or any part thereof. And also should and would well and sufficiently uphold, cleanse, scour, and repair yearly and every year during the said demise, all the ditches, trenches, and water-courses, in the piece or parcel of meadow land, called — meadow, and all other the ditches, trenches, and water-courses, in and upon every part of the said other premises thereby demised, as often as necessary, so as to keep the same cleansed, scoured, repaired, and in good condition, and should and would deliver up unto the said plaintiff his heirs or assigns, the same in such good order and condition at the end of the said term as aforesaid. As by the said indenture, reference being thereunto had, will (amongst *other things) more fully and at large appear. By virtue of which said indenture, the said E. F. afterwards, to wit, on the, &c. entered into the said demised tenements, with the appurtenances, and became and was so possessed thereof, for the said term so to him thereof granted as aforesaid. And the said plaintiff in fact saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on, &c. (*d*) at, &c. (*venue*) aforesaid, all (*e*) the state, right, title, interest, term of years then to come and

ON
LEASES.Covenant
to repair,
after lessor
should have
put in repair,
and being
allowed
rough timber.Covenant
to leave in
repair.Covenant
to cleanse
ditches,
&c.Reference
to the
lease.[*554]
Entry of
lessee.Assignment
to the defendant.

(b) Upon a covenant to repair and keep in repair, during the continuance of the term, an action may be maintained for breaches committed before the term has expired. 1 B. & A. 584.

(c) If there be an exception in the lease as to fire, it must be stated, 4 Campb. 20.—2 Brod. & Bing. 395.—5 J. B. Moore, 164,

S. C.

(d) The day is not material; it is usual to insert some day about the time of the supposed assignment to the defendant. See the note, ante, 552 c, as to this assignment and mode of stating it.

(e) When this must be qualified, see Cowp. 766.

ON
LEASES.

Defendant's entry.

General performance by plaintiff.

Defendant's general non-performance.

[*555]
Averment of performance by plaintiff of condition precedent (g).

First breach in not repairing; and for leaving out of repair.

unexpired, property, profit, claim, and demand whatsoever, of him the said E. F. of, in, and to the said demised premises, with the appurtenances, by assignment thereof then and there made legally, came to and vested in the said defendant. Whereupon and whereby the said defendant then and there entered (f) into and upon all and singular the said demised premises, with the appurtenances, and became and was thereof possessed, and continued so thereof possessed, from thence until the — day of —, A. D. —, when the said demise ended and determined, to wit, at, &c. (*venue*) aforesaid. And although the said plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled, and kept all things therein contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof, to wit, at, &c. (*venue*) aforesaid. Yet protesting that the said defendant since the said assignment so made as aforesaid, hath not performed, fulfilled, or kept any thing in the said indenture contained on his part and behalf, as such assignee as aforesaid, to be performed, fulfilled, and kept, *according to the tenor and effect, true intent and meaning of the said indenture, the said plaintiff in fact saith, that although the said messuage or tenement, and out-buildings in and by the said indenture demised, were, after the making thereof, to wit, at, &c. (*venue*) put in good and tenantable repair, by and at the expense of the said plaintiff, and although timber in the rough, sufficient and proper, for all necessary repairs was allowed, and from time to time provided and set out by the said plaintiff, to wit, at, &c. (*venue*) aforesaid (h); yet the said defendant did not nor would, after the said assignment, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, at his own costs and charges, support, uphold, maintain and keep, all and every the said messuage or tenement, and buildings, gates, &c. (*as in the indenture*.) of the said demised premises, in good tenantable repair, order, and condition, nor did nor would leave the same premises in such good repair, order, and condition, at the determination of the said term (*as in the indenture*) according to the form and effect of the said indenture in that behalf; but on the contrary thereof, he the said defendant, after the making of the said indenture, and after the said assignment to the said defendant as aforesaid, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, to wit, on, &c. and from thence for a long space of time, to wit, from thence until the determination of the said term, suffered and permitted the said messuage, dwelling-house, buildings, gates, &c. (*as in the indenture*.) to be and continue, and the same were, for and during all that time, ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary maintaining, supporting, upholding, and keeping the same; and the said defendant at the determination of the said term, left the same premises so out of repair, and in such

(f) This does not seem necessary, ante, 551, n.—1 B. & B. 265.

(g) As to conditions precedent, see 2 Saund. 352 c.—Willes, 496.—Ante, vol. i. Index, "Condition precedent."

(h) This averment being traversable,

must correspond with the fact; if the plaintiff was merely ready to find timber, let the allegation be accordingly, and aver notice of the plaintiff's readiness to the defendant.

bad order and condition, as last aforesaid, contrary to the form and effect of the said indenture, and of the covenant so made by the said E. F. for himself and his assigns, *as aforesaid, to wit, at, &c. (*venue*) aforesaid. —And the said plaintiff in fact further saith, that the said defendant did not nor would, yearly and every year, during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, well and sufficiently uphold, cleanse, scour, or repair, all the ditches, trenches, and water-courses, in the said piece or parcel of meadow-land, called — meadow, and all other the ditches, trenches, and water-courses, in or upon the said premises, by the said indenture demised, as often as was necessary, so as to keep the same cleansed, scoured, repaired, and in good condition; nor did nor would deliver up the same unto the said plaintiff in such good order and condition at the end of the said demise, according to the form and effect of the said indenture in that behalf, but wholly neglected so to do; and on the contrary thereof, he the said defendant, after the making of the said indenture, and of the said assignment, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, to wit, on, &c. and from thence for a long space of time, to wit, from thence until the determination of the said demise, suffered and permitted the said ditches, trenches, and water-courses, in the said piece or parcel of land called — meadow, and all other the ditches, trenches, and water-courses, in the said premises, by the said indenture demised, to be and continue, and the same were, for and during all the time last aforesaid, foul, miry, choked up, and ruinous, out of repair, and in bad order and condition, for want of well and sufficiently cleansing, scouring, and repairing as aforesaid; and at the determination of the said term, he the said defendant delivered up the same unto the said plaintiff, in such order and condition as last aforesaid, contrary to the form and effect of the said indenture, and of the said covenant in that behalf made as aforesaid, to wit, at, &c. (*venue*) aforesaid. And so the said plaintiff in fact saith, that the said defendant (although often requested so to do) hath not kept the said covenant so made by the said E. F. for himself and his assigns, with the said plaintiff in manner and form aforesaid, but hath broken the same, and to keep the same with the said plaintiff, hath hitherto wholly refused, and still refuses so to do. To the damage of the said plaintiff of £— and therefore he brings his suit, &c.

ON
LEASES.Second
breach,
for not
cleansing
ditches,
&c.Conclu-
sion.

*[*After stating the lease, covenants, reference to lease, lessee's entry, and plaintiff's general performance, proceed thus:*]—Yet the said plaintiff in fact saith, that although after the making of the said indenture, to wit, on divers days and times between the — day of, &c. and the — day of, &c. to wit, at, &c. (*venue*) aforesaid, a large quantity, to wit, — tons of coals, were, under and by virtue of the powers and authorities in the said indenture contained, by the said defendant gotten, procured, and brought to land, from and under the said five several closes, pieces, or parcels of land, in the said indenture mentioned, and although

[*557]
Breach,
non-pay-
ment of
galage
rent of
coal mine
(i).

(i) See assignment of breach for non-payment of poor rates, whereby the lessor was obliged to pay them, 3 Wentw. 511; for not repairing after notice given, Id. 497; for cutting down trees, id. 446; for stubbing up a garden hedge, Id. 497; and for under-letting, contrary to covenants in the lease, Id. 519.

ON
LEASES.

the current price, per ton of coals, at — aforesaid, to wit, at, &c. (*venue*) aforesaid, between the days and times last aforesaid, was then and there advanced and raised from the price in the said indenture above mentioned, to the sum of — shillings per ton, yet the said defendant did not nor would, after the said, &c. nor on any other days or times before or since, pay, or cause to be paid to the said plaintiff, the said sum of — shillings per ton additional galage, on each and every ton of the said coals so raised and procured as aforesaid, as by the said indenture the said defendant had then and there covenanted and agreed to pay to the said plaintiff, but wholly neglected and refused so to do, and on account thereof, a large sum of money, amounting in the whole to a large sum of money, to wit, to the sum of £— of lawful, &c. became and was, and still is, due and payable to the said plaintiff, contrary to the form and effect, true intent and meaning of the said indenture, and of the said covenant of the said defendant so made as aforesaid, to wit, at, &c. (*venue*) aforesaid. And so, &c.—[*Conclude as usual.*]

Breach for
ploughing
up above
60 statute
acres of
land, con-
trary to a
covenant
in inden-
ture
whereby
defendant
agreed to
forfeit 5*l.*
for each
acre
ploughed
up above
the 60*l.*

(k).

[*558]

And the said plaintiff in fact saith, that after the making of the said indenture, and during the continuance of the said term thereby granted, and whilst the said defendant was so possessed of the said demised premises, with the *appurtenances, to wit, in each and every of the respective years of our Lord — and —, the said defendant did till, delve, plough up, and convert into tillage, above 60 statute acres of land, to wit, 100 acres of land belonging to the said premises, other than a summer fallow, in each and every of those years, contrary to the true intent and meaning of the said indenture, whereby, and according to the form and effect of the said indenture, the said defendant forfeited and became liable to pay the said plaintiff divers penalties, to wit, the penalty of £5 an acre for every acre of the said lands so tilled, delved, ploughed up, and converted into tillage, contrary to the true intent and meaning of the said indenture, that is to say, at such of the first and next rent days, which first and next happened after the said penalties so became forfeited as aforesaid; yet the said defendant (although often requested) hath not paid the said penalties or forfeitures, or any or either of them, to the said plaintiff at the rent days, and in manner aforesaid, or otherwise howsoever, but hath hitherto wholly refused and neglected so to do, and therein failed and made default, contrary, &c. to wit, at &c. (*venue*).

Breach for
not insur-
ing premi-
ses in one
of the
London or
Westmin-
ster fire
offices,
against
loss or
damage,
by defend-
ant or any
other per-
son (l).

And the said plaintiff further saith, that the said defendant (although often requested, &c.) did not nor would, from time to time and at all times, after the said assignment so made to him as aforesaid, and during the said term by the said indenture granted, insure, or cause or procure to be insured, and kept insured, in the name of the said plaintiff, at any of the offices for insurance against fire, in London or Westminster, all and singular the said messuages or tenements, and premises, by the said indenture demised, with the appurtenances, from and against loss or damage

(k) See 3 B. & A. 692, and that this reservation is stipulated damages, and not a penalty, see *id.*—3 Younge & Jerv. 298.

(l) A covenant by lessee to insure, and keep insured, to a certain amount, "in some

sufficient insurance office within the cities of London or Westminster," is sufficiently certain. 3 Campb. 134. See 5 B. & Ald. 1, as to this covenant running with the land.

by fire, to the amount and in the manner specified in the said indenture in that behalf, and according to the form and effect thereof, but wholly neglected and refused so to do, and therein failed and made default; and, on the contrary thereof, the said plaintiff in fact saith, that the said messuage or tenements, and premises, with the appurtenances, *after the said assignment so made to the said defendant, and during the said term by the said indenture granted, to wit, on, &c. and from thence until the day of suing forth the original writ of the said plaintiff against the said defendant, were and continued to be, wholly uninsured from and against loss or damage by fire, by the said defendant, or by any other person or persons whomsoever, under and by virtue of the said covenant of the said E. F., &c. by them in that behalf made for themselves and their assigns, with the said plaintiff as aforesaid, contrary to the form and effect of the said indenture, and of the said last-mentioned covenant in that behalf, to wit, at, &c. (*venue*) aforesaid.

ON
LEASES.

[*559]

That before and at the time of making the said indenture, certain arrears of rent, viz. £3, of quit-rent, for five years, for certain part of the said premises, were in arrear to the lord of the manor, &c. and certain other charges and incumbrances for suits of court and acquittances, &c. amounting altogether to £3, at the time of making the said indenture, were due and in arrear to the said lord, &c. which he the said plaintiff afterwards, to wit on, &c. at, &c. (*venue*) aforesaid, was compelled to pay, in order to save his goods from being distrained upon, and did pay the same to the said lord, &c. who, at the time of making the said indenture, and of such payment, and lawful right, &c. and claimed the same.

Breach by
lessee
against
lessor,
that con-
trary to,
&c. cer-
tain quit-
rent was
due (m).

For that whereas heretofore, to wit, on &c. (*date of lease*) at, &c. (*venue*) by a certain indenture then and there made between the said defendants, of the one part, and the said plaintiff, of the other part, which said indenture, sealed with the seal of the said defendants, the said plaintiff now brings into court here, the date whereof is the day and year aforesaid, the said defendants, &c. did demise, lease and to farm let, unto the said plaintiff, a certain messuage and premises therein more particularly mentioned, to have and to hold the same [*here set out habendum et reddendum, as ante, 550, and according to the terms of the lease, and then set out covenant for quiet enjoyment, which may be as follows:*] and the said defendants, by the said indenture, did covenant, promise, and agree, to and with the said plaintiff, that he the said plaintiff paying, &c. and observing, &c. (*as in covenant*) all and singular the covenants and agreements therein contained, which on his and their parts were or ought to be paid, done, observed and performed, and according to the true intent and meaning of the said indenture, should and might peaceably and quietly have, hold, occupy, possess, and enjoy the said messuage and

By lessee
against
lessor, for
quiet en-
joyment.
Breach,
that one J.
B. as
ground
landlord,
distrained
on plain-
tiff's
goods (n).

(m) This is a good breach. See 3 East, 491, &c.—2 B. & P. 13.—1 Saund. 59.—4 Taunt. 329.—See other assignments of breaches of covenant for quiet enjoyment, 5 Wentw. 53, 56, 60, 280. Post, next form for suffering the ground landlord's rent to be in arrear, whereby plaintiff was obliged

to pay it, to prevent a distress. 5 Wentw. 63.

(n) See form, 5 Wentw. 63. As to this breach, and when action lies, see 2 Saund. Rep. by Patteson & Williams, index "*Lease*."

ON
LEASES.

Entry of
lessee.

Averment
of perfor-
mance of
covenants
by plain-
tiff.

Breach by
defend-
ants.

Distress
made by
ground-
landlord
on plain-
tiff's
goods.

premises thereby demised, with the appurtenances thereto belonging, for and during the said term of seven years, wanting three days, thereby granted, without the let, suit, trouble, denial, interruption, or molestation, of them the said defendants, their executors, administrators, or assigns, or any other person or persons, lawfully claiming, or to claim, by, from, or under, or in trust for them, or any or either of them, or by or through their or either of their acts, means, defaults, or procurements, as by the said indenture, reference being thereunto had, will, amongst other things, more fully appear, by virtue of which said indenture the said plaintiff, afterwards, to wit, on, &c. at, &c. entered into the said demised premises, with the appurtenances, and became and was possessed thereof for the said term, so to him thereof granted as aforesaid; and although the said plaintiff hath always, from the time of the making of the said indenture, hitherto observed, performed, fulfilled, and kept all and singular the said covenants and agreements in the said indenture contained, which on his part were or ought to be paid, done, observed, and performed, according to the true intent and meaning of the said indenture, to wit, at, &c. (*venue*) aforesaid, yet protesting that the said defendants have not performed, fulfilled, or kept any thing in the said indenture contained, on their part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture, the said plaintiff in fact saith, that the said defendants did not nor would suffer or permit the said plaintiff, for and during the continuance of the said term of the said indenture granted, peaceably and quietly, to have, hold, occupy, possess, and enjoy, the said messuage, and premises by the said indenture demised, with the appurtenances, without the let, suit, trouble, denial, interruption, or molestation of the said defendants, their heirs, administrators, or assigns or any other person or persons, lawfully claiming, or to claim, by, from, or under, or in trust for them, or any or either of them, or by or through their or either of their acts, means, defaults, or procurement, according to the form and effect of the said covenant of the said defendants, in the said indenture in that behalf made as aforesaid, but on the contrary thereof, the said plaintiff in fact saith, that after the making of the said indenture, and during the continuance of the said demise, and whilst he the said plaintiff was possessed of the said demised premises, to wit, on &c. (*day of distress, or about it*) at, &c. (*venue*) a certain distress was made by and on the behalf of a certain person, to wit, one T. B. on certain goods and chattels of the said plaintiff, in and upon the said messuage and premises, for a certain sum of money, to wit, at, &c. then due and owing from the said defendants to the said T. B. for and in respect of certain rent before that time due and in arrear from the said defendants, to the said T. B. as the ground-landlord of the said demised messuage or premises with the appurtenances, and by means of the premises he the said plaintiff was not only put to, and suffered great trouble and inconvenience, but was forced and obliged to, and did necessarily pay the said sum of £—, together with the charges of the said distress, in the whole amounting to a large sum of money, to wit, the sum of £—, and was and is by means of the premises greatly injured and damnified in the occupation, possession, and enjoyment of the said messuage and premises, contrary to the form and effect of the said indenture, and of the

said covenant in that behalf so made as aforesaid ; and so, &c.—[*Conclude as usual, as ante, 419.*]

ON
LEASES.

Breaches of different covenants between lessor and lessee, &c. may readily be framed, according to the particular circumstances of each case, and in general may be in the negative of the words of the covenant, see 3 T. R. 307, and ante, 452, note, vol. i. Chapter on Declarations.—The above precedents may therefore, in this respect, suffice.—But as difficulties frequently occur in stating the different titles of plaintiffs in covenant, the following forms are given, and which are arranged nearly according to the plan in 2 Blackstone's Commentaries, respecting real estates.

Breaches
in gene-
ral.

*TITLE PLEADED (o).

[*560]

I. ESTATE AND QUANTITY OF INTEREST (p).

ESTATE
AND
QUANTITY
OF INTER-
EST.

For that whereas one G. H. before and at the time of the making of the indenture hereinafter mentioned, was seised (q) in his demesne (r) as of fee (s), of and in the tenements and premises, with the appurtenances hereinafter mentioned to have been demised, to wit, at, &c. (*venue*). And being so seised heretofore, to wit, on, &c. at, &c. (*venue*) by a certain indenture then and there made between the said G. H. of the one part, and the said defendant of the other part, one part, &c.—[*Here set out the profert, and all necessary parts *of the lease, as ante, 549 ; as to the statement of the conveyance, &c. by virtue of which the plaintiff claims, see post, 573. If the seisin be stated as a consequence of a conveyance, &c. the statement is as follows :—*"Whereupon and whereby the said plaintiff then and there became, and was, and from thence hitherto hath been, and still is, seised in his demesne as of fee, of and in the said tenements and premises with the appurtenances, and being so seised," &c.]—[*Then proceed to state the usual averments of performance of covenant by plaintiff, and defendant's breach.*]

Induce-
ment that
lessor was
seised in
fee simple
of corpo-
real here-
dita-
ments.

[*561]

For that whereas the said A. B. and C. his wife, before and at the time of the making of the indenture hereinafter mentioned were seised in their demesne as of fee (u), in right of the said C. of and in the tene-

Seisin in
fee, &c.
in hus-
band and
wife, in
right of
the wife
(t).

(o) As to when an inducement of plaintiff's interest is necessary and traversable, see 4 J. B. Moore, 303.—1 Saund. 333, n. 2.—1 Stra. 230.—7 T. R. 538.—Com. Dig. Pleader, C. 36.—Gilb on Debt, 410.—Dyer, 365.

(p) As to this division, see 2 Bla. Com. 103.

(q) As to the words, "seised," or "posseised," see Com. Dig. Pleader, C. 35, 36, 37.—Co. Lit. 17 a.—Carth. 9.—2 Chit. Rep. 314. After verdict the averment of *seisin*, without showing of what estate, will be aided. 4 Bing. 646.—1 Bing. 633, S. C.

(r) 2 Bla. Com. 105, 106.—Heath's Max. 145. If the estate be incorporeal, the words "in his demesne," are to be omitted,

2 Bla. Com. 106.—Co. Lit. 17 a. b. n. 1.—Com. Dig. Pleader, C. 35.—2 Wils. 224. They seem also improper in pleading a reversion on an estate of freehold. Co. Lit. 17 b. n. 4.—Plowd. 191 a. Seisin of an advowson, &c. "as of fee and right," 1 East, 488.—Thomp. Ent. 203.—Seisin by disseisin, 1 Saund. 55.

(s) As to the words "as of fee," see Co. Lit. 17 b.—4 Bing. 633, S. C. In a writ of right, also say, "and right," 5 East, 372.—2 B. & P. 570.

(t) Dougl. 329.—1 Saund. 253, n. 4.—2 Saund. 235, n. 269, 263, n. 1.—Hob. 1, 2.—Heath's Max. 146.

(u) As to these words, see ante, 560, notes.

ESTATE
AND
QUANTITY
OF INTER-
EST.

ments and premises, with the appurtenances hereinafter mentioned to have been demised, to wit, at, &c. (*venue*) and being so seised, &c.—[*Here state the lease by husband and wife, and the covenants, the lessee's entry, and the plaintiff's derivative title, &c. If the seisin in fee in right of the wife be stated as a consequence of a conveyance, &c. the statement is as follows:—*"Whereupon and whereby the said A. B. and C. his wife, then and there became, and were, and from thence hitherto have been, and still are, seised in their demesne as of fee, in right of the said C. (*w*) of and in the said tenements, with the appurtenances, and being so seised," &c.].—[*Then proceed to state the usual performance of covenants by plaintiff, and the defendant's breach.*]

[*562]
Seisin in
tail (*z*).

*For that whereas one E. F. before and at the time of the making of the indenture hereinafter mentioned, was seised in his demesne as of fee tail, (or, *if special entail, add*, "that is to say, to him and the heirs lawfully issuing of the body of him the said E. F. on the body of—to be begotten,") (or, "of the bodies of the said E. F. and of—," &c.) of and in the tenements, with the appurtenances hereinafter mentioned to have been demised, to wit, at, &c. (*venue*) and being so seised, &c.—[*Here set forth the lease, &c. and plaintiff's derivative title, &c.—If the seisin in tail be stated as a consequence of a conveyance, &c. the statement is as follows:—*"Whereupon and whereby the said E. F. then and there became, and was, and from thence hitherto hath been, and still is seised in his demesne as of fee tail of and in the said tenements, with the appurtenances."].—[*Then proceed to state the usual averments of performance of covenant by plaintiff, and the defendant's breach.*]

Seisin for
life (*y*).

[*563]

For that whereas one E. F. before and at the time of making of the indenture hereinafter mentioned, was seised (*z*) in his demesne as of freehold, for the term of his natural life, (or, "for the term of the natural life of G. H.") of and *in the tenements, with the appurtenances hereinafter mentioned to have been demised, to wit, &c. and being so seised, &c.—[*Here set forth the lease, &c. If the seisin for life be stated as a consequence of a conveyance, &c. the statement is as follows:—*"Where-

(*w*) If this consequence be misstated, the declaration, &c. will be bad on special demurrer, Doug. 329. *See Quere vide Plowd.* 191 a.

(*z*) 1 Saund. 255.—2 Rich. C. P. 350. In a declaration, when the title is stated as inducement, the commencement of the estate tail need not in general be stated, though it is otherwise in a plea, Com. Dig. Pleader, E. 19, C. 35. In pleading seisin of an estate by gift to husband and wife, and to the heirs of the body of the wife by the husband begotten, as the wife has an estate in special tail, and the husband only an estate for life, it should be alleged, "that the husband and wife were seised together, and to the heirs of the body of the wife in her right," and not that they were seised of the freehold, or fee tail. Co. Lit. 26 a, n. 1. It is not necessary to aver the continuance of the life of the tenant in tail, or of the

estate tail. 1 Saund. 235 b, n. 8.

(*y*) See the form, 1 Saund. 231.—Com. Dig. Pleader, C. 35.—Co. Lit. 42 a. Under a will, see 3 M. & S. 382.—Seisin in fee of lessor and tenant for life, the latter demising, see 1 T. R. 93.—6 Co. 14 b. In a declaration, when the title is stated merely as inducement, it is not necessary to show the commencement of the estate for life, but it is otherwise in a plea, Com. Dig. Pleader, C. 35, E. 19. 1 Saund. 187, n. 1.—8 T. R. 488. Unless the *cestui que vie* be a party to the action, or no title be derived under him, it must be averred that he was living at the time the cause of action accrued, as to which averment, see 1 Saund. 236, n. 8.—2 Bla. Com. 120. In pleading a lease for life, which passes by livery and seisin, no entry of the lease should be stated, 11 Co. 52 b.

(*z*) See ante, 560, note (*q*).

upon and whereby the said E. F. then and there became, and was and from thence hitherto hath been, and still is, seised in his demesne as of freehold, for the term of his natural life, of and in," &c.].—[Then proceed to state usual averments of performance of covenants by plaintiff, and the defendant's breach of covenant.]

ESTATE
AND
QUANTITY
OF INTER-
EST.

For that whereas one E. F. before and at the time of the making of the indenture hereinafter mentioned, was seised of the tenements hereinafter mentioned to have been demised, in his demesne as of freehold, for the term of his life, as tenant thereof, by the law of England, to wit, at, &c. (*venue*) and being so seised, &c.—[If the seisin be stated as a derivative title, state the marriage, birth of a child, death of the wife, as in 2 Rich. C. P. 350.]—"Whereupon and whereby the said E. F. then and there became and was, *and from thence hitherto hath been and still is, seised in his demense as of freehold, of and in the said tenements, with the appurtenances, for the term of his life, as tenant thereof, by the law of England, to wit, at," &c. (*venue*).—[See the precedent, 2 Rich. C. P. 350.]

Tenancy
by curtesy
or by dower (a).

[*564]

For that whereas one E. F. before and at the time of the making of the indenture of demise hereinafter mentioned, was lawfully possessed (c) of the tenements and premises, with the appurtenances, hereinafter mentioned to have been demised to the said defendant, (that is to say) for the residue and remainder of a certain term of years, to wit, of — years, commencing from, &c. (d) to come and unexpired therein, to wit, *at,

By assign-
ee of less-
sor, being
a termor,
against
lessee (b).
[*565]

(a) See 2 Bla. Com. 126.—3 B. & P. 652, 3. For forms, see 2 Rich. C. P. 350.—1 East, 213.—1 Saund. 250, 256. Rast. Ent. 580 b. In a declaration, when the title is stated merely as inducement, the above form will suffice, but in a plea it is in general necessary to show the commencement of the title, as in some of the precedents referred to. As to pleading tenancy by dower, see 2 Saund. 423, 306 b, n. 13.—3 East, 276.—Vin. Ab. Dower, M. a. pl. 25, &c. Free Bench.—5 East, 273.

(b) When the action is at the suit of the assignee of the lessor who was a termor, or by the executor of such lessor for rent due after his death, it is necessary, in order to show the plaintiff's right of action, to state the lessor's title as above, and the assignee must set forth all the mesne assignments of the term down to himself, though we have seen it is otherwise in a declaration against the assignee of a term, 1 Saund. 112, n. 1.—Ante, 552, note.—Clift. 121, 2. But it seems unnecessary to show that the assignments were by deed or signed, 1 Saund. 224, n. 3, 276, n. 1, & 2. *Sed Quære* if this rule does not apply only to declarations by or against the assignees of the lessee, who might at common law assign by parol, see *Id.*; and it is certainly usual to show the assignment was by deed. This concise mode of stating the interest is sufficient when the title is pleaded as inducement,

Com. Dig. Pleader, E. 19, C. 35.—Co. Lit. 17 a. As to pleading possession of a term in right of a wife, see Plowd. 191 a.—*Sed vide* Dougl. 329. Ante, 559.

(c) The word "possessed," and not "interested," must be adopted, 1 Show. 106.—1 Saund. 251, n. 1. 106.—2 Saund. 176, n. 5; unless when the term is in reversion, 1 Saund. 251, n. 1.—2 Saund. 176, n. 5; in which case the interest is to be described as post, 568, n. (k).

(d) This is a material averment, and is traversable, 1 B. & B. 531.—4 J. B. Moore, 303; and it should seem the declaration is not sufficient without it, *Id.* Com. Dig. Pleader, C. 43.—Dyer, 365 b.

Sometimes the precedents merely state, "that is to say, for the residue of a certain term of years, whereof — years and upwards were then to come and unexpired;" inserting a number of years sufficient to show that the reversion was in the lessor, and this mode seems sufficient, the lessor's title being merely inducement.

Where the plaintiff, in the first and third counts alleged, that at the time of the making of the agreement, he was possessed of a house for a certain term of years, to expire on the 25th day of December, 1856, and in the second count alleged that he was entitled to the term under and by virtue of a certain contract; proof that he was possessed of a term of twelve years

ESTATE
AND
QUANTITY
OF INTER-
EST.

&c. (*venue*) and being so possessed thereof, he the said E. F. on, &c. at, &c. (*venue*) aforesaid, by a certain indenture, &c.—[*Here state the lease, or indenture and covenants, as ante, 549; then state the entry by the lessee, as ante, 551; and after this, state the mode in which plaintiff became assignee, which, if by a deed-poll, will be as post, 575—if by surrender, as post, 575—if by bargain and sale enrolled, as post, 576—if by lease and release, as post, 578,—and by other means, post, 573 to 592; then state the possession of the residue of the term, in consequence of the assignment, &c. as follows:—*] “Whereupon and whereby the said plaintiff became and was, and from thence hitherto hath been, and still is, possessed of the said tenements with the appurtenances, for the residue and remainder of the said term therein, then to come and unexpired, to wit, at, &c. (*venue*) aforesaid.”—[*Then state the usual averment of performance of covenants by plaintiff, and non-performance by defendant.*]

By execu-
tor of les-
sor, being
a termor,
against
lessee, for
a breach
of cove-
nant after
testator's
death (e).

For that whereas the said E. F. in his life-time, since deceased, before and at the time of the making of the indenture of demise hereinafter mentioned, was lawfully possessed (*f*) of the tenements, with the appurtenances, hereinafter mentioned to have been demised to the said defendant, that is to say, for the residue and remainder of a certain term of — years, commencing from, &c. to come and unexpired therein, to wit, at, &c. (*venue*) and being so possessed thereof, he the said E. F. in his life-time, on, &c. at, &c. (*venue*) aforesaid, by a certain indenture, &c. [*Here set forth the indenture or lease, as ante, 550; then the defendant's entry, as ante, 551; and before the averment of performance, proceed to state the lessor's will, and death, and the probate, thus:—*]—And the said defendant being so possessed of the said demised premises, with the appurtenances, and the said E. F. being so possessed of the said reversion, as aforesaid, afterwards, and during the said term by the said indenture granted, to wit, on, &c. (*day of death or about it*) at, &c. (*venue*) the said E. F. duly made and published his last will and testament in writing, bearing date a certain day and year therein named, to wit, the same day and year last aforesaid, and thereby, amongst other things, he the said E. F. then and there appointed the said plaintiff executor thereof, and afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, he the said E. F. died so possessed of the said reversion, of and in the said demised premises, with the appurtenances, without revoking or altering his said will; and after whose death, to wit, on, &c. (*day of probate, or about it*) at, &c. (*venue*) aforesaid, the said plaintiff duly proved the said last will and testament, and took upon himself the burthen of the execution thereof (*g*), whereby the said plaintiff as executor aforesaid, became and was possessed of the said reversion of and in the said de-

only, and that there was no contract under which he was at that time entitled to an extension of the term, held a fatal variance, although it appeared that plaintiff had since become possessed of a lease to expire in December, 1856; 1 M. & P. 717.

(e) When the action is at the suit of the executor or administrator of a lessor who was a termor, for rent due after his death, it is necessary, in order to show the plaintiff's right of action, to state the lessor's ti-

tle as above. When such action is at the suit of an administrator, a form may be readily adopted from the one above, stating the grant of administration. This concise mode of stating the interest is sufficient when the title is pleaded as inducement, Com. Dig. Plead. E. 19. C. 35.—Co. Lit. 17 a.—Ante, 564.

(f) As to these words, ante, 564, n.

(g) See as to the necessity of stating probate, 2 Stra. 716.

mitted premises, with the appurtenances, to wit, at, &c. (*venue*) aforesaid. And although, &c.—*Conclude, stating performance of covenants by the testator in his lifetime, and by plaintiff after his death, and the defendant's breach of covenant as in other cases.*]

ESTATE
AND
QUANTITY
OF INTER-
EST.

For that whereas, before and at the time of making the indenture hereinafter mentioned, to wit, on, &c. at, &c. (*venue*) one E. F. demised the tenements, with the appurtenances, hereinafter mentioned, to the said G. H. deceased, his executors, administrators and assigns, To hold the same to the said G. H. his executors, administrators, and assigns, from, &c. for one year thence next ensuing, and fully to be complete and ended; and so from year to year, for so long time as the said E. F. and G. H. should respectively please; by virtue of which said demise, the said G. H. entered into the said tenements, with the appurtenances, so to him demised as aforesaid, and became and was possessed thereof, and being so possessed thereof, heretofore, and during the continuance of the said demise to wit, on, &c. at, &c. (*venue*) by a certain indenture then and there made between the said G. H. of the one part, and the said defendant of the other part, the counterpart, &c.—[*here state the lease to the defendant, which was for twenty-one years—the covenants—reference to the lease—entry of the lessee—the death of the testator, during the continuance of the first demise, having made his will, and thereby appointed plaintiff executor—that he proved the will, and thereby became possessed of the interest in the first demise, as in preceding form, mutatis mutandis, and then averring the breaches of covenant during the continuance of the first demise.*]

By executor of lessor, tenant from year to year, for breach of covenant in a lease for 21 years, granted by him (A).

[*After stating the indenture or lease between plaintiff and the testator, and the entry of the testator, as usual, see ante, 549, &c. proceed thus:*]—And the said E. F. (*the testator*) continued so possessed of the said demised premises, for a long space of time, to wit, from thence, until, &c. (*day of his death or about it*) when the said E. F. died, to wit, at, &c. (*venue*) in whose death, to wit, on the day and year last aforesaid, all the estate and interest of the said E. F. of, in, and to the said demised premises, with the appurtenances, came to and vested in the said defendant as executor as aforesaid, to wit, at, &c. (*venue*) aforesaid, by reason whereof the said defendant as executor as aforesaid, afterwards, to wit, on the day and year last aforesaid, entered into and upon all and singular the said demised premises, with the appurtenances, and became and were possessed, and from thence hitherto have been and still are possessed thereof, for the residue of the said term so to the said E. F. thereof granted as aforesaid, to wit, at, &c. (*venue*) aforesaid.—[*Then proceed to state the averments of performance by plaintiff, and the breach by the executors, as in other cases.*]

Against the executor of a lessee, for a breach of covenant after his death.

*III. ESTATE AND TIME OF ENJOYMENT.

[*568]

For that whereas one E. F. before and at the time of the making of

(A) This precedent was holden good on Wentw. 461.

demurrer, 2 Chit. Rep. 461; see also 3 (i) As to this division, see 2 Bla. Com. 163.

ESTATE
AND TIME
OF ENJOY-
MENT (i)
Seisin in

ESTATE
AND TIME
OF ENJOY-
MENT.

fee in re-
version
(k).

Interest in
a term to
com-
mence in
future
(m).

[*569]

the indenture hereinafter mentioned, was seised in his demesne (l) as of fee, of and in the reversion of a certain messuage, &c. with the appurtenances, immediately expectant upon the death of G. H. who was seised of the tenements, as of freehold, as tenant thereof, by the law of England. And the said E. F. being so seised of the said reversion of the said tenements, with the appurtenances, he the said E. F. heretofore, to wit, on, &c. at, &c. (verue) by his certain indenture made between, &c. [*Here state the indenture containing a demise to J. K. for twenty-one years, to commence after the death of the tenant for life: then state the lessee's interest in the lease as follows:*]—By virtue of which said demise the said J. K. then and there became and was possessed of the interest of the said term expectant upon the death of the said G. H. And the said J. K. being so possessed of the interest in the said term, and the said E. F. being so seised of the reversion thereof expectant upon the *death of the said G. H. he the said E. F. afterwards, to wit, on, &c. —[*Here state bargain and sale, &c. by E. F. to the plaintiff, and assignment by J. K. the lessee, to C. D. the defendant, of the interest in the term, to commence on the death of G. H.: then state the death of G. H., the entry of C. D. as tenant, and the seisin of the reversion by A. B. the plaintiff, and the rent in arrear, &c. as usual, as ante, 551.*]

Remain-
der in fee
in a copy-
hold (n).

[*State the seisin of the lord, and that at a court baron, &c. he granted*] the said tenements, with the appurtenances, to one G. H. for the term of his life, and the remainder thereof after the decease of the said G. H. to one E. F. and his heirs for ever. By virtue of which said grant he the said G. H. entered into the said tenements, with the appurtenances, and was seised thereof in his demesne as of freehold for the term of his life, at the will of the lord, according to the custom of the said manor, the remainder thereof belonging to the said E. F. and his heirs. And the said G. H. being so seised thereof, and the remainder thereof belonging to the said E. F. and his heirs as aforesaid, he the said E. F. &c.

ESTATE
AND NUM-
BER OF
OWNERS

(o).

IV. ESTATE AND NUMBER OF OWNERS.

As to the number of owners, see 2 Bla. Com. 103, 175 to 195.—An estate is either in severalty, joint-tenancy, coparcenary, or in common.

(k) See the form, with notes, 1 Saund. 250, &c.—2 B. & P. 574.—Attornment of tenant need not be alleged, 2 Saund. 305 b. 13.—Doug. 283. See a form stating a reversion after an estate tail, 2 Saund. 235.

(l) The forms in Saund, 250.—Co. Ent. 708 b. contain the words "in his demesne," but other forms omit them. Winch. 1103.—1 Saund. 106. When a reversion depends on an estate for years, pleading either seisin in demesne as of fee, or seisin as of fee, will be proper; but if the reversion depend on an estate of freehold, the words "in his demesne," should be omitted;

Plowd. 191 a.—Co. Lit. 17 b. n. 1; see also Com. Dig. Pleader, C. 35.—Doc. Plac. 287.—1 M. & P. 733.—Ante, 560. n. As to pleading a reversion in general, see 1 Saund. 234, n. 3, 4.

(m) As to the *interesse, termini* see 1 Saund. 252, note 1.—Ante, 564, note.—2 Saund. 176, note 5.—1 Saund. 105.—Clift's Ent. 222.

(n) As to this form, see 1 Saund. 146, 7, and notes.—See the mode of pleading a remainder in fee of a freehold estate, 2 Saund. 235.

(o) 2 Bla. Com. 103.

[In all the foregoing precedents the estate having been described as in severalty, it will be merely necessary here to give the form of pleading (p) in the case of an estate in fee in the husband and wife in right of the wife, when the wife survives, and which is as follows :]—And the said E. F. and G. his wife, being so seised of the said reversion as aforesaid he the said E. F. afterwards, to wit, on, &c. at, &c. (venue) aforesaid, died, and the said G. then and there survived him, whereupon and whereby she the said G. then and there became, and was, and still is, sole seised of the said *reversion, with the appurtenances, in her demesne as of fee (q). ESTATE AND NUMBER OF OWNERS. An estate in severalty. [*570]

For that whereas, before and at the time of the making of the indenture hereinafter mentioned, E. F. and G. H. were seised as joint-tenants in their demesne as of fee (r), of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised to the said defendant, and being so seised thereof heretofore, to wit, on, &c. at, &c. (venue) by a certain indenture then and there made between the said E. F. and G. H. of the one part, and the said defendant of the other part, the counterpart, &c.—[Here set out the lease, as usual, the reference to it, and the lessee's entry, as ante, 549, 550, 1, and then state the death and survivorship as follows :]—And the said defendant being so possessed of the said demised premises, with the appurtenances, for the said term so to him thereof granted as aforesaid, and the reversion thereof, after the expiration of the said term belonging to the said E. F. and G. H. afterwards, and in the life-time of the said G. H. and during the said term by the said indenture granted, to wit, on, &c. at, &c. (venue) the said E. F. died so seised of the said reversion of and in the said demised premises, with the appurtenances, as aforesaid, and the said G. H. then and there survived him, whereupon and whereby the said G. H. then and there became and was sole (s) seised of the said reversion, of and in the said demised premises, with the appurtenances, in his demesne as of fee, and being so seised, &c. Estate in joint-tenancy and the death of one, and sole seisin of the survivor.

For that whereas, before and at the time of the making of the indenture hereinafter mentioned, E. F. and G. H. were seised in their demesne as of fee (t), of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised to the said defendants, as daughters and co-heir (u) of one J. K. deceased. And being so seised heretofore, to wit, *on, &c. at, &c. (venue) by a certain indenture then and there made, &c.—[If the estate in coparcenary, be stated derivatively from the father, it is described as follows :]—For that whereas, before and at the time of the making of the demise hereinafter mentioned, one J. K. was seised in his demesne as of fee, of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised. And being so seised, he the said J. K. heretofore, to wit, on, &c. at, &c. (venue) by a certain in- Estate in coparcenary. [*571]

(p) See the next form as to sole seisin by survivorship, in case of joint tenancy.

(q) See this form, 1 Saund. 253; and as to the allegation of sole seisin in general, 2 Saund. 10, n. 14.

(r) As to these words, see ante, 560, n.

(s) See the last note, and 2 Saund. 10, n.

14.

(t) As to these words, see ante, 560, n.

(u) In 1 Saund. 255, and Winch. 1163, the parceners are described as co-heirs; but according to Co. Lit. 163, 164, and 2 Bla. Com. 187, all parceners make but one heir. See also Rob. Gav. 114.

ESTATE
AND NUM-
BER OF
OWNERS.

denture then and there made, &c.—[*Here set forth the demise to the defendant, the covenants, the reference to the lease, and the lessee's entry, and then state the death of the lessor, and descent to the coparceners, as follows:*—]—And the said defendant being so possessed of the said tenements, with the appurtenances, and the reversion thereof, after the expiration of the said term, belonging to the said J. K. and his heirs, he the said J. K. afterwards, to wit, on, &c. at, &c. (*venue*) died so seised of the said reversion as aforesaid; whereupon and whereby the said reversion of and in the said tenements, with the appurtenances, descended and came to the said defendants, as daughters and as co-heir of the said J. K. whereupon and whereby the said defendants then and there became, and were, and still are, seised of the said reversion of and in the said tenements, with the appurtenances, as of fee.

Tenancy
in com-
mon (*wp*).

For that whereas, before and at the time of the making of the indenture of demise hereinafter mentioned, one E. F. was seised in his demesne as of fee, of and in one undivided moiety, the whole into two equal moieties to be divided, of and in the tenements, with the appurtenances, hereinafter mentioned to have been demised to the said defendant; and one G. H. was also then seised in his demesne as of fee, of and in the other undivided moiety, of and in the said tenements, with the appurtenances, to wit, at, &c. (*venue*); and thereupon heretofore, to wit, on, &c. at, &c. (*venue*).—[*Here state the lease by both tenants in common.*]

THE TI-
TLE, AND
HOW AC-
QUIRED.

V. THE TITLE, AND HOW ACQUIRED.

Title to
the entire-
ty by de-
scent in
fee (*z*).

[*572]

[*State the seisin of the lessor and the lease, as ante, 560, and the lessee's entry, and then proceed as follows:*—]—And *the said defendant being so possessed as aforesaid, and the said E. F. being so seised of the said re-

(*w*) See the form, Winch. 1163; how to describe the demand, *de una medietate* of the rent, Carth. 289. As to joinder or severance in an action, 5 T. R. 246.

(*z*) It must, in covenant by an heir on the lease of his ancestor, be shown, that the lessor was seised in fee, Gilb. Debt, 408, 9, 10. As to pleading title by descent in general, see 2 Bla Com. 200 to 240.—Com. Dig. Pleader, 2 E. 1, 2.—Vin. Abr. Heir. See the form, Co. Ent. 708 b.—2 Saund. 418. As to pleading a descent in tail, 1 Saund. 255. The like as co-heirs, *ld. ibid.* and ante, 570. It may be pleaded that B. is heir to A. without saying, either that A. is dead, or had no son, 2 Saund. 305 a. n. 13.—2 Lutw. 1172. It must be shown *how* the plaintiff is heir, whether as son or daughter, grandson, cousin, &c. 2 Saund. 45 a.—5 East, 272.—1 Salk. 355; and that he was heir to the person last seised, Co. Lit. 11 b.—Vin. Abr. Heir, L. pl. 14, 15.—1 Stra. 230. In 3 B. & P. 453, it was decided, that in a count on a writ of right, it

is not sufficient to state that the lands descended to four women, “as nieces and co-heirs of J. S.” without showing how they were nieces. And pleading title as heir to an uncle. he must show how he is heir, and make the father a medium, viz. that the inheritance descended to him *ut consanguineo et heredi*, viz. son of such an one, who is brother and heir to the uncle, 12 Mod. 619. And so in case of a descent from the grandfather, viz. as son and heir to the father, who was son and heir to the grandfather. 12 Mod. 619. But between two brothers a descent is *immediate*, and title may therefore be made by one brother, or his representatives to or through another brother without mentioning their common father; and the son of one brother may claim as cousin and heir to the son of the other brother, without naming the grandfather, thus, “as son of Francis, who was the brother of John, who was the father of Matthew,” 2 Bla. Com. 226—Vin. n. Ab. Heir, L. 1. pl. 18, &c.—5 East, 272. As to stating de-

version as aforesaid, he the said E. F. afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, died so seised of the said reversion of and in the said demised tenements, with the appurtenances as aforesaid, whereupon and whereby the said reversion of and in the said tenements, with the appurtenances, then and there descended and came to the said plaintiff, as son and heir of the said E. F. deceased, and thereby he the said plaintiff then and there became, and was, and still is, seised of the said reversion of and in the said tenements, with the appurtenances, *in his demesne as of fee.—[*Then proceed to state the averments of performance of covenants by plaintiff, and defendant's breach, as in other cases.*]

THE TITLE, AND HOW ACQUIRED.

[*573]

And the said C. being so seised, of and in the said reversion in the said demised tenements, with the appurtenances as aforesaid, she the said C. afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, took to her husband plaintiff; by virtue whereof the said plaintiffs then and there became and were seised of the said tenements, with the appurtenances, in their demesne as of fee, in right of the said C.

By marriage (y).

And the said E. F. being so seised as aforesaid, he the said E. F. afterwards, to wit, on, &c. at, &c. (*venue*) enfeoffed *the said plaintiff of the said tenements, with the appurtenances, to have and to hold the same to the said plaintiff and his heirs and assigns, to the use of the said plaintiff, his heirs and assigns for ever; by virtue of which said feoffment, he the said plaintiff then and there became and was seised of and in the said tenements, with the appurtenances, in his demesne as of fee; and being so thereof seised, &c.

By feoffment (z).
[*574]

For that whereas, heretofore, to wit, on &c. at, &c. (*venue*) by a certain indenture then and there made between E. F. of the one part, and the said plaintiff of the other part, (which said indenture, sealed with the seal of the said E. F. the said plaintiff now brings here into court, the date whereof is the day and year aforesaid) the said E. F. did demise,

By lease (a).

scent to the king, 4 Mod. 355. As to pleading a title by descent in a *copyhold estate*, see 4 Co. 22 b.—Vin. Abr. *Copyhold*, U. b. When descent traversable, Dyer, 365 b.

(y) See the form, 1 Saund. 253. Pleading seisin in fee tail in husband and wife, by marriage, 1 Saund. 255.—2 Rich. C. P. 350, 1. Seisin in fee in right of the wife, ante, 561. Tenancy by curtesy by husband's surviving, ante, 563. Sole seisin in wife by her surviving, ante, 570.

(z) See the forms, 2 Saund. 9, 20—4 Mod. 355, and the law as to feoffments, 2 Bla. Com. 310 to 316. When feoffment traversable, Dyer, 365 b. A feoffment is not pleaded by deed, 2 Saund. 9, n. 13; and therefore no profit thereof need be made; and the statute of frauds, 29 Car. 2. c. 3, which requires that livery should be accompanied by some instrument in writing, has not altered the form of pleading, 3 T. R. 156.—1 Saund. 9 a. note 1.—Livery of seisin on the feoffment need not be stated

in pleading, Co. Lit. 303 b.—2 Saund. 305 a. n. 13. 1 Saund. 228 b. As to the distinctions between a gift of real property and a feoffment, see 2 Bla. Com. 316, 317. As to the mode of pleading a *grant*, id. 317. 2 Saund. 96, 297, 327, 8, n. 12.

(a) 2 Bla. Com. 317 to 323. Lease for lives, 3 Wils. 129. Demise by the king by indenture enrolled, &c. 1 Saund. 187. When a tenant for life and the remainderman in fee join in making a lease, it should not be pleaded, as a joint lease by both in its inception, for, living the tenant for life, it is only *his lease*, and the *confirmation* of the remainderman, Cas. and Op. vol. ii. 148, edit. A. D. 1791.—6 Co. 14 b. 15 a. 2 Bla. Com. 325. If the lessee, or any other, plead a demise by husband and wife, it is not necessary to plead it to have been by deed, 2 Co. 61 b.—Sav. 111.—Dyer, 91 b.—Cro. Eliz. 438, 482; or that any rent was reserved, Cro. Eliz. 112. And as to pleading a lease by husband and wife in general, see 2 Saund. 180 b.

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lease, set, and to farm let (b) unto the said plaintiff, his executors, administrators, and assigns, a certain messuage or dwelling-house, &c. situate, &c. (except as in the said indenture is excepted.) To have and to hold the said messuage or dwelling-house, &c. with the appurtenances, (except as aforesaid) unto the said plaintiff, his executors, administrators, and assigns, from the — day of —, then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended, [here set out any parts of the lease that may be applicable to the case, and see the form and notes, ante, 449, 550] as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. By *virtue of which said demise, the said plaintiff afterwards, to wit, on, &c. entered (c) into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term, so to him thereof granted as aforesaid; and being so possessed, &c.

Assignment of a term to the plaintiff (d).

By virtue of which said demise, he the said E. F. afterwards, to wit, on &c. aforesaid, entered into and upon all and singular the said demised tenements, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid. And the said E. F. being so possessed thereof, he the said E. F. afterwards, to wit, on, &c. at, &c. (venue) aforesaid, by his certain deed-poll indorsed on the said indenture, and duly signed by him and sealed with his seal, and which the said plaintiff now brings here into court, the date whereof is the day and year last aforesaid, he the said E. F. for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over, unto the said plaintiff, his executors, administrators, and assigns, [here set out the operative words of the deed of assignment,] as by the said deed-poll, reference being thereunto had, will more fully appear. By virtue of which said deed-poll, the said plaintiff afterwards, to wit, on, &c. last aforesaid, at, &c. (venue) aforesaid, became and was, and from thence hitherto hath been, and still is possessed of the said tenements, with the appurtenances, for the residue of the said term so thereof granted as aforesaid. And although, &c.—*Aver plaintiff's general performance of the lease since the assignment to him of lessee's interest, and the defendant's breach of covenant as in other cases.*]

Surrender of a leasehold interest (e).

And the said E. F. being so possessed of the said demised tenements

(b) These are the words usually adopted. See 1 Saund. 187. See ante, 549, 550, as to how to set out the lease.

(c) It is not necessary to state the entry, 1 Saund. 203, n. 1. As to the *interesse termini*, ante, 564, note, 568, note m. Possession of a term, 2 Saund. 21. Ante, 564, n.

(d) 2 Bla. Com. 326.—See ante, 564. In an action of the assignee of the reversion, or by the assignee of the tenant, he must state the operative part of the deed of assignment, &c. and all mesne assignments, by virtue of which he is entitled to sue; 1 Saund. 112 b. n. 1. 234, n. 3. But it seems the assignee of a term need not in a declaration show the assignment to have been by deed, or in writing, under the Sta-

tute 29 Car. 2. c. 3. s. 3. though it may be otherwise in a plea.—3 Lev. 155.—Com. Dig. Plead. 2 v. 2. And where the title is doubtful, or the assignments have been lost, 2 Bla. Rep. 1228, it is advisable not to refer to the deeds of assignment, 1 Saund. 234, n. 3, 276, n. 1, 2. *Sed query* whether the rule, as to its not being necessary to state the assignment to have been by deed, does not apply only to the assignee of a lessee, who might at common law assign by parol.—See 1 Saund. 234. A more concise form may be adopted against an assignee, ante, 564.

(e) See the form, 1 Saund. 235.—2 Saund. 22.—2 Bla. Com. 326. As to what operates as a surrender, and the mode of plead-

with the appurtenances, as aforesaid, he the said *E. F. after the making of the said indenture, and during the continuance of the said term thereby granted, to wit, on, &c. at, &c. (*venue*) aforesaid, did surrender to the said G. H. the said term of years of him the said E. F. then to come and unexpired, of and in the said demised tenements, with the appurtenances, and all his estate, right, title and interest, of and in the same; which said surrender he the said G. H. then and there excepted.

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And the said E. F. being so seised, afterwards, to wit, on, &c. at, &c. (*venue*) by his certain writing then and there made by the said E. F. and sealed with his seal, the date whereof is a certain day and year therein named, to wit, the day and year last aforesaid, he the said E. F. for and in consideration of the natural love and affection which he the said E. F. bore for the said plaintiff, then and there being his [cousin,] did covenant for himself and his heirs, to and with the said plaintiff and his heirs, that he the said E. F. and his heirs, then and from thenceforth for ever, did, would and should stand and be seised of the said [or, "of the said reversion of and in the said"] demised tenements, with the appurtenances, to the use of the said plaintiff, his heirs and assigns, for ever, whereupon and whereby, according to the form and effect of the said deed and of the said covenant of the said E. F. and by force of the Statute for transferring uses into possession (*g*), he the said plaintiff then and there became and was seised of and in the said demised tenements, with the appurtenances, [or, "of the said reversion,"] in his demesne as of fee. And being so seised, &c.

Covenant to stand seised to uses (*f*).

And the said E. F. being so seised, afterwards, to wit, on, &c. at, &c. (*venue*) by a certain indenture of bargain and *sale then and there made between the said E. F. of the one part, and one G. H. of the other part, which said indenture, sealed with the seal of the said E. F. the said G. H. now brings here into court (*i*), the date whereof is the day and year aforesaid, and which said indenture of bargain and sale was afterwards, and within six months next after the date thereof, to wit, on, &c. in due manner enrolled in the High Court of Chancery of our lord the now king, at Westminster, in the county of Middlesex, according to the form of the Statute in such case made and provided (*k*), he the said E. F. for

Bargain and sale enrolled (*k*).

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ing it, see 1 Saund. 235, c. n. 9.—6 East, 86.—Com. Dig. Surrender, N. Though since the Statute against frauds, a surrender not merely by operation of law, must be in writing, yet in a declaration it is not requisite to allege that it was in writing though it may be necessary in a plea; 1 Saund. 276 a. notes 1 and 2.—5 Taunt. 257; and see 6 Bing. 529.

(*f*) As to this conveyance, see 2 Bla. Com. 338, and as to pleading it, 2 Saund. 97 b. c.—Lutw. 1207.—Carth. 307.—3 Lev. 370.

(*g*) See post, 577, n. (*l*).

(*h*) The nature of this conveyance is described in 2 Bla. Com. 338, and 1 Saund. 251, n. 2; see the forms, 1 Saund. 251, 2. 256.—2 Saund. 275, 297 c.—Id. 11. The bargain and sale, in Outram v. Morewood,

3 East, 346, was pleaded as in this precedent.

(*i*) It has been supposed not to be necessary to make a profert of deeds, operating under the Statute of Uses, 8 T. R. 573.—1 Saund. 9, n. 1; but the safer course is to make a profert, and which seems necessary where the party pleading has a right to the possession of the deeds.

(*k*) By 27 Hen. 8 c. 16. bargains and sales shall not enure to pass a freehold, unless the same be made by indenture, sealed and enrolled within six months after the date thereof, in one of the courts at Westminster, or with the Custos Rotulorum of the county.—2 Bla. Com. 338. 1 Saund. 251, n. 2. It is necessary to show in what court the deed is enrolled, 1 Saund. 251, n. 3.—Com. Dig. "Bargain and Sale,"

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and in consideration of a certain sum of money, to wit, the sum of £—(l) therefore then and there paid by the said G. H. to the said E. F. did bargain and sell (m) to the said G. H. amongst other things, the said demised premises, with the appurtenances; to have and to hold the same to the said G. H. his heirs and assigns, to the only proper use and behoof of him the said G. H. his heirs and assigns for ever; as by the said last-mentioned indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. By virtue of which said bargain and sale, and enrolment, *and by force of the Statute, for transferring uses into possession* (n), he the said G. H. then and there became and was seised of the reversion of the said *demised premises, with the appurtenances, as of fee, and the said G. H. being so seised, &c.

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Lease and
release
(o).

And the said E. F. being so seised, [or, "so seised of the said reversion"] as aforesaid, afterwards, to wit, on, &c. at, &c. (venue) aforesaid, by a certain indenture of bargain and sale then and there made between the said E. F. of the one part, and the said plaintiff of the other part, which said indenture, sealed with the seal of the said E. F. the said plaintiff now brings here into court, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid (p), he the said E. F. for and in consideration of a certain sum of money, to wit, the sum of 5s. then and there therefore paid by the said plaintiff, to the said E. F. did bargain and sell the said [or, "the said reversion of and in the said"] demised tenements, with the appurtenances, to the said plaintiff, to have and to hold the same to the said plaintiff, his executors, administrators, and assigns, from the day next before the day of the date of the said last-mentioned indenture, for the term of one whole year from thence next ensuing, and fully to be complete and ended; as by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear (q). By virtue of which said last-mentioned indenture, and by force of the Statute made for transferring uses into possession (r) the said plaintiff then and there became and *was possessed of the said tenements, with the appurtenances, for the said term so to him thereof granted as aforesaid, [or, *if the conveyance was of a reversion expectant on the expiration of a lease for years, insert, after the word "possession," as follows, "the said reversion of and in the said*

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b. 12. This regulation does not extend to London, &c. Com. Dig. "*Bargain and Sale*," B. 5.

(l) In pleading a conveyance under the Statute of Uses, it is necessary in all cases (except in the instance of a covenant to stand seised, ante, 576,) to state that a *valuable* consideration was paid.—Com. Dig. "*Bargain and Sale*," B. 12. — 1 Mod. 263. — 2 Saund. 12, n. 20. — Ante, vol. 1. tit. "*Declarations*."

(m) The operative words are so pleaded in 2 Saund. 275, which is more correct than the form in 1 Saund. 251. — See also 2 Saund. 97 c.

(n) The 27 Hen. 8. c. 10. is always called in pleading "*the Statute for transferring uses into possession*."—1 Saund. 151, n. 2.

—2 Saund. 97 c.

(o) 2 Bla. Com. 339.—See forms, 2 Saund. 10. 275.—Lutw. 567.—3 Wils. 134. —Lil. Ent. 136. As to the mode of pleading the lease for a year, see 2 Saund. 10. n. 15. Lease by husband and wife, 2 Saund. 180 B.

(p) It has been considered that no profit need be made of the lease or release, see ante, 577, n. a. — 9 J. B. Moore, 593; but *vide* Lil. Ent. 136.—3 Wils. 134, and 2 Saund. Rep. 10, 11, where there is a profit.

(q) This is not necessary.

(r) This allegation in the old way of pleading was omitted, but it is now always inserted, 2 Saund. 10, n. 1, 15. — Supra, note (n).

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Release (t).

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By private act of parliament (z).

By fine levied by husband and wife, of the inheritance of the wife (a).

demised tenements, with the appurtenances, became and was vested (s) in the said A. B. for the said term so to him thereof granted as aforesaid," the reversion [or, *if expectant on a lease, "the further reversion,"*] thereof, with the appurtenances, belonging to the said E. F. his heirs and assigns. And the said plaintiff, being so interested as aforesaid, and the said defendant, being so possessed of the said demised premises for the residue of the said term so to him thereof granted as aforesaid, afterwards, to wit, on, &c. (u) at, &c. (venue) aforesaid, by a certain indenture of release then and there made between the said E. F. of the one part, and the said plaintiff of the other part, and which said last-mentioned indenture, sealed with the seal of the said E. F. the said plaintiff now brings here into court, the date whereof is the day and year last aforesaid (w), he the said E. F. for and in consideration of a certain sum of money, to wit, the sum of £— then and there paid to him by the said plaintiff, did grant, bargain, sell, alien, release, and confirm (x) unto the said plaintiff and his heirs, the said demised premises, with the appurtenances, to have and to hold, &c.—[*Set out the habendum as in the deed.*] By virtue of which said last mentioned indenture, and by force of the Statute made for transferring uses into possession (y), afterwards and during the continuance of the said term by the said first-mentioned indenture granted, to wit, on, &c. aforesaid, at, &c. (venue) aforesaid, he the said plaintiff became, and was, and from thence *hitherto hath been, and still is seised in his demense as of fee, [or, "of and in the said reversion"] of and in the said demised tenements, with the appurtenances.

For that whereas, heretofore, to wit, on, &c. at, &c. (venue) by a certain act of parliament made in the — year of the reign of his present majesty, [or, "his late Majesty King —"] intituled, &c. after reciting, that, &c. it was, amongst other things, enacted, &c.—[*Here set forth the material causes, relating to the matters in dispute.*] As by the record of the said act of parliament, remaining amongst the rolls of the parliament of our lord the now king, at Westminster, in the county of Middlesex, may more fully and at large appear.

And the said E. F. and G. his wife, being so seised (b), afterwards and

(s) See the opinion of Mr. Booth, in Cases and opinions, vol. ii. 143 to 149, tit. "*Reversion.*" edit. 1791, as to the effect of a conveyance by lease and release, of a reversion expectant on a term, and the mode of pleading such conveyance, and see Co. Lit. 270 a. note 3.—4 Cruise, 199; from which it appears to be incorrect to plead, that the lessor was possessed of the reversion.

(t) See forms, 2 Saund. 11, 276, 7.—Lutw. 568.

(u) As to the date of lease and release, 2 M. & S. 434.

(w) As to the profert, see ante, 577, note (i).

(z) As to the proper words to be here inserted, 2 Saund. 97, a. b. c. and the forms, ibid. 11, 276, 277. *Quere* as to using all these words, see 1 Chit. Rep. 67.

(y) Ante, 578, note (o); ante, 577, note (i).

(z) 2 Bla. Com. 344, 345.—As to pleading a private act of parliament, see Bac. Abr. tit. Statute, L.—Bul. Ni Pri. 224, see a precedent, 1 Saund. 193. The defendant is not entitled to oyer, Dougl. 476, 7.—1 Saund. 9, l. b.

(a) As to the fine and effect of it, 2 Bla. Com. 348, 357.—1 Saund. 319, n. 1. See the form of a fine, 2 Bla. Com. App. No. 4.—See the precedents, 2 Saund. 175, 269, 270. 1 Saund. 258.—Co. Ent. 700. Clift, 819, pl. 5.—1 Leon. 255.—2 Rich. C. P. 531, vol. xvii. M. S. 633. This form was adopted in 3 East, 346.

(b) It is not in general necessary to allege a seisin in fee, 2 Saund. 175, n. 1.—1 Leon. 255. See a statement of seisin in fee in right of the wife, 2 Saund. 269.

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during the continuance of the said demise, to wit, in [Hilary] Term (c), in the year of the reign of our sovereign lord the now king, a certain fine was duly had and levied in his said majesty's court of the Bench at Westminster, *in the county of Middlesex, before —, (d) then his majesty's justices of the Bench aforesaid, and other faithful subjects of our said lord the king, then there present, between the said plaintiff by the name of —, complainant, and the said E. F. and G. his wife, by the names of, &c. deforciant, amongst other things, of the said demised tenements, with the appurtenances, by the name and description of, &c.; whereupon a certain plea of covenant (e) was summoned between them in the same court, to wit, that the said E. F. and G. acknowledged the said tenements with the appurtenances, to be the right of the said plaintiff, as those which the said plaintiff had of the gift of the said E. F. and G. and the same remitted and quitted claim from the said E. F. and G. and the heirs of her the said G. (f) to the said plaintiff and his heirs for ever (g). And further the said E. F. and G. granted for themselves, and the heirs of the said G. that they would warrant to the said plaintiff and his heirs the tenements aforesaid, with the appurtenances, against all men for ever; as by the record of the said fine, remaining in the said court of the Bench aforesaid, more fully appears, (h); which said fine so had and levied as aforesaid, was had and levied to the use and behoof of the said plaintiff, and his *heirs and assigns forever, to wit, at, &c. (venue) aforesaid. By virtue (i) of which said fine the said plaintiff then and there became and was seised of the said tenements, with the appurtenances, in his demense as of fee.

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The like with proclamations.

See the precedent, 1 Saund. 259.—As to pleading a fine with proclamations as to bar to the issue in tail, and in general when such proclamations are necessary, and how they are to be pleaded, see 1 Saund. 259, n. 8.—5 Saund. 175, n. 3, 4.—See the form, 2 Bla. Com. App. No. 4.

Deed to lead the uses of recovery, and recovery accordingly (k).

And the said defendant further says, that before the said several times when, &c. in the said first count mentioned and at the several times here-

(c) The term must be shown, and in what court the fine was levied, 2 Saund. 175, n. 2.

(d) It appears advisable to state the names of all the judges, 2 Saund. 175, n. 2.

(e) 2 Rich. C. P. 352.—2 Saund. 270.

(f) In 2 Saund. 270, it is stated, "the heirs of the husband," but this is inaccurate, when the estate is the inheritance of the wife, 2 Saund. 176, n. 3.—2 Rich. C. P. 352.

(g) If a less estate, see 2 Saund. 175.

(h) A reference to the record of the fine, or of proclamations, is unnecessary, 2 Saund. 176, n. 4.

(i) As to this statement, see 2 Rich. C. P. 352.—2 Saund. 270, 176. And as to the statement of a deed to lead the uses of the fine, see the following precedent of a recovery, and the statement of the deed to declare the uses of the fine, 2 Saund. 270.

(k) The recovery is pleaded in this form

more concisely than is usual. See the next form. The above form in a plea was advised by Mr. Serjeant Williams, in preference to the more prolix statement. He pleaded it thus in a special verdict, and the court expressed their approbation of it. See also 8 East, 560. Lutw. 1539.—Doc. Plac. 209, a.—Jacob's Law Dict. tit. "Recovery." See the record of recovery, 10 Wentw. 251, and the exemplification of it, ibid. 252. The recovery is in this case merely inducement to show that C. D. was tenant for life. See the form of recovery with single vouchers, and writ of seisin thereon, 2 Saund. 89, &c.; and one with double voucher, 2 Bla. Com. App. No. 5, which will assist in framing the statement of a recovery. See the nature of a recovery defined, &c. Willes, 451.—2 Saund. 42, n. 7.—2 Bla. Com. 357.—See the forms, Winch. Ent. 1139.—2 Lutw. 1641.—Clift, 814, pl. 3.

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mafter mentioned, one E. F. as heir at law of G. H. deceased, was seised in his demesne as of fee, of and in the manor of, &c. with the appurtenances, in the county aforesaid. And being so seised thereof, he the said E. F. heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, by his certain indenture of bargain and sale, bearing date the day and year last aforesaid, and made between the said defendant, the now defendant, of the first part, the said E. F. of the second part, I. K. of the third part, N. O. of the fourth part, and P. Q. of the fifth part; which said indenture bearing date the day and year aforesaid, was then and there sealed with the seal of the said E. F. and was, within six months then next following, to wit, on, &c. in due manner enrolled in the High Court of Chancery of our said lord the king, (according to the form of the Statute in such case made and provided,) in consideration of the sum of 5s. of lawful money of Great Britain, to him the said E. F. in hand then and there paid by the said N. O. he the said E. F. at the request and by the direction and appointment of the said J. K. testified as therein mentioned, did bargain and sell, and the said E. F. did grant, bargain, sell, and confirm unto the said N. O. (amongst other things) the said manor, of, &c. with the appurtenances, in the county aforesaid, to have and to hold the same to the said N. O. and his heirs and assigns, to the use and behoof of the said N. O. and his heirs and assigns for ever, to the intent and purpose that the said N. O. might become perfect tenant of the freehold of the said manor, with the appurtenances. And it was thereby agreed that the said P. Q. should, before the end of that present Easter Term, or of some other subsequent Term, sue forth a writ of entry against the said N. O. in order to have a recovery suffered of the manor, of, &c. *sur disseisin en le post*. And that the said recovery when suffered should be and enure to the use of the said C. D. the now defendant, and his assigns, for and during the term of his natural life, and the remainder thereof to the use of the said J. K. his heirs and assigns for ever. And the said defendant futher says, that afterwards, to wit, in — Term, in the — year of the reign of our lord the now king, a writ of entry *sur disseisin en le post*, was sued out, and a common recovery in due form of law suffered, of the said manor, with the appurtenances, in pursuance of the said indenture, wherein the said P. Q. was demandant, against the said N. O. tenant, and the said N. O. vouched to warranty the said defendant (the now defendant) who appeared and vouched to warranty the said J. K. who appeared and vouched to warranty —, the common vouchee, and a writ of seisin was thereupon awarded to the said P. Q. and the sheriff of the same county returned the same writ executed; as by the record and proceedings thereof remaining in the court of our said lord the king, of the bench here to wit, at Westminster, more fully appears. And the said defendant further saith, that the said J. K. and all those whose estate he now hath, and at the said several times when, &c. had of and in the said manor, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, and have used, and been accustomed to have, and of right ought to have had, and the said defendant who is so seised of the said manor, with the appurtenances, for the term of his life as aforesaid, still of right ought to have, &c.—[Here the subject-matter of the prescription was stated.]

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The recovery.

THE TITLE, AND HOW ACQUIRED. The like more fully pleaded (i).

R. H. and M. vouch J. Z. the son.

J. Z. the son vouches R. H.

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R. H. defends.

[After stating that R. H. and M. by fine became seised, *proceed as follows :]—And the said R. H. and M. being so seised, N. Z. and J. M. afterwards, to wit, in the same Term of St. Michael, in the — year of the reign aforesaid, in the said court of the Bench, before —, and his companions, justices of the bench aforesaid, impleaded the said R. H. and M. in a plea of land of the aforesaid manor and tenements (amongst other things) by the writ of the said lady the queen, of entry upon *disseisin en le post*, in the same court returnable and duly returned, and the said R. H. and M. and N. Z. and J. M. parties to the said writ in the said court in due manner appearing, and the said R. H. and M. so being seised of the manor and tenements, with the appurtenances, in their demesne as of fee as aforesaid, the said N. Z. and J. M. then declaring upon the said writ, in their proper persons demanded against the said R. H. and M. the manor and tenements aforesaid, with the appurtenances, (amongst other things) by the names and descriptions aforesaid, as their right and inheritance, and into which the said R. H. and M. had not entry, unless after the disseisin, of which R. H. thereof unjustly and without judgment had made to the said N. Z. and J. M. within thirty years then last past; and whereupon they said that they were seised of the manor and tenements aforesaid, with the appurtenances, in their demesne as of fee and right, in time of peace in the time of the said then queen, by taking the profits thereof, to the value of, &c. and into which, &c. and thereupon they brought suit, &c. And the said R. H. and M. in their proper persons, came and defended their right, when, &c. and thereupon vouched to warranty J. Z. gentleman, son and heir apparent to the said J. Z. esquire, which said J. Z. the son present then in court, by H. M. W. esquire, his guardian, which said H. M. W. was admitted by the said court of the said queen, to appear for the said J. Z. the son being then under age, as the guardian of the said J. R. the son, the manor and tenements aforesaid, with the appurtenances, to them warranted, &c. and thereupon the said N. Z. and J. M. demanded against the said J. Z. tenant, by his own warranty, the manor and tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon they said that they were seised of the manor and tenements aforesaid, with the appurtenances, in their demesne as of fee, in time of peace, in the time of the said queen, by taking the profits thereof, &c. and into which, &c. and thereupon they brought suit, &c. And the aforesaid J. Z. tenant, by his own warranty, defended his right, when, &c. and thereupon *further vouched to warranty, R. H. who was present there in court, in his proper person, and freely, the manor and tenements aforesaid, with the appurtenances, to him warranted, &c. And thereupon the said N. Z. and J. M. demanded against the said R. H. tenant, by his own warranty, the manor and tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon they said that they themselves were seised of the manor and tenements aforesaid, with the appurtenances, in their demesne as of fee and right in the time of peace, in the time of the said then queen, by taking the profits thereof, to the value, &c. and thereupon they brought suit, &c. And the said R. H. tenant by his own warranty,

(i) This form is precisely as pleaded in the notes, ante, 580, 502; and 1 Hen. Bla. Outram v. Morewood, 3 East, 346.—See 395.

defended his right, when &c. and said that the aforesaid R. H. did not disseise the aforesaid N. Z. and J. M. of the manor and tenements aforesaid, with the appurtenances, as the aforesaid N. Z. and J. M. by their writ and count aforesaid above supposed, and of this he put himself upon the country; and the aforesaid N. Z. and J. M. thereupon craved leave to imparl, and they had it; and afterwards the aforesaid N. Z. and J. M. came again there into court in that same Term, in their proper persons, and the aforesaid R. H. though solemnly called, came not again, but departed, in contempt of the court, and made default. Therefore it was then considered that the aforesaid N. Z. and J. M. should recover their seisin against the aforesaid R. H. and M. of the manor and tenements aforesaid, with the appurtenances, and that the aforesaid R. H. and M. should have of the land of the said J. Z. the son, to the value, &c. and that the said J. Z. the son, should further have of the land of the said R. H. to the value, &c. and the said R. H. in mercy, &c. And thereupon the said N. Z. and J. M. prayed a writ of the lady the queen, to be directed to the sheriff of the county aforesaid, to cause them to have full seisin of the manor and tenements aforesaid, with the appurtenances, and it was granted to them, returnable there, on, &c. At which day came there into court the aforesaid N. Z. and J. M. in their proper persons, and the sheriff, to wit, —, esquire, then returned, that he, by virtue of the writ aforesaid to him directed, on, &c. then last past, did cause the said N. Z. and J. M. to have full seisin of the manor and tenements aforesaid, with the appurtenances, as by that writ he was commanded, &c.: as by the record and process thereof in the court of our said lord the king, of the Bench, at Westminster, now remaining, appears: which said recovery as to the coals and iron stone being within or *under any part of the said lands and tenements in, &c. (except the coals and iron stone being within or under any of the messuages, buildings, orchards, and gardens, which were then standing and being upon any of the said lands and tenements,) with free liberty of ingress and egress into the said premises, in places convenient for the getting and digging for the same coals and iron stone, and for the stacking the same in places near where the same should be gotten, until they might conveniently be sold, or be carried away, off and from the said premises, was had and suffered, to the use of the said J. Z. the father, for and during the term of fourscore years, if he so long did live, the remainder thereof to the use of the said J. Z. the son, and to the heirs male of his body lawfully begotten and to be begotten, and for default of such issue, to the use of the second, third, fourth, fifth, sixth, seventh, and eighth sons of the body of the said J. Z. the father, begotten or to be begotten severally and successively, one after another according to seniority, and to the several and respective heirs male of the body of such sons, respectively, and for default of such issue, to the use of the said J. Z. the son, and to his heirs forever, to wit, at, &c. (*venue*) aforesaid. By virtue of which said recovery, and by force of the statute made for transferring uses into possession, the said J. Z. the father, became possessed, amongst other things, of the said coals, with the liberties and appurtenances thereto belonging, for the term of fourscore years, if the said J. Z. the father, should so long live; and the said J. Z. the son, became seised thereof in his demesne as of fee tail, the further remainder and reversion thereof belonging as before limited; and

THE TITLE, AND HOW ACQUIRED.

Judgment.

Writ.

Return.

[*586]
Uses of recovery.

Right of J. Z. the father, and seisin of the reversion in J. Z. the son, by virtue of recovery.

THE TITLE, AND HOW ACQUIRED.

the said J. Z. and father, being so possessed, he the said J. Z. the father, afterwards, to wit, on, &c. in, &c. to wit, at, &c. (*venue*) aforesaid, was created a knight by the said queen, which honor of knighthood the said J. Z. the father, then and there accepted. And the said Sir J. Z. afterwards, to wit, on, &c. in, &c. at, &c. (*venue*) aforesaid, died without any issue of his body, save the said J. Z. the son, and said J. Z. the son being so seised as aforesaid, afterwards to wit, on, &c. in, &c. at, &c. (*venue*) aforesaid, &c.—[*Lease and release by the son.*]

[*591] Title by devise in fee simple (m).

*And the said E. F. being so seised as aforesaid, he the said E. F. afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, duly made and published his last will and testament in writing (n) bearing date, &c. and signed by him the said E. F. and attested and subscribed in the presence of the said E. F. by three credible witnesses, according to the form of the Statute in such case made and provided (o), and thereby (amongst other things) gave and devised the said demised premises, with the appurtenances, unto the said plaintiff, to hold unto and to the use of the said plaintiff, and his heirs and assigns forever. And the said E. F. afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, died so seised of the reversion of and in the said demised premises, with the appurtenances as aforesaid, without altering his said will, as to his said devise of the said demised premises, with the appurtenances. Whereupon and whereby (p) the said plaintiff then and there became and was seised of the said reversion in his demesne as of fee. And being so seised, &c.

[*592] Title to a chattel real, by will (q).

*And the said defendant being so possessed of the said demised premises, with the appurtenances, and the said E. F. being so possessed of the said reversion as aforesaid, afterwards, and during the said term by the said indenture granted, to wit, on, &c. at, &c. (*venue*) the said E. F. duly made and published his last will and testament in writing, bearing date the same day and year last aforesaid, and thereby, amongst other things, gave and bequeathed the said reversion of and in the said demised premises, with the appurtenances, unto the said plaintiff and his assigns, and by his said will, he the said E. F. then and there appointed G. H. executor thereof. And afterwards, to wit, on, &c. at, &c. (*venue*) he the said E. F. died so possessed of the said reversion of and in the said demised premises, with the appurtenances, without revoking or altering the said will with respect to the said bequest. After whose death, to wit, on, &c. at, &c. (*venue*) aforesaid, the said G. H. duly proved the said last

(m) See the forms, 2 Saund. 235, 6.—1 Saund. 253.—Lil. Ent. 133.—7 East, 128.—3 Wils. 130. See a devise for the residue of a term pleaded, Morg. 455, 461. See the form stating a title by devise of a copyhold and surrender to the use of the will, ante, 586.

(n) The will must be shown to have been made in writing, in pursuance of the statutes 32 H. 8. c. 1. and 34 H. 8. c. 5.—1 Saund. 276 a. n. 2.

(o) 29 Car. 2. c. 3. s. 5. but neither this nor the statute of Wills need be referred to, Dyer, 85 b. It is not necessary in

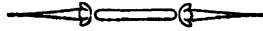
pleading a will, to state that the solemnities required by the statutes against frauds have been observed, see the case of Davis v. Reeves, Vern. & Scriv. 497; reported 1 Bridgm. Equity Digest, 2d edit. 611. pl. 630.

(p) No assent of the executor is to be stated in the case of a devise of a *freehold* interest, Co. Lit. 111 a.—1 Saund. 278, note, 5.—3 East, 120.—7 East, 324.

(q) This form is framed precisely as in the case of Mackay, v. Mackreth, 2 Chit. Rep. 471.—See also 1 Saund. 278.—2 Id. 21.

will and testament, and took upon himself the burthen of the execution thereof (r), and then and there assented (s) to the said bequest of the said reversion to the said plaintiff, whereby the said plaintiff became and was possessed (t) of the said reversion of and in the said demised premises, with the appurtenances, to wit, at, &c. (*venue*) aforesaid. And being so possessed, &c.

THE TITLE, AND HOW ACQUIRED.



*DECLARATIONS IN DETINUE.

[*593]

Ellenborough.

— next after — in
— Term, — Will. 4.

First count on a bailment to be re-delivered on request (u).

— (w), (to wit). A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea, that he render to the said A. B. certain goods and chattels [or, "deeds and writings," *according to the fact,*] of the said A. B. of great value, to wit, of the value of £— of lawful, &c. which he unjustly detains from him (x). For that whereas the said plaintiff heretofore, to wit, on, (y), &c. at (z), &c. (*venue*) delivered to the said defendant certain goods and chattels, to wit, &c. (a) of the said plaintiff, of great value (b), to wit, of the value of £— *of lawful money of, &c. to be re-delivered by the said defendant to the said plaintiff, when he the said defendant should be thereunto afterwards requested (c); yet the said defendant, although he was afterwards, to wit, on

[*594]

(r) It is necessary to state the proof of the Will, 2 Stra. 716. See the precedent, 1 Saund. 106, 7. See form where one of the devisees disclaimed by deed the estate devised, 3 B. & A. 31.

(s) In case of a bequest of chattel real, the legatee must, in pleading, aver the assent of the executor, which is necessary to vest the legal interest in him; see 1 Saund. 278, n. 5.—See *supra*, n. (p).

(t) Ante, 574, and 2 Saund. 21.

(u) Com. Dig. pleader. 2 X. 2. Mode of Declaring, 1 New Rep. 140.—See the forms in Detinue, Morg. 581.—4 T. R. 229.—7 Wentw. 647.—Woodd. 106.—1 New Rep. 140.—Willes 119, and in *trover*, post, 835. When this action lies in general, and its properties, see ante, vol. i. Index, Detinue.

(w) The *venue* is transitory. Com. Dig. Action, N. 6, unless against justices of the peace, &c.

(x) In C. P. the form runs, "C. D. was summoned to answer A. B. of a plea, that he render to the said A. B. certain goods and chattels [or, "deeds and writings"] of great value, to wit, &c. which he unjustly

detains from him, and thereupon the said A. B. by E. F. his attorney, complains against the said C. D. for that whereas, &c."

(y) The day is not material, unless it constitute part of the contract.

(z) The *venue* being transitory, the precise place is immaterial.

(a) As to the certainty necessary in the description of the chattels, 2 Saund. 47 b.—Co. Lit. 286 b.—Bac. Ab. tit. Detinue, B.—Com. Dig. tit. Pleader. 2 X. 2. The date of a deed, &c. need not be stated, 1 Wils. 116.—See Willes' Rep. 126. 12 Mod. 9.—2 Vent. 78.

(b) The declaration may mention the value of every particular, of all in gross, Com. Dig. tit. Pleader, 2 X. 2.—2 Bla. Rep. 853; and the latter is most usual. Formerly a distinction was taken as to *price* and *value*, in the description of *animate* and *inanimate* chattels, Cro. Jac. 130; but this is no longer attended to, Bac. Ab. tit. Trover, F.—N. B. 88. M. and *value* appears in all cases to be the preferable description.

(c) The contract of bailment must be

IN
DETINUE.

Second
count, on
a supposed
finding
(e).

the day and year aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do (*d*) hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, and still unjustly detains the same from the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And whereas also the said plaintiff heretofore, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, was lawfully possessed of certain other goods and chattels, to wit, &c. of great value, to wit, of the value of £— of like lawful money as of his own property, and being so possessed thereof, he the said plaintiff afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, casually lost the said goods and chattels, out of his possession, and the same afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, came to the possession of the said defendant by finding (*f*) ; yet the said defendant well knowing the said last-mentioned goods and chattels to be the property of the said plaintiff, and of right to belong and appertain to him, hath not as yet delivered the said last-mentioned goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although he was afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do, but hath hitherto wholly refused so to do, and hath detained, and still doth detain the same from the said plaintiff, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of £— (*g*) and therefore he brings his suit, &c.

[*595]
Debt and
detinue
in the
same dec
laration
(h).

*— (to wit) A. B. complains of C. D. being, &c. of a plea that he render to the said A. B. the sum of £— of lawful, &c. which he owes to and unjustly detains from him, and also that he render to him the said A. B. a certain indenture of lease of the said A. B. bearing date, &c. which he unjustly detains from him ; for that whereas, [*here insert the counts in debt, and the conclusion as ante, 16, 19, 384, omitting the words "to the damage, &c." and then insert the counts in detinue for the lease, &c. as in the last form to the end, and conclude, "to the damage," &c.*]

truly stated ; see the forms, 3 Woodd. 106.—1 New Rep. 140.—Willes' Rep. 119.

(*d*) The forms in 1 New Rep. 140.—3 Woodd. 106.—Willes, 119, do not state a special request ; but from Willes, 118—5 T. R. 409, it should be averred ; and see the form in 7 Wentw. 635, 6, 7.

(*e*) Com. Dig. Pleader, 2 X. 2. See the forms, 1 New. R. 140.—Willes' Rep. 118.—4 T. R. 229, and the notes to the preceding count.

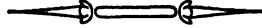
(*f*) This is not traversable. 1 New R. 140.—Ante, vol. I. Index, Detinue.—Doct. Plac. tit Detinue.

(*g*) As the judgment in this action is conditional to recover the specific chattel, or in case it be not forthcoming, damages

for detaining the same, Cro. Jac. 628—Com. Dig. Pleader, 2 X. 12, a sum should be here inserted to cover the real value.

(*h*) That debt and detinue may be joined, see 2 Saund. 117 b.—Bro. Joinder in Action, 97, and for the forms see Brownl. Red. 186.—Rast. 150. When a defendant has in his possession personal property, formerly of the plaintiff, and it be doubtful whether a contract by the defendant for the purchase thereof can be proved, it is advisable to insert a count in *debt* for goods sold, and another count in *detinue* for the chattel, in order that the plaintiff may recover on one ground or the other ; and many other cases may occur, in which this joinder of action may be advisable.

*DECLARATIONS IN CASE.

*Ellenborough.*

—— next after —— in Beginning and conclusion of a declaration in case, or trover in K. B.
 —— Term, — Will. 4. (i).

—— (to wit.) A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case. For that whereas, &c.— [*Here state the cause of action, and conclude as follows:*]—To the damage of the said plaintiff of £— (k), and therefore he brings his suit, &c. Pledges, &c.

In the Common Pleas.

—— next after —— in The like in C. P.
 —— Term, — Will. 4. (l).

—— (to wit.) C. D. was attached to answer A. B. of a plea of trespass on the case, and thereupon the said A. B. by E. F. his attorney, complains, for that whereas, &c.— [*State cause of action, and then conclude as follows:*]—Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of £— (m), and therefore he brings his suit, &c.

I. FOR TORTS TO THE PERSON.

I. FOR KEEPING MISCHIEVOUS ANIMALS.

FOR KEEP-
ING MIS-
CHIEVOUS
ANIMALS.

[*Commencement as above.*]—For that whereas the said defendant, heretofore, to wit, on, &c. (*day of injury or about it*) *and from thence, for a long space of time, to wit, until and at the time of the damage and injury to the said plaintiff as hereinafter mentioned, to wit, at, &c. (*venue*) wrongfully and injuriously did keep a certain dog, he the said defendant, during all that time, well *knowing* that the said dog then was [used and accustomed *to attack and bite mankind (o),] to wit, at, &c.

For keep-
ing a dog
used to
bite man-
kind (n).
[*597]

(i) As to the title, see ante, 12, n. a.

(k) A sum sufficient to cover the real damage.

(l) Ante, 12, n. a.

(m) Supra, n. k.

(n) As to the liability of the owner of animals for mischief done by them, see ante, vol. i. Index, "*Animals.*" 1 Burn, J. 26th, edit. tit. "*Dogs.*"—Roscoe on Evi-

dence, 219.—Com. Dig. Pleader, 2 P. 2.—Com. Dig. Action upon the Case for Negligence, A. 5.—3 C. & P. 138.—9 East, 281.—2 Stra. 1264.—4 Campb. 198.—1 Stark. 285.—1 B. & C. 620, S. C.—1 Esp. 203. See the forms, Plead. Ass. 117.—Morg. 443.—8 Wentw. Index, 23.

(o) This *scienter* must be alleged and proved, 1 M. & S. 238.—Dyer, 25 b. 29 a.

FOR KEEP-
ING MIS-
CHIEVOUS
ANIMALS.

(venue) aforesaid; and which said dog afterwards, and whilst the said defendant so kept the same as aforesaid, to wit, on, &c. aforesaid, at, &c. (venue) aforesaid, did attack and bite the said plaintiff, and did then and there greatly lacerate, hurt, and wound one of the legs of him the said plaintiff; and thereby he the said plaintiff then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, for the space of six months then next following, during all which time he the said plaintiff thereby suffered and underwent great pain, and was thereby then and there hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted; and also, by means of the premises, he the said plaintiff was thereby then and there put to great expense, costs, and charges, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about endeavoring to be cured of the said wounds, sickness, lameness, and disorder so occasioned as aforesaid, and hath been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. (venue) aforesaid.—[Add a count, stating that the dog "was of a ferocious and mischievous nature," and another for not keeping the dog properly secured or fed, as the facts may be.]—To *the damage of the said plaintiff of £— and therefore he brings his suit, &c.

[*598]

Pledges, &c.

The like
for keep-
ing a dog
accustom-
ed to bite
sheep or
other ani-
mals (p).

[Same as the last precedent to the asterisk.]—To hurt, chase, bite, worry, and kill sheep and lambs (q), which said dog afterwards, to wit, on the day and year aforesaid, and on divers other days and times, between that day and the day of commencing this suit, to wit, at, &c. (venue) aforesaid, did hunt, chase, bite, and worry divers, to wit, [one hundred] sheep and [one hundred] lambs of the said plaintiff, of great value, to wit, of the value of £—, there then found and being; by means whereof, divers, to wit, [fifty] of the said sheep, and [fifty] of the said lambs of the said plaintiff, being of great value, to wit, of the value of £—, then and there died, and became of no value to the said plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were then and there greatly terrified, damaged, and injured, and rendered of no use or value to the said plaintiff, to wit, at, &c. (venue) aforesaid.—[Add a count or more, as suggested in form, ante, 597.]—To the damage, &c.—[Conclusion as ante, 596.]

—2 Salk. 662—2 Stra. 1264.—1 Lord Raym. 606.—12 Mod. 332.—1 Lutw. 90.—Cro. Car. 487. What is or is not sufficient evidence of the defendant's knowledge of the propensity, see 2 Stra. 1264. 2 Esp. Rep. 482.—Com Dig. Action on the Case for Negligence, A. 5—4 Campb. 198.—1 Stark. 285—3 C. & P. 138. It may be advisable to add a count for not keeping the dog properly secured, 2 Esp. Rep. 482; or properly fed. See the precedents, Pl. Ass. 105.—2 Rich. C. P. 173.—Morg. 442.—Lil. Ent. 29. An averment that the dogs were accustomed to bite sheep, is not supported by proof they were ferocious and used to bite men, 1 B. & A. 621; 2 Stark. 214, S. C.; and it would be sufficient to state that

the dog was of a "ferocious and mischievous nature." 1 B. & A. 621.

(p) See the notes to the last precedent, ante, 586, 7, and Burn, J. 26th edit. tit. "Dogs."

(q) See ante, 596, 7. If there be no evidence of the defendant's having notice of the dog's propensity to kill the particular cattle which have been injured, it may be advisable to state what particular mischief he had done before, 1 Ld. Raym. 110.—Salk. 13; or to state a propensity to injure animals in general, see 12 Mod. 335, 6.—Ld. Raym. 608.—1 Salk. 13—2 Esp. Rep. 482, which would be sufficient, if not specially demurred to, 1 M. & S. 238—1 Ld. Raym. 109.

II. FOR PUBLIC NUISANCES.

[*Commencement as ante*, 596.]—For that whereas the said defendant, before and at the time of the committing of the *grievance hereinafter next mentioned, was possessed of a certain messuage, with the appurtenances, situate and being in a certain street called — in the parish of — in the county of — which said street, at the time of the committing of such grievance, and from thence hitherto hath been, and still is, a common public street and highway, for all persons to go, return, pass, and repass, in, by, and with coaches, chariots, and other carriages, at their free will and pleasure, to wit, at, &c. (*venue*) yet the said defendant, well knowing the premises, whilst he was so possessed of the said messuage, with the appurtenances as aforesaid, to wit, on, &c. (*day of injury, or about it*) at, &c. (*venue*) aforesaid, wrongfully and unjustly put and placed divers large quantities of materials, dirt, and rubbish in the said street, near to the said messuage, and wrongfully and injuriously kept and continued the same therein, and during the night-time of that day, without fixing or placing, or causing to be fixed or placed, any light or signal at or near such dirt or rubbish, to denote or show that the same were so there as aforesaid, by means and in consequence of which said negligence and improper conduct of the said defendant in that respect, afterwards, to wit, in the night-time of the said day, to wit, at, &c. (*venue*) aforesaid, a certain carriage of the said plaintiff, of great value, to wit, of the value of £— with the said plaintiff therein, then and there going and passing in and through the said street, was accidentally driven upon and against the said dirt and rubbish, and was thereby then and there overturned, by means whereof the said plaintiff then and there became and was greatly hurt bruised, cut, and wounded, and sick, sore, &c.—[*Same damage, as ante*, 597, and if the plaintiff's carriage were injured, state such damage, and the expense of repair,] to wit, at, &c. (*venue*) aforesaid.

FOR PUBLIC NUISANCES.

Against the occupier of a house adjoining a public street, for laying rubbish therein, whereby plaintiff was overturned in his carriage (r). [*599]

And whereas also, before and at the time of the committing of the grievance by the said defendant as hereinafter mentioned, there was, and from thence hitherto hath been, and still is, a certain other common and

Second count, omitting the statement of the defendant's possession of the house.

(r) See forms, 8 Wentw. 428.—2 Rich. C. P. 141, 2 —Morg. 438. As to the liability of the occupier in a case of this nature, see ante, vol. i. Index, tit. "*Nuisance, Land*."—1 B. & P. 404.—2 H. Bla. 350.—Com. Dig. Action on the Case for a Nuisance.—8 Wentw. Index, 28, 72.—3 Campb. 398.—Burn, J. 26th edit. tit. "*Nuisance*." Where A. contracted with B. to repair his (A.'s) house for a stipulated sum, and B. contracted with C. to do the work, and C. with D. to furnish the materials, and the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned; it was held, that A. was liable for the damage, 1 B. & P. 404, and see 4 M. & S. 29.—5 B. & C. 560. So where an incorporated water-works com-

pany contracted with certain pipe-layers to lay down pipes, employed workmen by whose negligence an accident happened, Ld. Ellenborough held the company liable, 3 Campb. 403, and see 1 Stark. 189. See, as to leaving open cellar doors, &c. the form and notes, post, 600. When trustees of a public road are not liable, see 4 M. & S. 27.—Ante, vol. i. Ind. "*Agents*." "*Trustees*." In general an action is not sustainable for a public nuisance, unless the plaintiff has sustained some particular damage, Com. Dig. Action on the case for a Nuisance, C.—Co. Lit. 56 a.—9 Co. 112 b, 113.—2 T. R. 667.—3 Wils. 412.—11 East, 61.—12 East, 432. 4 M. & S. 101.—2 Bingh. 156, 263. See the form and notes, post, 600, for obstructing a highway.

FOR PUB-
LIC NUI-
SANCES.

public highway, in the parish aforesaid, for all the liege subjects of our said lord the king, to go, pass, and repass, at all times of the year, at their free will and pleasure; yet the said defendant, well knowing the premises, heretofore, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, wrongfully and unjustly caused to be put and placed divers large quantities of materials, dirt, and rubbish, in the said last-mentioned common and public highway, whereby the said plaintiff, being a liege subject of our said lord the king, lawfully passing in and along the said last-mentioned highway in a certain carriage was then and there, with great force and violence, overturned in the said last-mentioned carriage. By means, &c.—[*Same damage as in the first count, and conclude as ante, 596.*]

For keep-
ing a hole
(which
led to de-
fendant's
cellar) so
badly cov-
ered, that
plaintiff
fell down
and broke
his leg
(*g*).

For that whereas the said defendant, before and on, &c. (*day of injury or about it*) was the possessor and occupier of a certain messuage and premises, with the appurtenances, situate in the county of M. and near to a certain common and public highway there, in which said highway there now is, and before and on the same day and year aforesaid there was, a certain hole, opening into a certain cellar and vault, of and belonging to the said messuage and premises of the defendant, to wit, at, &c. (*venue*). Yet the said defendant, well knowing the premises, whilst he was so the possessor and occupier of the said messuage and premises, with the appurtenances, and whilst there was such hole as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) wrongfully and unjustly permitted the said hole to be and continue, and the same was then and there so badly, insufficiently, and defectively covered, that by means of the premises, and for want of a proper and sufficient covering to the said hole, the said plaintiff, who was then and there passing in and along the said highway, then and there necessarily and unavoidably slipped and fell into the said hole, and thereby the left leg of the said plaintiff was then and there fractured and broken, and he the said plaintiff became and was sick, sore, lame, diseased, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time he the said plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business, by him during that time to be performed and transacted, and was also, by means of the premises, forced and obliged to pay, lay out, and expend, and did pay, lay out, and expend a large sum, to wit, the sum of £— [*state enough*] in and about the endeavoring to get healed and cured of the said wounds, sickness, and disorder, to wit, at, &c. (*venue*).

(*g*) The occupier of a house is bound to rail in the area, and if an accident happen it is no defense that the premises had been in the same situation for many years before the defendant came in possession of them, 3 Campb. 398. Where the tenant of a house was bound to repair it, but the landlord superintended the repairs, and the cellar was left in a dangerous state, and an accident happened, the landlord was held liable, 4 Taunt. 649. — 2 H. Bla. 349. So where the defendant had employed a bricklayer to make a sewer, who left it open, in

consequence of which the plaintiff fell in, and broke his leg, the defendant was held liable, 6 Esp. 6.—5 B. & C. 559. In a late case, it was held that a tradesman who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it is so placed and secured, as that, under ordinary circumstances, it shall not fall down; but if the tradesman has so placed and secured it, and a wrong-doer throws it over, the tradesman will not be liable in damages for any injury occasioned by it, 4 C. & P. 262.

For that whereas, before and at the time of the committing of the grievance hereinafter next mentioned, to wit, on, &c. (*day of obstruction, or about it*) there then was, and from thence hitherto has been, and still ought to be, a certain common and public bridle-way, and drift-way [*according to the fact—if the way was for all purposes, say “highway,”*] in, through, over, and along a certain close, then and there situate and being in the parish of B. in the county of N. for all the leige subjects of our lord the king to go, return, pass, and repass, on foot and with cattle, at all times of the year, of their free will and pleasure [*if the right be at only particular seasons of the year, or for particular purposes only, state it accordingly*] to wit, in the parish aforesaid, in the county aforesaid. And whereas, before and at the time of the committing of the grievances hereinafter and before mentioned, the said plaintiff was lawfully possessed of divers, to wit, three asses, laden with coals, goods, and chattels of the said plaintiff, and just before and at the time of the committing of the said grievances by his servants in that behalf, was driving and conducting his said asses, so laden as aforesaid, in, through, over, and along the common and public [bridle-way and drift-way] aforesaid, to wit, at the parish aforesaid, in the county aforesaid; yet the said defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure the said plaintiff, and to prevent him from driving and conducting his said asses, so laden as aforesaid, in, through, over, and along the said common and public [bridle-way and drift-way] wrongfully and injuriously shut, closed, and fastened, and caused to be shut, closed, and fastened, a certain gate across the said common [bridle-way and drift-way] aforesaid, and kept and continued the said gate so shut, closed, and fastened across the said common and public [bridle-way and drift-way] aforesaid, for a long space of time, to wit, for the space of — hours then next ensuing, and thereby, during all the time aforesaid, obstructed the said common and public [bridle-way and drift-way] and thereby prevented the said plaintiff from driving and conducting his said asses, so laden as aforesaid, in, through, over, and along the said common and public [bridle-way and drift-way] by reason of all which the aforesaid premises, the said plaintiff was obliged to drive and conduct his said asses, so laden as aforesaid, back again, and by a very circuitous road, and for a much greater distance than he otherwise would and of right ought to have done, to wit, at, &c. (*venue*) aforesaid.

FOR PUBLIC NUISANCES.

For obstructing a public highway (A).

*III. FOR MALICIOUS ARREST OR PROSECUTION.

[*600]

[*Commencement as ante*, 596.]—For that whereas (i) the *said defend-

FOR

MALICIOUS ARREST.

[*601]

(A) An action will not in general lie by an individual for the obstruction of a public highway, see Comb. 180.—6 Mod. 255.—3 Mod. 269.—Cro. Eliz. 664; but if the obstruction occasion him any special damage, then the party injured may bring an action against the party causing the obstruction, see 2 Bing. 156, 263.—4 M. & S. 101.

(i) It was formerly usual to commence the declaration, by a recital that “*by the law of the realm no person ought to be arrested, &c. for a debt under 10*l.*, &c.*” see 8 Wentw. 328.—Morg. Prec. 400, 402; but as the 7 & 8 Geo. 4. c. 21, enacts, that when the cause of action does not amount to 20*l.*, or upwards, the plaintiff shall not proceed

For a malicious arrest under a latitat, where the former suit termi-

FOR
MALICIOUS
ARREST.

—
nated by
plaintiff's
taxing
costs up-
on a rule,
for the
payment
of money
into court
(k).

ant heretofore, to wit, on, &c. (l) at, &c. (venue) (m) not then having any reasonable or probable cause of action whatsoever against the said plaintiff, to the amount of the sum of money for which the said defendant maliciously caused the said plaintiff to be arrested, as hereinafter mentioned (n), but wrongfully and unjustly contriving and intending to imprison, harass, oppress, and injure the said plaintiff, falsely and maliciously (o)

by arrest, this public and general law need not be recited.

(k) See a great variety of forms indexed in 8 Wentw. Index, xv. to xxi.—Morg. 409, &c.—Lil. Ent. 35. As to this action in general, see ante, vol. i. Index, "Mal. Pros."—Co. Lit. 161 a, n. 4.—2 Wils. 305.—Bac. Abr. Action on the Case, H.—Com. Dig. Action on the Case for a Conspiracy, A. &c.—3 Bla. Com. by Chitty. 126, &c. n. The gist of the action for a *malicious arrest* is the unfounded *arrest or imprisonment*, 2 Wils. 305; *falsehood* in the demand, *malice*, and the want of *probable cause*, 1 T. R. 544.—2 T. R. 231. The suit must also have decided by some legal means, before an action is maintainable, 1 Esp. Rep. 80; see 3 Bing. 297.—Post, 603, n. No action can be supported merely for a malicious suit, without an arrest or imprisonment. 1 Salk. 14.—1 B. & P. 205.—Com. Rep. 190.—Selw. N. P. 1027.—1 Gow. C. N. P. 20.—1 Camp. 203, n.—6 Mod. 73.—3 Bl. Com. by Chit. 126, notes. A party is subject to this action where there is an admitted set-off, and he arrests without regarding it, 3 B. & C. 139.—4 D. & R. 653, S. C.—4 Burr. 1996.—5 B. & A. 513; and as to arresting for penalty of a bond, see 1 Saund. 58 c. It seems the party is liable, though the acts were done by his attorney, and without his (the defendant's) knowledge, 3 M. & P. 12. The reasonableness or *probability of the cause*, is a mixed question of law and fact, for the jury to decide on, 2 B. & C. 692.—4 D. & R. 107, S. C.—2 Moore, 80.—1 Wils. 232.—1 T. R. 544; see 2 B. & C. 692, where plaintiff arrested on a Plead's opinion. Proof of *express malice* is not evidence of want of probable cause, 1 T. R. 545. Though want of probable cause is evidence of malice, it is always desirable, if possible, to prove express malice, but in some cases malice may be implied, as where plaintiff brought an action, and delayed it afterwards for some time, and then discontinued, and paid costs, it was considered malice might be inferred, 4 B. & C. 21: though in another previous case it was considered by Lord Ellenborough that a mere discontinuance was not of itself evidence of malice, 1 Stark. 50. Suffering a non-pros is not of itself evidence of malice, 4 Taunt. 7; nor is taking money (after being paid in by defendant) out of court, and not proceeding, 3 Esp. Rep. 34. Arresting on a bill upon which the defendant was discharged for want of notice of dishonor, is not a sufficient want of probable cause, 1 Stark. C.

N. P. 50.—Arresting a person by mistake, will rebut evidence of malice against him, see M. & M. C. N. P. 180. 3 Campb. 180.—3 East, 314. A plaintiff is bound to accept the debt and costs on a *ca. sa.*, and if he proceed afterwards, he will be liable to an action for a malicious prosecution, 4 B. & C. 26; see also 1 B. & P. 388.—14 East, 468.

Whenever the imprisonment is under regular process, *trespass* cannot be supported, and *case* is the only remedy, 3 T. R. 185.—110b. 266.—1 T. R. 544.—2 T. R. 225.—2 Chit. Rep. 304.

When the arrest was on process out of an inferior court, the declaration will be similar to the above, except in the statement of the process. *Case* may be supported, though the court had no jurisdiction. 2 Wils. 302, 376.—Com. Rep. 190.

(l) The teste of the writ, or the day it was actually issued; but the first is preferable; ante, 446, n.

(m) The *renew* is transitory.

(n) As to the sum for which a party may be arrested, see ante, 600, n. Sometimes the precedents run, "*to the amount of 10*l.* or upwards*;" but when there was a debt to that amount, and the arrest has been for too much, the above precedent is the proper form, and will always suffice, 1 Campb. 295. In 1 Salk. 15, it is said the plaintiff should show how much was due, but that cannot be necessary. It should seem that in an action for a malicious arrest, where there was a set-off, the declaration should aver a *scienter* of the set-off; or at least should state that the defendant had not cause of action to an amount for which *he could* arrest. In 2 Wils. 302, in an action for maliciously holding plaintiff to bail in an inferior court, which had not jurisdiction, it was held necessary to aver in the declaration a *scienter* in the defendant of the want of this jurisdiction.

(o) As to the allegation of defendant's malicious intent, see 2 Wils. 305, and 1 Wils. 233. The words "*falsely*," or "*wrongfully*," have been holden to be sufficiently expressive of a malicious intent, 1 Saund. 242 a. n. 2.—1 East, 563.—Com. Dig. Action on the Case for a Conspiracy, C. 3. Legal definition of malice, Gilb. Cases Law & Evid. 193.—Stark. on Evid. tit. Malice.—4 B. & C. 255. The malice may be implied from the want of probable cause, 1 T. R. 545. As to proof of malice in a criminal prosecution, see 9 East, 361; and what evidence suffices, see 1 Stark. 48. 1 Marsh. 222. Party not liable if he acts

caused and procured to be sued and prosecuted out of the court of our said lord the king, before the king himself (*p*) a certain writ of our said lord the king, [*here state the issuing of the writ, which may be stated as in an action on a bail-bond, as ante, 446, 450, 451; if it was a latitat, state it as follows:*—called a latitat (*q*), at the *suit of the said defendant against the said plaintiff, directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff that [*examine with writ*] he should take the said plaintiff (*r*), if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, at Westminster, on — next after — to answer the said defendant of a plea of trespass, and also to a bill of the said defendant against the said plaintiff for £— upon promises, according to the custom of the said court of our said lord the king, before the king himself, to be exhibited, and that the sheriff should then have there that writ. And the said defendant, contriving and intending as aforesaid, afterwards, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, falsely and maliciously, and without having any reasonable or probable cause of action whatsoever against the said plaintiff, to the amount of £20 or upwards, caused and procured the said writ (*or, if a bill of Middlesex say "precept,"*) to be, and the same then and there was marked and indorsed for bail £— (*s*), and the said writ (*or, if a bill of Middlesex, say "precept,"*) being so marked and indorsed for bail as aforesaid, the said defendant afterwards, and before the said return thereof, to wit, on, &c. (*the precise time is not material, but it is usual to insert the day of arrest, or some day just before it*) at, &c. (*some place in county where arrest made*) contriving and intending as aforesaid, and without having any reasonable or probable cause of action whatsoever against the said plaintiff, to the amount of £20 or upwards, falsely and maliciously (*t*) caused the said plaintiff to be arrested (*u*) by his body, under and by vir-

FOR
MALICIOUS
ARREST.

[*602]

Indorse-
ment for
bail.The ar-
rest.

under what he conceives sound advice, 1 Stark. 502.—2 B. & C. 693.—4 D. & R. 167, S. C.

(*p*) See ante, 446, as to the allegation of the court being held at the time of issuing the writ.

(*q*) As to the statement of a latitat, or bill of Middlesex, see ante, 446; of a special original, ante, 450; of a *capias*, in C. P. ante, 451. If the writ were issued into Middlesex, observe ante, 445, n. The writ should be correctly stated, 1 H. Bla. 49.—1 T. R. 238. *Quare* though usual, if necessary to state the writ thus fully.

(*r*) It is not necessary to state "and John Doe," ante, 446, n.

(*s*) According to the fact, stating process, with *ac etiam* clause, as sued out for 50*l.*, instead of 30*l.*, and indorsement for 15*l.*, the warrant being for 30*l.*, is fatal variance, 5 Price, 540. Sometimes it is stated that this indorsement was made by virtue of an affidavit, filed, &c. but this should be omitted, as it is unnecessary, and may encumber the plaintiff with unnecessary evidence; see ante, 447, n.

(*t*) Ante, 601, n. (*o*).

(*u*) To constitute an arrest, there must be either a corporeal touch, or a capacity

in the officer to arrest, and submission by the party, Bul. N. P. 62.—2 New Rep. 211.—R. & M. C. N. P. 321.—M. & M. 244. Where a sheriff's officer to whom a warrant upon a writ against A. was delivered, set a message to A. and asked him to fix a time to call and give bail, and A. accordingly fixed a time, and attended and gave bail; it was held, this was not an arrest, and that an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action, 6 B. & C. 528. In *George v. Radford*, 5th December, 1828, at Guildhall, where the officer swore that he arrested the defendant by showing him the warrant, telling him at whose suit, and that it was in the sheriff's office, and waited till the defendant paid him 2*l.* as a *douceur*, whereupon the defendant referred him to his attorney to put in bail, &c., Lord Tenterden C. J. thought strongly it was no arrest, but said he would reserve the point rather than nonsuit; see 1 C. & P. 153.—R. & M. C. N. P. 26.—2 C. & P. 605. It seems the sheriff's return of *cepi corpus* is *prima facie* evidence of the arrest, 11 East, 297.—2 Phil. Evid. 166; *sed vide* Peake, 174.

FOR
MALICIOUS
ARREST.

The bail
bond.

[*603]

The termination
of the former suit
(y).

[*604]

tue of the said writ (or, *if a bill of Middlesex, say, "precept,"*) and to be thereupon imprisoned and kept and detained in prison for a long space of time, to wit, for the space of — hours then next following and until (*w*) the said plaintiff, in order procure his release and discharge from the said imprisonment, was forced and obliged to and did then and there procure certain persons, to wit, E. F. and G. H. to become bail (*x*) for the appearance of the said plaintiff, in the said court of our said lord the king, before the king himself, at the return of the said writ, (or, *if a bill of Middlesex, say, "precept,"*) to answer the said defendant according to the exigency of the said writ (or, *if a bill of Middlesex, say "precept,"*) and upon that occasion he the said plaintiff and the said E. F. and G. H. were forced and obliged to, and did then and there enter into a certain bond or obligation for the purpose aforesaid. Whereas in truth and in fact the said defendant, at the time of suing forth the said writ (or, *if a bill of Middlesex, say, "precept,"*) and of the said arrest and imprisonment, had not any reasonable or probable cause of action against the said plaintiff, to the amount of the said sum of money for which he the said defendant so maliciously caused the said plaintiff to be arrested and held to bail as aforesaid, or whereby or for which he the said plaintiff, by the law of this realm, or by the practice *of the said court of our said lord the king, before the king himself, could or ought to have been arrested, or holden to bail as aforesaid.* And the said plaintiff further saith, that such proceedings were thereupon had in the said *suit, that after-

(w) This allegation need not be proved to the full extent laid, 1 Stark. 48.

(z) If the plaintiff did not find bail, or if there be any doubt as to the proof of bail bond, this allegation, and that of the costs of procuring bail, had better be omitted, or another count be inserted.

(y) This action must not be brought before the first suit has been legally determined; and it must be averred that the former suit terminated in the present plaintiff's favor, and a legal conclusion of the suit must be shown; and if the suit be not proved to have been determined in the manner alleged, it is a ground of nonsuit. Year Book, 2 R. 3., 9, pl. 22.—Dyer, 284.—Yelv. 117.—Gilb. Cases Law and Evid. 163.—Com. Rep. 190.—1 Salk. 15.—Dougl. 215.—Willes, 250, n, a.—1 Esp. Rep. 79.—10 Mod. 209.—Bac. Abr. Action on the Case, H. Com. Dig. Action Case Conspiracy, C. 5 Ante, vol. i. Ind. "Mal. Pros."—2 T. R. 225, 232.—1 Saund. 228 b, in notes, and 228, 229; but the omission is aided by verdict by the common law, 1 Saund. 228 b, in notes, and 228, 229. See the reason, 1 Saund. 228 b.—2 T. R. 228.—And it seems sufficient to say generally, "*that the said suit was ended and determined,*" see 3 Ld. Raym. 300. In Morg. Prec. 454, 5, the declaration merely alleges, "*that the plaint was duly ended and determined.*" In *We. therden v. Embden*, partially reported in 1 Campb. 295, the manner in which the suit ended was shown and objected to on motion in arrest of judgment, but the court held that as it was averred that the suit

was ended, the statement of the manner how was unnecessary, and the plaintiff had judgment, and it should seem a count averring generally a discontinuance is sufficient, 5 Price, 540. Several of the precedents in the old entries referred to 8 Wentw. Index, xix. do not show the termination of the first suit. The plaintiff in the above action obtained a verdict, notwithstanding the case in 1 Esp. Rep. 79.—3 Esp. Rep. 34; and no objection was taken to this mode of determining the suit. See Tidd's Prac. Forms, Index, Judgment for Defendant, as to the manner of describing the different modes by which the suit terminated in favor of the present plaintiff. An averment that the suit is ended, is evidenced by proof of the rule to discontinue upon paying of costs, and that the costs were taxed and paid. 1 Stark. 48.—4 Campb. 213, 8. C.; and the discontinuance (upon payment of the costs) has relation back to the Term when the rule to discontinue was pronounced, 1 D. & R. 2.—1 B. & C. 649, 8. C. In the Common Pleas it seems that the plaintiff must prove the discontinuance by an entry of it on the roll, *semble*, 1 M. & P. 195. How far an agreement to determine a suit, afterwards made a rule of court, is sufficient, see 2 D. & R. 343. In an action for a false arrest upon a plaint in the sheriff's court of London, evidence was given that the usual course of that court, upon the abandonment of a suit by the plaintiff, was to make an entry in the minute book of "withdrawn," and it was held that proof of such entry in the minute book

wards, to wit, on, &c. (z) a certain rule and order (a) was duly made by the said court, according to the course and practice of the same court, whereby it was ordered by the said court that (*let this agree with the order*) the said plaintiff should have leave to bring into court in the said suit £—(b), and that thereupon (unless the said defendant should accept thereof, together with his costs and charges to be taxed by the master of the said court, in full discharge of the said suit,) the said sum of £— should be struck out of the declaration in the said suit, and paid out of the said court to the said defendant, or his attorney, and that upon the trial of the issue the said defendant should not be permitted to give evidence for the said sum of £—. And the said plaintiff further saith, that afterwards, to wit, on, &c. (c), the said plaintiff did bring into court in the said suit, the said sum of £— in the said rule or order mentioned, and that the costs of the said defendant in the said suit, were duly taxed by the master of the said court, at the instance and request of the said defendant at £— which said last-mentioned sum of £— together with the said sum of £— was afterwards, to wit, on, &c. last aforesaid, duly paid to the said defendant, and the said defendant did accept the same, together with the said sum of £— in full discharge of the said suit. And the said action was and is by means of the premises, and according to the course and practice of the said court, wholly discharged, ended, and determined (d), to wit, at, &c. (*venue*) aforesaid. By means of which said several premises the said plaintiff, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted, but was also forced and obliged to lay out and expend, and did *necessarily lay out and expend divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £— (*state enough*) in and about the procuring the said suit, obtaining of his release from the said arrest and imprisonment, and in and about other the premises (f), and hath been and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.—[*Conclude as ante*, 506.][*Add a count, averring generally a discontinuance, or* “that the said suit was and is wholly ended and determined,” *as recommended in 5 Price*, 540, and *ante*, 603, note.]

FOR
MALICIOUS
ARREST.

Damages
(e).

[*605]

[*Same as the last precedent, to the asterisk in page 603, and proceed*

was sufficient to prove the determination of the suit, 14 East, 216.

(z) The date of the rule.

(a) See another form, 3 Bing. 297.—11 Moore, 59, S. C.

(b) The sum to be paid into court must have been under 10*l.*, or the declaration must be framed as above, and not as is sometimes the case. See *ante*, 600, 601, notes.

(c) The day of taxation.

(d) *Ante*, 603, n.

(e) If the plaintiff have sustained any particular damage, besides those inconveniences which are here enumerated, and

which are incidental to the imprisonment, it must be stated, or the plaintiff will not be permitted to give evidence of it on the trial. *Peake's C. N. P.* 46, 63.

(f) Cannot recover extra costs, *Ry. & Moo. C. N. P.* 419.—1 Campb. 151, 152.—4 Taunt. 7.—9 East, 361.—*Sed vide* 1 Stark. 306.

(g) See the notes to the last form. See 8 Wentw. 329, and the form of a judgment of discontinuance, *Tidd's Prac. Forms*, 310. As to the plaintiff's discontinuing being *prima facie* evidence of malice, see 4 B. & Cres. 21. *Sed vide* 1 Stark. 43. *Ante*, 600, n.

The like, where the first suit was discontinued (g).

FOR
MALICIOUS
ARREST.

as follows :]—And the said plaintiff in fact saith, that such proceedings were thereupon had in the said suit, that afterwards, to wit, in — Term the next following, the said defendant did not prosecute his said suit against the said plaintiff with effect, but voluntarily permitted the same to be discontinued for want of prosecution thereof, and thereupon it was then and there considered in and by the said court, that the said defendant should take nothing by his said bill (*or writ*). As by the record and proceedings thereof still remaining in the said court of our said lord the king, before the king himself at Westminster aforesaid, more fully appears (*h*); whereupon and whereby the said suit then and there became and was and is wholly ended and determined, to wit, at, &c. (*venue*) aforesaid. By means, &c. [*Conclude as in the last precedent.*]

[*606]
The like,
where the
first suit
was non-
prossed
(i).

*[*Same as the form, ante, 600, to the end of the asterisk, and then proceed as follows :*—And the said plaintiff in fact saith, that the said defendant did not prosecute his suit against the said plaintiff, but therein wholly failed and made default. And thereupon afterwards, to wit, in — Term, in the — year of the reign of our said lord the king, it was considered by the said court of our said lord the king, before the king himself, that the said defendant should take nothing by his said bill (*or writ*), but that he and his pledges to prosecute (*k*) should be in mercy, and that the said plaintiff should go thereof without day, &c. as by the record and proceedings thereof, still remaining in the said court of our said lord the king, before the king himself at Westminster aforesaid, more fully and at large appears (*l*); and the said action was and is thereby wholly ended and determined, to wit, at, &c. (*venue*) aforesaid. By means, &c.—[*Conclude as ante, 605.*]

The like,
where
there was
a verdict
for the de-
fendant in
the former
suit (m).

[*Same as the form, ante, 600, to the asterisk, and then proceed as follows :*—And the said plaintiff in fact saith, that such proceedings were had in the said suit, that afterwards, to wit, in — Term, in the — year of the reign of our said lord the king, it was considered, in and by the said court, that the said defendant should take nothing by his said bill (*or writ*), but that he and his pledges to prosecute should be in mercy, &c. as by the record, &c. (*n*). Whereupon and whereby the said suit became, and was, and is wholly ended and determined, to wit, at, &c. (*venue*) aforesaid.—By means, &c.—[*Conclude as ante, 605.*]

Case by
plaintiff
against
defend-
ant.

For that whereas heretofore, and before the grievance hereinafter next mentioned, to wit, in [Michaelmas] Term, in the [third] year of the reign

(*h*) As to the allegation referring to the record of the discontinuance, see ante, 473. Under that reference the record must be produced, 5 Price, 540, and therefore when the proceedings and judgment of discontinuance have not been, as they may be, entered of record, it should be omitted. It would in all cases in K. B. suffice to omit the averment. The production of the rule to discontinue, &c. would be sufficient, ante, 603, note.—1 Stark. 48.—4 Camp. 214. But it seems otherwise in C. P. see 1 M. & P. 191.

(*i*) See the notes to the form, ante, 602.

—Lil. Ent. 35. See the form of the entry of the judgment of *non pros*, Tidd's Prac. Forms, 310. That a plaintiff suffering judgment of *non pros* is not *prima facie* evidence of malice, see 4 Taunt. 7.

(*k*) Though the words "and his pledges, &c. be not in the record, the variance in inserting them would not be fatal, 13 East, 547, see 2 B. & C. 6.

(*l*) As to this allegation, ante, 605, note (*h*).

(*m*) See Tidd's Prac. Forms, 313.

(*n*) Ante, 605, note, (*k*).

of our lord the now king, in the court of our lord the king, before the [barons of his majesty's Exchequer], at Westminster, the said W. D. by the consideration and judgment of the said court, recovered against the said plaintiff £54. 19s. which were adjudged to the said W. D. in and by the said court for his damages by him sustained, as well on occasion of the not performing certain promises and undertakings before then made by the said plaintiff to the said W. D. as for his costs and charges by him the said W. D. about his suit in that behalf expended, whereof the said plaintiff was convicted. And the said W. D. as plaintiff in the said action, by the said L. C. his attorney and solicitor in that behalf, afterwards, to wit, on, &c. in the [third] year of the reign aforesaid, for the obtaining satisfaction of a certain residue of the said damages so recovered as aforesaid, by the said W. D. (part of the said damages having been before duly satisfied) sued and prosecuted out of the court of our said lord the king, at Westminster aforesaid, a certain writ called a writ of *capias ad satisfaciendum*, directed to the sheriff of the county of — whereby our said lord the king commanded the said sheriff that he should take the said plaintiff, if he should be found in his bailiwick, and him safely keep, so that he might have his body before the [barons of his majesty's Exchequer] at Westminster, in [eight] days of [St. Hilary] then next coming, to satisfy the said W. D. [£34. 19s.] residue of the said [£54. 19s.] which the said W. D. had so recovered as aforesaid, and that he should have then there that writ, and the said writ was afterwards duly indorsed by the said defendants with an indorsement, directing the said sheriff to levy a certain sum of money thereon, to wit, the sum of [£32], besides sheriff's poundage, and lawful expenses, and was afterwards, to wit, on the day and year last aforesaid, delivered by the said defendants to the said sheriff, so indorsed as aforesaid, to be executed in due form of law; and the said sheriff afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in obedience to and by virtue of the said writ, took and arrested the said plaintiff by his body, and detained and had him in his custody under the said writ, to wit, in the county aforesaid. And the said plaintiff, so being in custody as aforesaid, afterwards, to wit, on the [ninth] day of [January,] A. D. [1824], in the county aforesaid, tendered and offered to pay to the said W. D. by the hands of the said L. C. as his attorney as aforesaid, a large sum of money, to wit, the sum of [£34. 13s.] in full satisfaction and discharge of the said damages, costs, and charges so adjudged to the said W. D. as aforesaid, being the said sum so indorsed on the said writ as aforesaid, together with the sheriff's poundage, and lawful expenses as aforesaid, and being the whole amount which was lawfully due or demandable, of and from the said plaintiff, to or by the said defendants, under the said writ, and then and there demanded of the said defendant L. C. as such attorney as aforesaid, to receive the said sum in full discharge and satisfaction of the said damages, costs and charges, and sheriff's poundage, to instruct and inform the said sheriff that the same was satisfied, and to give the said sheriff authority to discharge the said plaintiff from his custody under the said writ, yet the said defendants, wilfully and maliciously devising and intending to oppress, harass, and injure the said plaintiff, and to cause and

FOR
MALICIOUS
ARREST.
—
and his attorney, for not releasing plaintiff out of prison after satisfaction of debt and costs, &c.^(o)

(o) That this action lies, see 4 Barn. & Cres. 26, the above being the declaration used in that case.

FOR
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ARREST.

procure the said plaintiff to be longer imprisoned and detained by the said sheriff under the said writ, without any reasonable cause whatsoever, then and there wilfully and maliciously refused to accept or receive the said sum of money, so tendered as aforesaid, in discharge of the said damages, costs and charges, sheriff's poundage, and lawful expenses, as aforesaid, and did not nor would instruct or inform the said sheriff that the said W. D. was satisfied of his said damages, costs, and charges, and sheriff's poundage, as aforesaid, nor give authority to the said sheriff to release the said plaintiff out of his custody, under the said writ, as aforesaid, whereby and by reason of the said conduct in that behalf, the said plaintiff was detained in custody under the said writ by the said sheriff for a long space of time after the said tender so made as aforesaid, to wit, for the space of ten months then next following, and was thereby put to great trouble, inconvenience, and expense, and thereby greatly injured and ruined in his credit, reputation, and circumstances, to wit, in the county aforesaid.

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FOR
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PROSECUTIONS.

For maliciously charging the plaintiff of felony before a justice of the peace, and causing him to be imprisoned, on a warrant, until he was discharged by the justice (p).

For that whereas the said plaintiff now is a good, true, *honest, just, and faithful subject of this kingdom (q) and as such hath always behaved and conducted himself, and hath not ever been guilty, or until the time of the committing of the several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty of [felony] or of any other such crime, by means whereof the said plaintiff, before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained and acquired the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to wit, at, &c, (venue) (r); yet the said defendant well knowing the premises, but contriving and maliciously (s) intending to injure the said plaintiff in

(p) See the various forms in 8 Wentw. Index, xv. to xxi.—Morg. 410, 413, 415. 2 Rich. C. P. 158.—Plead. A. 180, and the approved one in 1 D. & R. 97.—2 Chit. Rep. 304. As to this action in general, see ante, vol. i. Index, tit. "*Mal pros.*" Bac. Ab. Action on the case, H.—Com. Dig. Action on the Case for a Conspiracy.—1 Saund. 225 to 230, in notes.—3 Bla. Com. by Chitty, 326, from which it appears, that to support an action for a *criminal prosecution*, four circumstances must occur: 1st. *Falsehood* in the original charge, and which must have terminated in favor of the plaintiff. 2dly. *The want of probable cause* for instituting such proceedings, 3 Dow, Rep. 160. 3dly. *Malice* in the prosecutor, which must be proved, 9 East, 361.—5 Taunt. 187.—1 Marsh. 12. 4thly. *Damage* to the accused party, which may be either to his person by *imprisonment*—to his *reputation* by scandal,—or to his *property* by expense, Gilb. Cases Law & Evid. 185, 202.—12 Mod. 208.—1 T. R. 493 to 551. These four circumstances must be correctly stated in the declaration. The falsehood of the charge must have been substantiated by a verdict, or the decision of the court in which it is instituted, or by the proceedings having been otherwise legally determined, before the party aggrieved can com-

mence his action for the injury sustained, 2 T. R. 225.—1 Saund. 225.—Bul. N. P. 11.—1 Esp. 79.—The husband alone may sue for the malicious prosecution of his wife, where the *expenses* have been paid by him, 2 Stra. 977.—Ca. temp. Hardw. 54. No action is sustainable against the defendant, if the magistrate mistook the law, &c. 3 Esp. Rep. 166.—1 Stark. 67. See the law very fully considered in 3 Bla. Com. by Chitty, 126, notes.

(q) This inducement is usually inserted, but it is not traversable, Styl. 118, and if omitted, the declaration would be sufficient. The inducement is similar to that in an action for a libel, or for words, post, 620, 634, &c. In general, a criminal prosecution is injurious to the *character* of the plaintiff, see ante, 606 b, n.—Gilb. Cases L. & E. 185.—12 Mod. 208, in which case this inducement of the plaintiff's good character is proper, but if the proceeding were not prejudicial to the plaintiff's character, the inducement should be omitted, and the declaration commence with the statement, that the defendant contriving, to cause the plaintiff to be imprisoned, &c. *Id.* *ibid.*

(r) The *venue* is transitory.

(s) As to the allegation of malice, see ante, 601, note (o), and 4 Burr. 1974.

his aforesaid good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to cause the said plaintiff to be imprisoned for a long space of time, and thereby to impoverish, *oppress, and wholly ruin him heretofore *, to wit, on, &c. (*date of warrant or about it*) at, &c. (*venue*) went and appeared before one E. F. esq. (*t*) then and there being one of the justices of our lord the now king, assigned to keep the peace of our said lord the king, in and for the county of — and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed in the said county (*u*), and then and there, before the said E. F. so being such justice as aforesaid, to wit, at, &c. (*venue*) aforesaid, falsely and maliciously (*w*), and without any reasonable or probable cause (*x*) whatsoever, charged the said plaintiff with having [feloniously (*y*) stolen a certain gold watch of the said *defendant] and upon such charge the said defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said E. F. so being such justice as aforesaid, to make and grant his certain warrant, under his hand and seal, for the apprehending (*z*) and taking of the said plaintiff, and for bringing the said plaintiff before him the said E. F. or some other of his majesty's justices of the

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(*t*) A variance in the description of the justice's name of dignity would be fatal, 2 B. & A. 756.

(*u*) In Com. Dig. Action on the Case for a Conspiracy, C. 4, it is said that it must be alleged in the declaration, that the former proceeding against the plaintiff was instituted before a justice, or court of competent jurisdiction to try the offence, and see Rol. Ab. Action *sur* Case, p. 50; but as it is now settled, that an action may be supported for a malicious prosecution of a defective indictment (see 4 T. R. 247.—1 Salk. 15, notes.—2 Stra. 691.—5 B. & A. 634.—1 D. & R. 97, S. C.) and that case may be supported for a malicious arrest in court having no jurisdiction, 2 Wils. 302. It seems not material to allege that the justices, &c. had competent authority.

(*w*) As to *malice*, see ante, 601. note.

(*z*) This allegation is material, though the word "falsely," without "maliciously," would suffice, ante, 606, n. (*i*) 601, n.

(*a*).—1 Wils. 232.—1 T. R. 544, 5.—4 Burr. 1974.—Gilb. Cases L. & E. 187, 189.—See 3 Hawk. P. C. 7th edit. 166, as to what is a probable cause. It is a mixed proposition of law and fact, whether there was probable cause, and whether the circumstances alleged to show it probable cause, are true, and existed as matter of fact. But whether or not supposing them to be true, they amount to a probable cause, is a question of law, 1 T. R. 520, 534.—Bul. N. P. 14.—4 Burr. 1974.—2 B. & C. 693.—4 D. & R. 107.—Ante, 600, notes. *Prima facie* evidence of want of probable cause suffices, 6 Bing. 183.

The defendant may rebut the plaintiff's evidence of want of probable cause, by showing the existence of the probable cause. Where the defendant presented two bills for perjury against the plaintiff,

but did not appear himself before the grand jury, and the bills were ignored, and he presented a third, and, on his own testimony, the bill was found. This prosecution he kept suspended for three years, till plaintiff, taking the record down to trial, and defendant declining to appear as a witness, although in court, and called on, plaintiff was acquitted; it was held sufficient *prima facie* evidence of want of probable cause, *Willans v. Taylor*, 6 Bing. 183.—See 6 B. & C. 225.

(*y*) The statement of this charge is to be taken from the magistrate's warrant, or from the examination of the defendant on oath, when a sight of them can be obtained. As to the right of the party to copies of the depositions, see 2 Burn, J. 26th edit. 103. The charge must be accurately described, and if it did not impute the guilt of *felony*, though the magistrate erroneously thought it did, the action is not sustainable, 3 Esp. Rep. 165, 6.—1 Stark. 67, but if the charge and warrant be substantially described, it will suffice, 5 Taunt. 187.—In *Davis v. Noakes, Guildhall, London*, K. B. 1816—6 M. & S. 29—1 Stark. 377, (but see 13 East, 554.) the declaration in case, for maliciously charging the plaintiff before a magistrate, stated that the defendant charged plaintiff before a magistrate *with having feloniously stolen, &c.*, and the information and warrant produced, were, that the defendant *suspected and believed* that plaintiff had stolen, &c. and it being objected that this was a variance, Lord Ellenborough over-ruled the objection, because the charge must always be from suspicion, and plaintiff had a verdict. See also 1 Stark 67, as to admission of parol evidence, where the depositions are lost, &c. 2 B. & C. 494.—2 Burn, J. 26th edit. 53.

(*z*) This is to be taken from the warrant.

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peace in and for the said county of — to be dealt with according to law for the said supposed offence. And the said defendant, under and by virtue of the said warrant, afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, wrongfully and unjustly (a), and without any reasonable cause whatsoever, caused and procured the said plaintiff to be arrested by his body, and to be imprisoned (b), and kept and detained in prison, for a long space of time, to wit, for the space of — hours then next following, and until he the said defendant afterwards, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be carried and conveyed in custody before the said E. F. so being such justice as aforesaid, (if the plaintiff was committed for further examination then insert this averment between brackets) [and *to be committed by the said justice for a further examination, to a certain gaol or prison of our said lord the king, called — and there, to wit, in the said gaol or prison, the said defendant then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of — then next following, and until he the said defendant, afterwards, to wit, on, &c. falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said plaintiff to be carried and conveyed in custody before one G. H. then and there being a certain other justice of our said lord the king, assigned to keep the peace of our said lord the king, and to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county of —] to be examined before the said justice, touching and concerning the said supposed crime. Which said [last mentioned] justice having heard and considered all that the said defendant could say or allege against the said plaintiff touching and concerning the said supposed offence then and there, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, adjudged and determined that the said plaintiff was not guilty of the said supposed offence, and then and there caused the said plaintiff to be discharged out of custody, fully acquitted and discharged (c) of the

(a) Ante, 608, n.

(b) The imprisonment being one of the damages, in respect of which the action is sustainable, should be stated, if the fact, see ante, 606, note. Though indeed, it would suffice to sustain the action that plaintiff was injured in his reputation, or had been put to expense.

(c) The declaration must show that the former prosecution was at an end, though the omission will be aided by verdict, see the cases, ante, 603, note; and 1 Stra. 114. —Conn. Dig. Action on the Case for Conspiracy, C. 5.—Bac. Ab. Action on the Case, H. In 2 T. R. 231, Buller, J. observed, that "the words 'released and discharged from the said imprisonment' are not sufficient, they not being equal to the word *acquitted*, which has a definite meaning, namely, by a jury on the trial, and that it must be shown upon the face of the declaration, that the original prosecution was at an end." But it must not be inferred from

this observation, that no action can be supported by a person who was taken before a magistrate upon a charge of felony, of which the magistrate discharges him, and for which no indictment is afterwards preferred; if it were otherwise, as the party accused has no mode of forcing the prosecutor to prefer a bill, he would be without redress, and see 3 Esp. Rep. 165. In a precedent settled by an eminent Pleader, the following allegation was inserted instead of what is above, between the brackets, as follows: "and thereupon the said defendant not having any ground or evidence to support the said false and malicious charge, then and there, to wit, on, &c. aforesaid, neglected to bring the same on to a hearing or trial, and he the said plaintiff being innocent of the said supposed offence, was then and there duly discharged out of the said custody, fully acquitted and discharged of the said supposed offence." Case may be supported against a person for malicious-

said supposed offence; and the said defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is wholly ended and determined, to wit, at, &c. (*venue*) aforesaid.—[Add the following count, and at all events the statement of damages, *post*, 611.]

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TIONS.

And whereas also the said defendant, further contriving and maliciously and wickedly intending as aforesaid, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, falsely *and maliciously, and without any reasonable or probable cause whatsoever, charged the said plaintiff with having committed a certain offence punishable by law, to wit, felony (*e*); and upon such last-mentioned charge, he the said defendant, then and there, to wit, on the same day and year last aforesaid, at, &c. (*venue*) falsely and maliciously caused and procured the said plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of —, then next following, and at the expiration of which said time, he the said plaintiff was duly discharged and fully acquitted of the said last-mentioned offence, to wit, at, &c. (*venue*) aforesaid (*f*). By means of which said several premises (*g*), he the said plaintiff hath been, and is greatly injured in his said credit and reputation, and brought into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and divers of those neighbors and subjects, to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe, that the said plaintiff hath been and is guilty of [felony]; and also the said plaintiff hath, by means of the premises, suffered great anxiety and pain of body and mind, and hath been forced and obliged to lay out and expend, and hath laid out and expended, divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £— (*h*) in and about the procuring his discharge from the said imprisonment, and defending of himself in the premises, and the manifestation of his innocence in that behalf, and hath been greatly hindered and prevented, by reason of the premises, from following and transacting his lawful and necessary affairs and

Second
count (*d*).
[*611].

Damage
applicable
to both
counts.

ly obtaining a search warrant, though no goods were found, and though consequently no prosecution could be instituted, see *Bonte v. Cooper* and another, 1 T. R. 535. —3 Esp. Rep. 144, 147—*Roll. Ab. Action sur Case*, P and in *Bac. Ab. Action on the Case*, H. it is said, that action lies whether the prosecutor proceed so far as actually to exhibit an indictment or not.

(*d*) This count, in respect of its generality, is frequently adopted as a second count, see *Roll. Ab. tit. Action sur Case*, Q pl. 5. It may be questionable, however, whether it would be sufficient upon demurrer. See 5 B. & A. 634.—1 D. & R. 266, S. C. It has been held good after verdict, *id.*—*Cro. Eliz* 724—*Fee* 2 B. & Cres. 283.—6 M. & S. 29. See form, *post*, 616, and 1 D. & R. 97.—2 Chit Rep. 304.

(*e*) That this is sufficient, see 2 B. & C. 283—9 M. & S. 29.

(*f*) The accusation of felony before the

magistrate, or in any other course of legal proceeding cannot be treated as *libellous*, 1 Saund. 132, n. 1; but if the defendant, at any other time accuse the plaintiff of the felony, counts may be here added for the words, 1 Saund. 133.

(*g*) We have already seen that the damage may be imprisonment, scandal, or expense, *ante*, 606, 7, note; these, and any other particular damage, should be circumstantially stated or such as are not necessarily incidental to the premises will not be admissible in evidence, *ante*, 604 n. The plaintiff cannot recover damages for any imprisonment after the goal delivery, for it was his own fault to lay in prison, after that time, *Bro. Damages*, pl. 115.—*Sayer, Damages*, 87.

(*h*) As to what costs, see 1 Campb. 151, 2—*Ante*, 605, note. Plaintiff is not entitled to costs as between attorney and client, *ante*, 318, note.

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TION.

business for a long time, to wit, for the space of — and also, by reason and by means of the said premises, the said plaintiff, *hath been, and is, otherwise greatly injured in this credit and circumstances, to wit, at, &c. (venue) aforesaid.—[*Conclude as ante*, 596.]

For maliciously exhibiting articles of the peace at the Quarter Sessions against plaintiff, in consequence of which he was arrested on a warrant of the justices, and obliged to find sureties, and enter into a recognizance to appear at a future time; that he did appear, but was not proceeded against, and discharged (i).

For that whereas the said plaintiff now is, and from the time of his nativity hitherto hath been, a good, quiet, honest, and peaceable subject of this realm, and never hath been guilty, or suspected to have been guilty, of any breach of the peace, or of any other crime whatsoever, yet, the said defendant, well knowing the premises, but contriving and maliciously intending wrongfully and unjustly to hurt, injure, and prejudice the said plaintiff in this respect, and to cause him to undergo the pains and penalties by the laws and Statutes of this realm provided against persons guilty of a breach of the peace of our said lord the king, and to cause him to be put to great trouble and expense, in procuring bail for his personal appearance at the general Quarter Sessions of the peace to be held for the said county of Middlesex, at the session-house on Clerkenwell Green, in the said county, or if he could not procure such bail, to cause him to be imprisoned, and to be kept and detained in prison, until the general Quarter Sessions of the peace of our said lord the king, holden in and for the said county of Middlesex, at the sessions-house for the said county, on &c. before W. M. esq. and other justices assigned to keep the peace in and for the said county, and also to hear and determine divers felonies and misdemeanors committed in the said county, falsely and maliciously, and without any reasonable or probable cause whatsoever, in his own proper person, came before the said justices, and then and there being duly sworn before the said justices on the Holy Evangelists, exhibited to the said justices certain false, feigned, and malicious articles of the peace against the said plaintiff, by the name and description of, &c. under color and pretence of fear of bodily harm to be done unto the said defendant by the said plaintiff; by which said articles, the said defendant charged the said plaintiff, that on, &c.—[*Set out the articles or the substance of them to the end.*] And the said plaintiff saith, that upon such charge and exhibiting of such articles, the said defendant then and there, for the said supposed breaches of the peace, falsely and maliciously, and without any reasonable or probable cause, caused and procured D. W. and I. G. esquires, two of the said justices, to issue out their warrant under their hands, in open session aforesaid, directed to all constables, headboroughs, &c. (according to the directions) and strictly charged and commanded that they or some or one of them, should, on sight thereof, take and bring the said plaintiff, by the name and description of, &c. (as in warrant) before them, and others his majesty's justices, assigned to keep the peace in the county aforesaid, and also to hear and determine felonies and misdemeanors committed in the said county, at the then sessions of the peace, holden at the sessions-house in and for the said county, (if the court should then be sitting) to answer to the said articles of the peace so exhibited and filed against him by the said defendant as aforesaid, for fear of bodily harm, and if the court should not be sitting at the time of such taking, then, that they or some one of them should forthwith, afterwards,

(i) See the notes to the form, ante, 506 507.

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bring the said plaintiff before them or some other of his majesty's justices of the peace for the same county, to find sufficient sureties, personally to appear at the then session to answer the same articles, and all such other matters as on his majesty's behalf should there be objected; and if he could not be taken during the sessions, then, that they should bring him before them, or some other of his majesty's justices of the peace for the said county, as speedily after as might be, to find such sureties, personally to answer as aforesaid, and further to be dealt with according to the law. And the said defendant afterwards, to wit, on, &c. at Clerkenwell, in the said county, falsely and maliciously, and without any reasonable or probable cause, caused the said plaintiff to be taken into custody, by virtue of the said warrant, and then and there to be brought before one J. P. esq. then and still being one of the justices assigned to keep the peace in and for the said county, and to hear and determine divers felonies and trespasses in the said county committed, and to be by the same justice then and there obliged to find sureties, and with such sureties then and there to enter into a recognizance to our said lord the king, before the said justice, for his the said plaintiff's personal appearance at the then next general Quarter Sessions of the peace to be held for the said county, at the sessions-house on Clerkenwell Green as aforesaid, there to answer the said articles of peace so exhibited and filed against him by the said defendant as aforesaid, for fear of bodily harm. By reason whereof the said plaintiff afterwards, to wit, at the next general Quarter Sessions of the peace of our said lord the king, holden, by adjournment, in and for the said county of Middlesex, on, &c. at the sessions-house on Clerkenwell Green aforesaid, before W. M. esq. and other justices assigned, &c. did personally appear pursuant to the said recognizance, and the said defendant did not at the said last-mentioned sessions, nor was any bill of indictment preferred, either at the said last-mentioned session, or at any future or subsequent session, nor hath any other prosecution been commenced against the said plaintiff for the said supposed breaches of the peace, in the said articles mentioned, whereupon the said plaintiff was then and there discharged by the said court of session from the said recognizance, and also from the said articles; by reason of which said premises, the said plaintiff was forced and obliged to undergo, and did necessarily undergo, great fatigue of body and anxiety of mind, and did incur great expense, amounting, to wit, to the sum of £50, in and about then defending of himself in the premises, and in and about the procuring sureties to enter into the said recognizance, and in and about the appearing at the general Quarter Sessions of the peace, and the manifestation of his innocence in the premises, to wit, at, &c. (*venue*) aforesaid.

For that whereas the said defendant, contriving and maliciously intending to injure the said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to vex, harass, and injure the said plaintiff heretofore, to wit, on, &c. at, &c. (*venue*) went and appeared before one H. M. esq. then and there being one of the justices of our lord the now king, assigned to keep the peace of our said lord

For maliciously procuring a search warrant, and causing plaintiff's house to be searched for stolen goods (k).

(k) An action on the case lies for maliciously obtaining and executing a warrant to search a house for smuggled goods, where

none such are found, 1 T. R. 535, n.—1 D. & R. 97.—2 Chit. Rep. 304.

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TIONS.

the king, in and for the county of M. and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed in the said county, and then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, made a complaint before the said H. M. esq. so being such justice as aforesaid, as follows, that is to say, that there had been lately feloniously stolen, taken, and carried away, in the said county, nine paper patterns, the goods and chattels of the said defendant, and that the said defendant had cause to suspect and believe, and did suspect and believe that the said goods and chattels, or some part thereof, were then knowingly concealed in the house or apartments of a man named L. (meaning the said plaintiff) situated at, &c.; and upon such complaint he the said defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said H. M. esq. so being such justice as aforesaid, to make and grant his certain warrant under his hand and seal, bearing date the day and year aforesaid, and directed to all constables, and others his majesty's officers of the peace for the said county, whom it might concern, whereby, after reciting that complaint, upon oath had been made that day unto him the said H. M. by the said defendant, that there had been then lately feloniously stolen, taken, and carried away, in the said county, nine paper patterns, the goods and chattels of the said defendant, and that there was just cause to suspect the said stolen goods were then knowingly concealed in the house or apartments of a man named L. (meaning the said plaintiff) at, &c. the said H. M. required such officers and constables, to whom the said warrant was directed as aforesaid, forthwith to make diligent search in the day time in the said house or apartments for the said stolen goods, and if they should find the same or any part thereof, that they should then secure the said stolen goods, and bring the person or persons, in whose custody they should find the same, before the said H. M. or some other of his majesty's justices of the peace for the said county, to be examined and dealt with according to law. By virtue and under color of which said warrant, and by pretext of the execution thereof, the said defendant, together with one W. B. then being one of his majesty's officers of the peace for the said county, afterwards, to wit, on the day and year aforesaid, without any reasonable or probable cause whatsoever, and without the leave or license, and against the will of the said plaintiff, entered the dwelling-house of the said plaintiff, situated at, &c. and continued therein for a long space of time, to wit, for the space of [two] hours, and during that time then and there searched and ransacked the said dwelling-house, and the rooms and apartments thereof, and also the closets, drawers, desks, and boxes of the said plaintiff and his family in the said dwelling-house, and flung, tossed, and tumbled about the books, paper, furniture, and wearing apparel therein, and other the contents thereof, and thereby during that time then and there disturbed and disquieted the said plaintiff in the possession of his said dwelling-house; and the said plaintiff in fact saith, that neither the nine paper patterns, nor any goods or chattels of the said defendant, feloniously stolen, were found in the said dwelling-house, upon such search as aforesaid, or otherwise, nor were there any such goods and chattels therein before, at the time of the said complaint, or at any other time whatever, nor had the said defendant any reasonable or probable cause whatever for making the said complaint, or causing the said warrant

to be issued or executed as aforesaid; and the said plaintiff saith, that the said defendant did not further prosecute his said complaint, but deserted and abandoned the same, and the said complaint wholly ended and determined, to wit, at, &c. (*venue*) aforesaid. And whereas also the said defendant, further contriving and intending as aforesaid heretofore, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, went and appeared before the said H. M. esq. so being such justice as aforesaid, and then and there falsely and maliciously, and without any reasonable or probable cause, before the said H. M. esq. so being such justice as aforesaid, to wit, at Westminster aforesaid: in the county aforesaid, charged the said plaintiff with knowingly concealing in his house, or apartments, nine paper patterns, the goods and chattels of the said defendant, the same having been, as the said defendant then and there alleged, before then feloniously stolen, taken, and carried away, the said defendant falsely and maliciously, and without any reasonable or probable cause whatsoever caused the said H. M. esq. so being such justice aforesaid, to make and grant his certain warrant, under his hand and seal, for the searching of the said house or apartments of the said plaintiff, in order to find the nine paper patterns so alleged to have been feloniously stolen. By virtue and under color of which said last-mentioned warrant, and by pretext of the execution thereof, the said defendant, together with one W. B. then being one of his majesty's officers of the peace for the said county, afterwards, to wit, on the day and year aforesaid, without any reasonable or probable cause whatever, and without the leave or license, and against the will of the said plaintiff, entered the dwelling-house of the said plaintiff, situated, &c. aforesaid, and continued therein for a long space of time, to wit, for the space of [two] hours, and during that time then and there searched and ransacked the said dwelling-house, and the rooms and apartments thereof, and also the closets, drawers, desks, and boxes of the said plaintiff and his family, in the said dwelling-house, and flung, tossed, and tumbled about the books, paper, furniture, and wearing apparel therein, and other the contents thereof, and also during all that time then and there disturbed and disquieted the said plaintiff in the possession of the said dwelling-house; and the said plaintiff in fact saith, that neither the said nine paper patterns, nor any goods or chattels of the said defendant, or of any other person which had been feloniously stolen, were found in the said dwelling-house, upon such search as aforesaid, or otherwise, nor were there any such goods and chattels therein, before or at the time of the said complaint, or at any time whatever, nor had the said defendant any reasonable or probable cause for making the said last-mentioned charge, or causing the said warrant to be issued or executed as aforesaid; and the said plaintiff saith, that the said defendant did not further prosecute his said charge, but deserted and abandoned the same, and the said complaint has wholly ended and determined, to wit, at, &c. (*venue*) aforesaid. By means of which said several premises, he the said plaintiff has been, and is greatly injured in his said credit and reputation, and brought into public scandal, infamy, and disgrace, with and amongst his neighbors, and other good and worthy subjects of this kingdom, and divers of those neighbors and subjects, to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe that the said plaintiff hath been, and is guilty of the said offence.

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TIONS.

by the said defendant imputed to his charge, and also the said plaintiff hath, by means of the premises, suffered great anxiety and pain of body and mind, and hath been otherwise greatly injured in his character, credit, reputation, and circumstances, to wit, at, &c. (*venue*) aforesaid.

For mali-
cious pro-
secution
in Middle-
sex, of an
indict-
ment for
perjury
removed
into K. B.
by *certio-
rari*, upon
which the
plaintiff
was ac-
quitted (l).
[*613]

Removal
by *certio-
rari* (p).
Trial and
acquittal.

[*Inducement of good character, &c. and that plaintiff had not been guilty of perjury, and of defendant's malicious intention, similar to the precedent, ante, 606, 7, to the asterisk, and then proceed as follows:*]—To wit, on the — day of — in the — year of the reign of our lord the now king, at the general session (m) of oyer and terminer of our said lord the king, holden in and for the county of — at the sessions-house for the said county, before E. F., G. H., I. K. and L. M. esquires (n), and others their fellows, justices of our said lord the king, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed *within the said county, the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, indicted (o) and caused and procured to be indicted, the said plaintiff, by the name of A. B. late of the parish of — in the county of —, for that, &c.—[*here state the substance or material parts of the indictment, and then proceed as follows:*]—which said indictment, our said lord the king afterwards, for certain reasons caused to be brought before him, to be determined according to the law and custom of England. And the said plaintiff further says, that the said defendant afterwards, falsely and maliciously (q) and without any reasonable or probable cause prosecuted, and caused to be prosecuted, the said indictment against the said plaintiff, until the said plaintiff

(l) See the various forms in 8 Wentw. Index, xv. to xxi. Herne, 88.—Morg. 410, 359—Plead. A. 222; and the notes to the precedent, ante, 607. See a precedent for maliciously indicting plaintiff's wife at Hick's Hall, where she was acquitted, 2 Rich. C. P. 158. And see a precedent where the bill was returned not found, 5 Taunt. 187.—1 Marsh. 12.—8 Wentw. 344. The proceedings in the original prosecution are to be described as in the record of acquittal, a copy of which must be produced on the trial of the action, if the former prosecution were for a felony, but not when it was for a misdemeanor, 1 Bl. Rep. 385. 1 T. R. 518. Therefore, if the court will not in the former case grant a copy of the record, no action for a malicious prosecution can be supported. 1 Chit. Crim. Law, 835, &c. In 10 B. & Cres. 70, it was made a question, but not decided, whether a person acquitted of felony has a right to have a copy of the record of his acquittal. This action is supportable, though the indictment was bad, 5 B. & A. 634.—1 D. & R. 97, S. C.—4 T. R. 427. See the requisites necessary to sustain this action in Willes' Rep. 530, n. a.—2 Bla. Com. by Chitty, 126, notes. The plaintiff must show express malice, or the absence of all probable cause, 9 East, 361.—1 Marsh. 12.—5 Taunt. 187, S. C.—1 Marsh. 220.—See ante, 601 & 608.

(m) This statement is to accord with the caption, or style of the particular sessions, and with the record of acquittal. In 2 Bla. Rep. 1050, a declaration for maliciously indicting at the general quarter sessions, instead of the general session, was held sufficient, because the indictment was cognizable at both sessions, see 3 D. & R. 226.—4 B. & A. 435. After verdict it is no objection to the description of the court in which the indictment was found, that the names of the justices before whom the session of oyer and terminer is held are not set out, 1 D. & R. 266.—5 B. & A. 634, S. C. What are not variances, see Cro. Jac. 32.—Yelv. 46.—9 East, 157. It should appear by the declaration that the court before which the charge was preferred, had authority to determine it, Id. ibid.

(n) The allegation of the appointment of the justices by letters patent is unnecessary, and is better omitted, 2 Rich. C. P. 158.

(o) This is the usual allegation, 2 Burr. 993. Where the jury have thrown out the bill, the declaration should describe the prosecution as "a bill," and not as "an indictment," 1 Salk. 376.—Com. Dig. Indictment, B.—8 Wentw. 346.—5 Taunt. 187.

(p) If there was no removal, see 2 Rich. C. P. 159.

(q) Malice must be proved, 9 East, 361. Ante, 600, 601.

afterwards, to wit, at the sittings at nisi prius (r), holden on — next after the end of the term of —, in the — (s) year of the reign of our said lord the now king, before Charles Lord Tenterden, chief justice of our said lord the king, assigned to hold pleas before the king himself, John Henry Abbott, esquire, being associated unto the said chief justice, according to the form of the statute in such case made and provided, was in due manner, and by due course of law, acquitted of the said premises in the said indictment, charged upon him by a jury of the said county of Middlesex (t); and whereupon, it was afterwards, to wit, in [fifteen] days from the — day of St. Martin, in Michaelmas Term (u), in the 1st year of the *reign aforesaid, considered (w) and adjudged by the court of our said lord the king, before the king himself, the same court then and still being holden at Westminster, in the county of Middlesex, that the said plaintiff should depart thence without day in that behalf, and the said plaintiff was and is duly discharged of and from the premises in the said indictment specified; as by the record and proceedings thereof, remaining in the said court of our said lord the king himself, at Westminster aforesaid, appears. By means whereof, &c.—[State the damage, as ante, 611, 612, and any other damage, which the plaintiff has sustained, and conclude as ante, 596. A general count as follows may be added.]

FOR
MALICIOUS
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TIONS.

Judgment
thereon.
[*614]

And whereas also afterwards, to wit, on, &c, at a general sessions of oyer and terminer of our said lord the king, holden in and for the county of — at the sessions-house in and for the said county, before E. F. &c. esquires, (naming the justices as in the caption of indictment,) and others their fellows, justices of our said lord the king, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said county, the said defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, indicted, and caused and procured to be indicted, the said plaintiff, for [wilful and corrupt perjury] which, &c.—[Proceed, and conclude as in the first count.]

Second
count stat-
ing the in-
dictment
more
shortly
(z).

For that whereas, heretofore, to wit, at (z) the general quarter sessions of the peace of our lord the king, holden for the county of — at [the Guildhall, in King Street, Westminster,] in the said county, on, &c. to the — year of the reign of our lord the now king, before [W. M., A. C., &c. esquires,] and others their fellows, justices of our said lord the king,

For mali-
ciously in-
dicting
plaintiff
for an as-
sault, at
the Guild-
hall Ses-
sions, at
which he
was ac-
quitted
(y).

(r) If stated that the acquittal was "in the court of our lord the king, before the king himself," when it was at nisi prius, the variance would be fatal. See 11 East, 508.—2 Campb. 193, where see the law as to variances in general; and see 9 East, 157.—1 T. R. 235.—2 B. & C. 2.

(s) This day should correspond with the record of acquittal. When a variance is fatal, and when not, see 4 T. R. 590, 560.—Willes, 517.—9 East, 157.

(t) As to this allegation, see Cro. Car. 315. 316.—Herne, 89.

(u) This also must agree with the record, see 4 T. R. 590, 560.

(w) It is sufficient to state that the plaintiff was acquitted by a jury, Willes, 517.—

11 East, 513, 14.

(z) That this will suffice, and at all events after verdict, see 1 D. & R. 266.—5 B. & Ald. 634, S. C.

(y) See the requisites necessary to sustain this action, in Willes' Rep. 520, n. (a); and in the notes to the precedents, ante, 606, 7, 8. It is not sufficient to support the action, to show that the defendant was guilty of the first assault, Peake's Rep. 135. If the defendant caused the plaintiff to be apprehended before indictment preferred, by a justice's warrant, the first count will begin as ante, 607.

(z) The caption of the sessions at which the indictment was preferred must be accurately stated; see ante, 612, n.

FOR
MALICIOUS
PROSECU-
TIONS.

[*615]

Damages:
[*616]

assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in that county, that session of the peace was adjourned by the aforesaid justices of our said lord the king above named, and others their fellows aforesaid, until the — day of the same month of — at the hour of ten in the forenoon of the same day, to be holden at [the session-house on Clerkenwell Green], in and for the said county. And whereas also the said defendant, contriving and maliciously intending to injure the said plaintiff, and to cause him to be imprisoned, and kept and detained in prison, and to put him to great charges and expense of his monies, and to vex, harass, oppress, impoverish, and wholly ruin him the said plaintiff, heretofore, to wit, at the same session of the peace, being holden by adjournment aforesaid, at the session-house aforesaid, in and for the said county, on, &c. aforesaid, before the said justices of our said lord the king, and others their fellows aforesaid, he the said defendant falsely and maliciously, and *without any reasonable or probable cause whatsoever, indicted, and caused and procured to be indicted (a), one I. H. and the said plaintiff, by the names and additions of, &c. for that [*here state the substance of, or if the indictment be very short, set it out*] [the said I. H. and plaintiff on, &c. in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon him the said defendant, in the peace of God and our said lord the king then and there being, did make an assault, and the said defendant did then and there beat, wound, and ill treat, and other wrongs to the said defendant then and there did, to the great damage of the said defendant, and against the peace of our said lord the king, his crown and dignity:] and the said plaintiff further says, that the said defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, prosecuted, and caused and procured to be prosecuted, the said indictment against the said I. H. and plaintiff, to wit, at, &c. (venue) aforesaid, until the said plaintiff afterwards, to wit, at the then next general session of the peace of our said lord the king, holden in and for the said county of Middlesex, at the session-house for the said county, on, &c. (b) in the year aforesaid, before W. M. &c. esquires, and others their fellows, justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, was in due manner, and according to the course of law, by a jury of the said county, acquitted (c) of the premises in the said indictment charged upon him the said plaintiff in manner aforesaid, whereupon it was then and there considered in and by the said court, that the said plaintiff of the premises in the said indictment specified, should be discharged, and should go without day, as by the record and proceedings thereof, remaining in the said court, reference being thereunto had, will more fully appear. By means of which said premises, he the said plaintiff hath *been forced and obliged to undergo and hath under-

(a) See ante, 613, n. (o).

(b) It must appear that the plaintiff was acquitted upon the prosecution before the action brought; but the day of the acquittal is not material; and though it vary from the record, the declaration will be sufficient,

9 East, 157.—Ante, 612, note.

(c) It is sufficient to say generally, that the plaintiff was acquitted, and it need not be stated that he was *acquiescens inde, or de premisis*, Yelv. 161.

gone, many great trouble and labours both of body and mind, and to lay out and expend divers large sums of money, in the whole amounting to a large sum of money, to wit, to the sum of £— in and about the defending himself in the premises, and the manifestation of his innocence therein, and hath been imprisoned, and kept and detained in prison, for a great length of time, to wit, for the space of — days; and the said plaintiff was also, by means of the premises, greatly hindered and prevented from transacting his necessary and lawful affairs and business, for divers long spaces of time, and hath been and is otherwise greatly injured and damaged, and very much impoverished, to wit, at, &c. (*venue*) aforesaid. —[Add the following count.]

FOR
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TIONS.

And whereas also the said defendant, further contriving and intending as aforesaid, heretofore, to wit, on, &c. in the — year aforesaid, at the general quarter sessions of the peace of our said lord the king, holden by adjournment on the day and year last aforesaid, at the sessions-house on Clerkenwell Green, in and for the said county of Middlesex, before certain then justices of our said lord the king, assigned to keep the peace of our said lord the king in the said county of Middlesex, and also to hear and determine divers felonies trespasses, and misdemeanors committed in the same county, he the said defendant falsely, maliciously, and without any reasonable or probable cause whatsoever, indicted, and caused and procured to be indicted, the said plaintiff, together with the said I. H. [for that the said I. H. and A. B. on, &c. in the year aforesaid, with force and arms, at, &c. (*venue*) in and upon him the said defendant, in the peace of God and our said lord the king then and there being, did make an assault, and the said defendant then and there did beat, wound, and ill treat, and other wrongs to the said defendant then and there did, to the great damage of the said defendant, and against the peace of our said lord the king, his crown and dignity (e)]; and the said plaintiff further says, that the said defendant, further *contriving and intending as aforesaid, falsely and maliciously and without any reasonable or probable cause whatsoever, prosecuted, and caused and procured to be prosecuted, the said last-mentioned indictment against the said I. H. and plaintiff, to wit, at, &c. (*venue*) aforesaid, until the said plaintiff, afterwards, to wit, at the then next general sessions of the peace of our lord the king, holden in and for the said county of Middlesex, at the sessions-house of the said county, on, &c. in the — year aforesaid, before certain then justices of our said lord the king, assigned to keep the peace of our said lord the king in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county, was in due manner, and according to the due course of law, by a jury of the said county, acquitted of the premises in the said indictment charged upon the said plaintiff as aforesaid, to wit, at, &c. (*venue*) aforesaid. By means of which said last-mentioned premises, the said plaintiff hath been forced and obliged to undergo, and hath undergone, many great hardships, troubles, and labors, both of body and mind, and hath been forced and obliged to pay,

Second
count, stat-
ing the
count, in-
dictment,
and pro-
ceedings,
with less
particu-
larity (d).

[*617]

(d) See 1 D. & R. 266.—5 B. & B. 634. Ante, 614.

(e) Or, if for a felony, say, as the fact may be, "for felony, (to wit,) for felonious-

ly stealing, taking, and carrying away the said goods and chattels in the said first count mentioned," or state the charge shortly, as in the second count, ante, 614.

FOR
MALICIOUS
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TIONS.

lay out, and expend, and hath necessarily paid, laid out, and expended, divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £— in and about the defending himself in the said last mentioned premises, and the manifestation of his innocence therein; and the said plaintiff hath, by means of the same premises, been greatly hindered and prevented from transacting his lawful affairs and business, for divers long spaces of time, and hath been and is otherwise very much injured and damnified, and greatly impoverished, to wit, at, &c. (*venue*) aforesaid (*f*) to the damage, &c.—[*Conclusion of the declaration as ante*, 596.]

[*618]
For maliciously
suing out
a commis-
sion of bank-
ruptcy against
plaintiff,
under
which his
goods
were sold,
and which
was after-
wards super-
seded.
(*g*).

For that whereas the said plaintiff before and at the time of suing forth the commission of bankruptcy hereinafter *next mentioned, had not committed any act or acts of bankruptcy whatsoever, nor was in any wise subject or liable to have a commission of bankruptcy issued forth against him, but was in great regard, reputation, and credit amongst all persons trading and dealing with him, to wit, at, &c. (*venue*); yet the said defendant well knowing the premises, but falsely, wickedly, and maliciously contriving and intending to injure, aggrieve, and oppress the said plaintiff and to bring him into great disgrace with and amongst all his friends, neighbors, and acquaintance, and other good and worthy subjects of this realm, and to put him the said plaintiff to great expense of his monies, and falsely and maliciously to cause and procure the said plaintiff to be declared and adjudged a bankrupt, and to impoverish and wholly ruin him, heretofore, to wit, on, &c. (*date of commission*) at, &c. (*venue*) under pretence that the said plaintiff was indebted to the said defendant in the sum of £— and had become a bankrupt within the intent and meaning of the Statute made and then in force concerning bankrupts, falsely and maliciously, and without any reasonable or probable cause whatsoever, sued and prosecuted, and procured to be sued and prosecuted (*h*), a certain commission of bankruptcy of our said lord the king, sealed with the seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the same day and year aforesaid, against the said plaintiff directed to, &c. (*i*) whereby after reciting that our said lord the king had been informed that the said plaintiff, being a trader according to the provisions of an act passed in the 6th year of the reign of our said lord the king, intituled, "An Act to amend the Laws relating to Bankrupts," about — since, had become a bankrupt within the intent and meaning of the said Statute, to the intent to defraud and hinder the

(*f*) If the defendant verbally slandered the plaintiff, independently of the prosecution, counts for the words when actionable may be added.

(*g*) See other forms in 8 Wentw. 313.—Morg. Pre. 406.—2 Wils. 145.—1 Bla. Rep. 427. From 2 Wils. 383, 4, 5, 6, it seems that an action is sustainable, though the commission has not been superseded, if the party is not liable to the bankrupt laws; but see 7 Taunt. 399. As to these actions in general, see 1 Salk. 14.—1 B. & P. 205.—1 Saund. 238, 9. It is not necessary to aver that the plaintiff had not committed an act of bankruptcy, 2 Wils. 145, 147.

As to the evidence, see 3 Camp. 58, 60. 1 Barn. & Adolph. 128. As to what conclusive proof of malice, see 1 Swanst. 23. See a form of special plea to an action of this nature, stating the bankruptcy, &c. 2 B. & C. 908.—4 D. & R. 579, S. C.

(*h*) It must not be stated that the commission issued out of the Court of Chancery, 3 Camp. 58.—1 Taunt. 71. The statement of the commission and other proceedings should be examined with the originals.

(*i*) The names of the commissioners. See the direction of the commission, and examine therewith throughout.

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TIONS.

said defendant, and others his creditors, of their just debts and duties to them due and *owing, and our said sovereign lord the king, minding the due execution of the said Statute, upon trust of the wisdom, fidelity, diligence, and provident circumspection which our said lord the king had conceived in the said — [commissioner's names] did, by his commission under the great seal of the United Kingdom of Great Britain and Ireland, bearing date, on, &c. at, &c. name, assign, appoint, constitute, and ordain, the said, &c. [the commissioners] his special commissioners, thereby giving full power and authority to them, four or three of them, to proceed according to the said Statute, and take such order and direction with the body of the said bankrupt, as also with all his lands, tenements, and hereditaments, did, within this realm and abroad, as well copy or customary, hold as freehold, which he had in his own right before he became a bankrupt, as also with all such interest in any such lands, tenements, and hereditaments, as the said bankrupt might lawfully depart with all, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandizes, and debts, wheresoever they might be found or known, and to make sale thereof, or otherwise order the same for satisfaction and payment of the creditors of the said bankrupt, and to do and execute all and every thing and things whatsoever, towards and for all other intents and purposes, according to the ordinance and provision of the said Statute, willing and commanding them, four or three of them, to proceed to the execution and accomplishment of the same commission, according to the true intent and meaning of the said Statute, with all diligence and effect. And such proceedings were thereupon had by the said, &c. [names of commissioners] being three of the said commissioners named and authorized by the said commission, that afterwards, to wit, on, &c. at, &c. (venue) the said plaintiff, upon the prosecution of the said defendant, under color and pretence of the said commission of bankruptcy, was declared a bankrupt, and his goods and chattels, books, and effects, were thereupon then and there seized and taken from him; and the said plaintiff further says, that the said commission of bankruptcy afterwards, to wit, on, &c. at, &c. (venue) was duly superseded (k). And the said plaintiff further says, that by means of the suing out and prosecuting of the said commission of bankruptcy by the said defendant against the said plaintiff as aforesaid, and the several proceedings had thereon before the same could be superseded *as aforesaid, the said plaintiff was greatly injured in his credit and reputation with, and amongst all his neighbors and acquaintance, and all other his majesty's subjects, to whom he was in any wise known, and lost the use, benefit, and advantage of his said goods and chattels, books and effects, so seized and taken from him, and the same were sold and disposed of under the said commission, afterwards, to wit, on, &c. at, &c. (venue) aforesaid, for much less than the same were really worth, to wit, at the value or price of £—being £—less than the same were then really worth; and the said plaintiff hath also, by means of the premises, been forced and obliged to lay out and expend, and hath necessarily laid out and expended, a large sum of money, to wit, the sum of £—in and about the applying for and obtaining a *supersedeas* to the said commission,

[*620]

(k) As to this averment, see ante, 617, note. It is advisable to add a count omitting the allegation.

FOR
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TIONS.

and the said plaintiff hath been and is, by means of the premises, wholly ruined in his circumstances, to wit, at, &c. (*venue*) aforesaid. [*Add a count, omitting the statement of the supersedeas.*]

FOR
LIBELS.
1. For a li-
bel, indi-
rectly ac-
cusing
plaintiff of
perjury or
other spe-
cific of-
fence (l).
[*621]
General
induce-
ment of
good char-
acter
And of in-
nocence
of the par-
ticular
charge.
General
conse-
quences of
good char-
acter.

—[*Commencement and conclusion as ante*, 596.]—For that where-
as (m) the said plaintiff now is a good, true, honest, just, and faithful
subject of this realm, and as such hath always behaved and conducted
himself, and until the committing of the several grievances by the said de-
fendant as hereinafter mentioned, was always reputed, esteemed, and ac-
cepted by and amongst all his neighbors, and other good *and worthy
subjects of this realm to whom he was in any wise known, to be a per-
son of good name, fame, and credit, to wit, at, &c. (*venue*) (n).—And
whereas also, the said plaintiff hath not ever been guilty, or until the
time of the committing of the said several grievances by the said defend-
ant as hereinafter mentioned, been suspected (o) to have been guilty of
[*perjury* (p),] or any other such crime.—By means of which said pre-
mises, the said plaintiff, before the committing of the said several griev-
ances by the said defendant as hereinafter mentioned, had deservedly ob-
tained the good opinion and credit of all his neighbors, and other good
and worthy subjects of this realm, to whom he was in any wise known (q),
to wit, at, &c. (*venue*) aforesaid.—[*Here proceed to state the inducement,
which in a libel charging perjury, may be as follows, mutatis mutandis.*—

(l) See the forms of declarations for li-
bels, and for words referred to, in 8 Wentw.
Index, page iv. to xii.—2 Rich. C. P. 152,
and the forms, post.—Kitch. 509.—4 Taunt.
355.—In the first volume of this work, page
428 to 436, will be found a full treatise upon
the mode of framing a declaration for a li-
bel or verbal slander, which supersedes the
necessity of inserting many of the notes
inserted in former editions to the following
forms.

(m) It is usual to commence the declara-
tion, either for a libel or for words, with an
inducement of the plaintiff's good charac-
ter, and of his innocence of the crime im-
puted to him by the defendant, (Com. Dig.
Action for defamation, G. 1.) but as these
inducements are not traversable, (see Styles,
118.—11 Price, 235.—1 Lev. 297.—1 M. &
S. 285,) they may be omitted, and the de-
claration may commence with a statement
of defendant's malicious intention to injure
the plaintiff. When the libel, or slander,
does not affect the plaintiff in his moral
character, but merely imputes to him insol-
vency, or incapacity in the way of his trade,
&c. this inducement of good character is
inapplicable, and the declaration should
commence with an inducement respecting
the trade, &c.

(n) The *venue* is transitory, and the
court will not change it, 1 T. R. 571, and

647, unless the libel be written, as well as
published, only in one county, 3 T. R. 306,
652.—1 M. & P. 188.

(o) This general allegation is not ma-
terial, 1 M. & S. 285.

(p) See preceding page, note (m). If
the slander do not amount to a charge of
any specific offence, such as perjury or
theft, &c. the inducement, instead of this
word in italics, should run thus: "*Of the
offences and misconduct hereinafter men-
tioned to have been charged upon and imputed to
the said plaintiff, or of any other such of-
fences or misconduct.*"

(q) This inducement also is not travers-
able but it is usually inserted. When the
declaration is for a libel, or words affecting
the plaintiff in his profession, trade, &c.
the inducement respecting such profession,
&c. usually precedes the above inducement,
see forms, post.—Taunt. 355.—3 M. & S.
369, and which, in such cases, in addition
to the statement of the plaintiff's good
character as above, runs, "*and also by rea-
son of the premises the said plaintiff, in the
way of his aforesaid trade and business,
was daily and honestly acquiring great
gains and profits therein, to wit, at, &c.
aforesaid.*"—3 Mod. 112.—Proof of a part
of the inducement, stating that plaintiff
carried on two trades, suffices, 3 M. & S.
369.

And whereas also, before *the committing of the several grievances by the said defendant as [in the *first* and *second* (s) counts] hereinafter mentioned, a certain action had been depending in the said court of our lord the now king, before the king himself, at Westminster, in the county of Middlesex (t), wherein one E. F. was the plaintiff, and one G. H. was the defendant, and which said action had been then lately tried at the assizes in and for the county of —, and on such trial the said plaintiff had been, and was, examined on oath, and had given his evidence as a witness for and on the part and behalf of the said E. F., to wit, at, &c. (venue) aforesaid.]—Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously (u) intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that he the said plaintiff had been and was guilty of [perjury (w),] and to subject him to the pains and penalties by the laws of this kingdom made and provided against, and inflicted upon persons guilty thereof (x), and to vex, harass, oppress, impoverish, *and wholly ruin the said plaintiff heretofore, to wit, on, &c. (y) at, &c. (venue) aforesaid, *falsely, wickedly, and maliciously (z) did compose (a) and publish (b), and cause and pro-

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Special inducement that an action had been tried, and plaintiff examined as a witness (r).

General statement of defendant's malicious intent.

[*623]

(r) The necessity for and use of an inducement will be found treated of, ante, vol. i. p. 429. In addition, it may be observed, that when the words themselves are such as can only be understood in a criminal sense, as when the plaintiff is directly charged with a *theft* or *perjury*, &c. no inducement of any extrinsic matter is requisite, 5 East, 467, 8. But, if as in this case, the charge be not necessarily slanderous, the plaintiff must, by way of introduction or inducement, state, that some fact has taken place to which the defendant alluded, and to which the innuendoes, must afterwards refer. This is fully explained, ante, vol. i. p. 429, and authorities there cited. So, if the libel be actionable only in respect of its affecting the plaintiff in his office, profession, trade, employment, &c. an inducement must be stated, showing such office, &c. But where the libel, or words, admit, or import the fact to exist, no inducement or averment of the facts is necessary, id. In a late case, a count, after an inducement that one J. P. had become bankrupt, and that plaintiff was about to prove a debt justly due under his commission, charged defendant with saying of plaintiff, in his trade of livery stable keeper, and in a discourse touching the matters before mentioned, "he is a regular prover under bankruptcies," meaning that the plaintiff was accustomed to prove fictitious debts under commissions: it was held ill, without a previous averment that defendant had been accustomed to employ the words in that sense, 7 Bing. 119. See the mode of stating the inducement, ante, vol. i. 429, and

Bac. Ab. Slander, S. 2. Where the inducement is absolutely requisite, *time* and *place* should be stated, 4 T. R. 590, 560.

(s) When any of the counts either for a libel or for verbal slander, or for matter libellous, without inducement or reference to any extrinsic matter, the above inducement should be qualified, and confined merely to those counts which require an inducement.

(t) Herne, 137.

(u) The declaration must show a malicious intent in the defendant, but it is not necessary to use the word *maliciously*, for the word *falsely* or *wrongfully*, is sufficient. 1 Saund. 242 a. note 2—1 East, 563.—1 T. R. 545.—Com Dig. Action for Defamation, G. 5.

(w) Or if the charge be not of any specific offence, insert the allegation, as Ante, 620, note (m).

(x) Or if the charge affect the plaintiff in his trade, &c. insert, "*and thereby to injure the said plaintiff in his said trade and business.*"

(y) The day of the publication, but the precise day is not material.

(z) As to the words *falsely* and *maliciously*, see preceding page, note (u), and infra, note (i).

(a) It is usual, when there is any evidence of that fact, to state, in one count, that the defendant *composed* the libel; as to the evidence of which, see Bac. Ab. Libel, B. 1.—2 Phil. Evid. 236, 7, 7th edit.

(b) The declaration must show a publication, (2 Bla. Rep. 1037.—1 Saund. 242, note 1.—Com Dig. Action for Defamation,

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LIBELS.[*624]
The libel
and innu-
endoes.Second
count.

cure (c) to be published, of and concerning the said plaintiff (d), and of and concerning the said [action which had been so depending as aforesaid, and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid (e),] a certain false, scandalous, malicious (f), and defamatory libel (g) containing, amongst other things (h) the false (i), scandalous, malicious, defamatory, and libellous matter following (k), of and concerning the said *plaintiff (l), and of and concerning [the said action (m), and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid,] that is to say (n), he (meaning (o) the said plaintiff) was forsworn on the trial, (p), (meaning the said trial, and thereby then and there meaning that the said plaintiff, in giving his evidence as such witness, on the said trial as aforesaid, had committed wilful and corrupt perjury.)—[Add the following and other counts, as the case may suggest : (q)]—And the said plaintiff further saith (r), that the said defendant further

G. 4.—Bac. Ab. Libel, B. 2.—Ante. vol. i. 435, but the word "published" is not absolutely necessary, and the words "printed and caused to be printed," have been holden sufficient. 2 Bla. Rep. 1037.—1 Saund. 242, n. 1; 132, n. 2 and 3.—Com. Dig. Action for Defamation, G. 4.

(c) A statement that the defendant published, "or" caused to be published, is insufficient, but the uncertainty may be aided by the defendant's pleading. 8 Mod. 328.—Vin. Ab. Libel, E. pl. 4.—1 Show. 125.

(d) The declaration must show a *collatum*, or otherwise state that the libel was published of and concerning the plaintiff, ante, vol. i. 433.

(e) Where an inducement of extrinsic matter is necessary, it must not only be shown that the imputation related to the plaintiff's character, but it must also be charged that it had reference to such extrinsic matter, ante, vol. i. 432.

(f) As to these words, see ante, 622, n.

(g) As to what is a libel, see 1 Stark. on Libels, 403.—3 Bla. Com. 124, notes by Chitty.—9 B. & C. 172, 645.—5 Bing. 17.

(h) This allegation "*inter alia*" is sufficient. Vin. Ab. Libel, E. pl. 1: but if different parts of a libel not following each other be set out in the same count, it is better not to describe it as an entire libel, and the parts may be set forth thus, "in one part of which said libel there was and is contained the following false, &c. matter of and concerning the said plaintiff that is to say, &c. (stating that part of the libel, and then say) and in another part of which said libel there was, &c." 1 Campb. 353; and see the form, post, 632.

(i) As to the words *falsely* and *maliciously*, see the preceding page, note (u), and 1 Saund. 242, note 2.—2 East, 436.

(k) This seems the proper mode of stating the libel, and it would be sufficient to prove that it was in substance correct, 2 Salk. 660, 661. It would be improper to state that the libellous matter was "to the effect following." 2 Salk. 417. 600.—11 Mod. 78,

849.—Vin. Ab. Libel, E.—2 Show. 436.—1 Marsh. 522.—6 Taunt. 169, S. C.: and to state that the libel was to the substance following, would be bad, even in arrest of judgment after verdict, 3 B. & A. 503.—3 M. & S. 115.—4 B. & C. 473.—Ante, vol. i. 434.

(l) This is necessary, unless the libel be stated to have been addressed to the plaintiff, and written in the second person, "*You, &c.*" 1 Saund. 342 a. note 3.—Cro. Jac. 231.—Com. Dig. Action on the Case for Defamation, G. 7.—4 M. & S. 164.—Ante, vol. i. 433.

(m) Whenever an inducement of extrinsic matter is necessary, (as to which see ante, vol. i. 429, and ante, 621, n. (r)), it is equally necessary here to aver, that the libel related thereto, as that the libel or words were published of the plaintiff, "of and concerning his evidence in the said suit," or, "of and concerning the said plaintiff in the way of his said trade, &c." 8 East, 427.—1 Saund. 242, 3, notes 3 & 4.—Ante, vol. i. 432, 3.

(n) As to the mode of setting out the libel, and what is a variance, see fully, ante, vol. i. 434, 5, 6.

(o) As to the nature and use of and necessity for an innuendo, see fully, ante, vol. i. 436, 437, 8.

(p) If distinct passages are set out in the same count, see the mode, ante, vol. i. 434.—1 Campb. 353.—1 Stark. Slander, 2d edit. 380, and a form, post, 632.

(q) If there be any doubt either as to the precise terms of the libel, or as to the evidence of the defendant's intention in the different parts of it, it is advisable to insert different counts varying the statement of the libel and innuendoes according to the supposed facts, and the evidence which it is expected may be adduced in support of them.

(r) If the second count commence, "*And whereas also,*" &c. it will nevertheless be sufficient, 2 Lev. 193.—3 Id. 338.

contriving and intending as aforesaid, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, falsely, wickedly, and maliciously, did publish a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiff, and of and concerning [the said action, which had been so depending as aforesaid (*s*), *and of and concerning the evidence by him the said plaintiff given on the said trial, as such witness as aforesaid,] containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, and of and concerning [the said action, and of and concerning the evidence given by him the said plaintiff on the said trial, as such witness as aforesaid,] that is to say, [*vary the statement of the words and innuendoes, as may be advisable, under the particular circumstances of each case.*—And the said plaintiff further saith, that the said defendant further contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, falsely, wickedly, maliciously, wrongfully, and unjustly, did publish, and cause and procure to be published, a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said plaintiff, containing, amongst other things, certain other false, scandalous, malicious, defamatory, and libellous matter, of and concerning the said plaintiff, as follows, that is to say, [he (meaning the said plaintiff) is perjured]. By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been, and to be a *person guilty of [*perjury*,] and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse to have any transaction, acquaintance, or discourse with the said plaintiff, as they were before used and accustomed to have, and otherwise would have had.—[*Here insert a statement of any special damage plaintiff has sus-*

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[*625]

Third
count for
a libel,
contain-
ing a di-
rect
charge of
perjury
(*i*).General
damage
(*u*).

[*626]

Special
damage
(*w*).

(*s*) Though the second count may refer to matters stated in the first, or the inducement thereto, (see 2 Hen. Bla. 131.—2 Wils. 114, 115.—Cro. C. C. 9th edit.—Cro. Eliz. 240.—2 Lev. 193.) yet it is necessary, when the libel is not actionable in itself, as stated in the second or subsequent count, that the inducement, ante, 621, note (*r*), should extend to such counts, and that it be averred that the libel was published, or the words uttered, with reference to the matter stated in such inducement.

(*t*) If there be any direct charge of perjury, or of any other offence obviously actionable, without any inducement or explanation, one or more counts should be inserted in the declaration as above, in order to avoid the necessity of proving the matter stated in the inducement, and in such

case it should be merely stated that the libel was published, or the *colloquium* was had of and concerning the plaintiff, generally, without any allegation that the same related to the action, or to the examination of the plaintiff as a witness, as in the preceding counts.

(*u*) This statement of general damage is not traversable.

(*w*) As to the statement of special damage, see ante, vol. i. 440, 442.—Com. Dig. Action on case for Defamation, G. 11. When the libel, or verbal slander is not in itself actionable, and the action is sustainable merely in respect of special damage, the declaration would be defective if such damage were not correctly stated, 1 Saund. 243, n. 5; but if the libel or words be of themselves actionable, the plaintiff may re-

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tained in consequence of the libel. If the damage be the loss of service, it may be stated as follows:—And also by reason thereof one E. F. who before, and at the time of the committing of the said grievance, was about to retain and employ, and would otherwise have retained and employed the said plaintiff as his servant, for certain wages and reward, to be therefore paid to the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, wholly refused to retain and employ the said plaintiff in the service and employ of the said E. F. and the said plaintiff hath from thence hitherto remained and continued, and still is wholly out of employ; and the said plaintiff hath been and is, by means of the premises, otherwise greatly injured, to wit, at, &c. (*venue*) aforesaid. To the damage, &c.—[*Conclusion as ante*, 596.]

[*627]
2. For a libel, directly accusing plaintiff of a theft or other specific offence (z).

*— [Commencement and conclusion, as ante, 596.]—For that whereas (y) the said plaintiff now is a good, true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (*venue*). And whereas also, the said plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty of [*theft*] or any other such crime. By means of which said premises, the said plaintiff, before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c. (*venue*) aforesaid. Yet the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff had been and was guilty of [*theft*], and to subject him to the pains and penalties by the laws of this kingdom made and

cover, though no special damage be stated or proved, *id. ib.*—3 Esp. 133. In either case, however, the plaintiff cannot give evidence of any special damage, unless it be stated in the declaration, *Bul. N. P. 7.*—1 *Stra.* 666—1 *Saund.* 243, note 5.—3 Esp. 134. The special damage must be the legal and natural consequence of the words spoken, 8 *East*, 3; and it should seem, that if the plaintiff might have his action over against the third person in respect of his refusal to complete a contract, &c. which he had entered into with the plaintiff, the damage is not sufficient; therefore care must be taken in the statement of the damage, 2 *B. & P.* 280.—3 *Id.* 372. The special damage, when the action is sustainable only in respect of it, must be particu-

larly specified in the declaration; therefore in a declaration by a victualler, for calling his wife "whore," whereby several customers left off dealing with him, without naming any one in particular; this was held not to be sufficient statement of special damage, *Bul. Ni. Pri. 7.*—1 *Saund.* 245 c. n. 5.—8 *T. R.* 130.—2 *B. & P.* 288, 289.—*Sir W. Jones*, 196.—1 *Stark.* 172. Loss of visiting of certain specified friends is sufficient damage and see how to state it, 1 *Taunt.* 39: and a form, post, 641.

(z) As to when there is no necessity for any special inducements, see ante, vol. i. 432. Observe the notes to the preceding form.

(y) As to the inutility of this inducement, see ante, 620, n.

provided against, and inflicted upon persons guilty thereof, and to vex, harass oppress, impoverish, and wholly ruin the said plaintiff, heretofore, to wit, on, &c. (*the day of publishing the libel, but the precise day is not material,*) at, &c. (*venue*) aforesaid, falsely, wickedly, and maliciously (*z*) did [compose (*a*) and] publish (*b*), and cause and procure to be published, of and concerning the said plaintiff (*c*), a certain false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory and libellous matter following (*c*), of and concerning the said plaintiff, (that is to say) [he (meaning (*d*) the said plaintiff,) stole Mr. B.'s sheep.]—[Add one or more further counts, as the case may suggest, and see the form of a second or subsequent count, as ante, 655, and conclude with stating the damage, as ante, 626.]

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For that whereas the said plaintiff is a good (*e*), true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (*venue*). And whereas also the said plaintiff hath not ever been guilty, or, until the time of the committing of the grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty, of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him by the said defendant, or of any other offences or misconduct. By means of which said several premises the said plaintiff, before the committing of the several grievances hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c. (*venue*) aforesaid.—[If there be any occasion for any special inducement in order to explain the libel, as to which, see ante, vol. i. page 429, here insert it. In the case upon which this form was framed, the inducement was as follows :]—And whereas, before and at the time of the committing of the grievances by the said defendant as hereinafter mentioned, the said plaintiff was tenant to the right honorable Archibald Lord Douglas, of a messuage and premises, with the appurtenances, situate, at, &c. (*venue*) and he the said plaintiff being desirous *and intending to become a parishioner of the same parish, and to qualify himself to attend the vestry of and for such parish, as such parishioner, agreed with the said Lord Douglas to pay the taxes of and for the said house, which he so inhabited as tenant thereof to the said Lord Douglas; and whereas also, before and at the time of the committing of the grievances by the said plaintiff in the first count mentioned, the said defendant was the churchwarden of and for the said parish of —. And the said plaintiff

3. For a libel imputing no specific offence, or imputing want of moral conduct.

Special inducement.

[*628]

(z) As to the words *falsely* and *maliciously*, see ante, 622, n. (u).

(a) It is usual, when there is any evidence of that fact, to state, in one count, that the defendant *composed* the libel, as to the evidence of which, see Bac. Ab. Libel, B. 1.

(b) The declaration must show a publication, see the notes, ante, 623.

(c) As to these words, see ante, 623, notes.

(d) As to the necessity for and use of inducements, see ante, vol. i. page 436 to 438, and as to the mode of setting out the libel, see *Id.* 434 to 436.

(e) That this general inducement of good character is not necessary, see ante, 620, n.

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so being desirous and intending to attend such vestry of the said parish, as such parishioner, had thereupon, by his certain note in writing, given notice to the said defendant of his said agreement with the said Lord Douglas, to wit, at, &c. (*venue*) aforesaid.]—Yet the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure him in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, and to cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff had been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him by the said defendant, and to vex, harass, and oppress him the said plaintiff, on, &c. (*the day of publishing the libel*) at, &c. (*venue*) aforesaid, falsely, wickedly, and maliciously, did compose and publish, and cause and procure to be published, of and concerning him the said plaintiff, [and concerning such agreement with the said Lord Douglas, and concerning the said note in writing,] a false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, [and of and concerning such agreement, &c.] that is to say, &c. [*Here state the matter of the libel, with innuendoes, and add one or more other counts as the case may suggest. See the the form of a second or subsequent count, ante, 625 ; conclude with stating the damage as follows :*]

Damage.

[*629]

— By means of the committing of which said several grievances by the said defendant, the plaintiff hath been and is greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, insomuch that divers of those *neighbors, and subjects, to whom the innocence of the said plaintiff in the said offences and misconduct so as aforesaid mentioned to have been charged upon and imputed to the said plaintiff, were unknown, have on occasion of the committing of the said several grievances by the said defendant from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been guilty of the offences and misconduct so as aforesaid mentioned to have been charged upon and imputed to him as aforesaid, and have, by reason of the committing of the said several grievances by the said defendant, from thence hitherto refused and still do refuse to have any acquaintance, intercourse, or discourse with the said plaintiff; and the said plaintiff hath been, and is, by means of the premises otherwise greatly injured and damnified, to wit, at, &c. (*venue*).—[*Add special damage if any.*] To the damage, &c.

4. For a libel of plaintiff, in his profession as an attorney, for a libel upon himself

For that whereas the said plaintiff, for a long time before and at the time of committing of the grievances by the said defendant hereinafter mentioned, had been, and was, and still is, an attorney of the court of our said lord the king, before the king himself [*or, if of C. P. say "before his majesty's justices of the bench,"*] and also a solicitor of the High Court of Chancery, and had used, exercised and carried on the profession and buisness of an attorney and solicitor, with great credit and reputation.

[And (g) the said plaintiff and one E. F. another of the attorneys of our said lord the king, before the king himself, and also a solicitor of the said High Court of Chancery, had as such attorneys and solicitors, been concerned in the prosecution of a certain commission of bankruptcy against the said defendant, and in divers proceedings and disputes concerning his estates, and effects, and the said plaintiff had always behaved and conducted himself therein with skill, care, judgment, and integrity, to wit, at, &c. (*venue*) aforesaid.] Yet the said defendant well *knowing the premises, but contriving, and falsely and fraudulently intending to injure the said plaintiff in his said credit and reputation, and also in his said profession and business, and to cause it to be suspected and believed that the said plaintiff had [conducted himself dishonestly, injudiciously, and improperly, in relation to the said commission of bankruptcy, proceedings, and disputes, *or*, "had been guilty of the misconduct hereafter mentioned to have been charged and imputed to him by the said defendant,"] and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff, heretofore, to wit, on, &c. (h) at, &c. (*venue*) wrongfully, maliciously, and injuriously composed and published, and caused to be composed and published, a certain false, scandalous, malicious, and defamatory libel of and concerning the said plaintiff [and E. F.] and of and concerning him in the way of and in respect to his [their] said profession and business [under the said commission of bankrupt,] containing, amongst other things, the false, scandalous, defamatory, and libellous matter following, of and concerning the said plaintiff [and E. F.] and of and concerning him in his [their] said profession and business, under the said commission of bankrupt,] that is to say:—[*here set out the libel verbatim, with appropriate innuendoes; as to the mode of doing which, see ante, vol. i. 434, 435, 436, and add any other counts the case may suggest.*] By means of which said premises, the said plaintiff hath been and is greatly prejudiced in his credit and reputation aforesaid, and brought into public scandal, infamy, and disgrace, and is suspected to have been guilty of the misconduct so as aforesaid mentioned to have been charged upon and imputed to him, and to have acted dishonestly and unskilfully in the way of his said business and profession, [and to have conducted himself dishonestly, injudiciously, and improperly, in relation to the said commission of bankruptcy, proceedings, and disputes,] and has been greatly vexed, harassed, oppressed, and impoverished, and has also lost and been deprived of divers great gains and profits, which would otherwise have arisen and accrued to him in his said profession and business, and hath been and is otherwise much injured and damnified therein, to wit, at, &c. (*venue*) [*if the plaintiff has sustained any special damage, state it.*] To the damage, &c.

FOR
LIBELS.
—
and another in his mode of conducting a commission of bankruptcy (f).
[*630]

Damage.

For that whereas the said plaintiff now is a good (i), true, honest, just,

(f) See the notes to the form, ante, 620, and also the notes to the form, post, 632 k, for verbal slander of an attorney. See forms in Wentw. Ind. iv. to xii.—2 Rich. C. P. 152.—4 Taunt. 355. A joint action lies where *two partners* are injured in their trade, 3 B. & P. 150; but where *two persons* are charged with a felony, they must bring

separate actions, Cro. Car. 513.—2 Saund. 117 a.

(g) This averment between brackets, should be omitted, if not applicable to the case.

(h) Day of publication, or about it.

(i) That this general averment of good character is not necessary, see ante, 620,

5. For a libel of plaintiff in his trade (i), imputing insolvency, &c.

FOR
WITNESSES,

and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (*venue*). And whereas also the said plaintiff, before and at the time of the committing of the grievances by the said defendant as hereinafter mentioned, was a ——— and the trade and business of a ——— then exercised and carried on and still doth exercise and carry on, to wit, at, &c. (*venue*) aforesaid. And whereas also the said plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty, of the offences and misconduct as hereafter stated to have been charged upon and imputed to him by the said defendant, or of any other such offences or misconduct, [*or, if the libel do not charge the plaintiff with any misconduct, then omit the last averment, and in the case of a libel imputing insolvency, say,* “and the said plaintiff hath always exercised and carried on, and still doth exercise and carry on, the said trade and business with integrity and punctuality of dealing, and has always been able and willing to pay his just debts, and hath never been in insolvent or bad circumstances.”] By means of which said premises, the said plaintiff, before the committing of the said several grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, and was daily and honestly acquiring great gains and profits in his aforesaid trade and business, to the comfortable support of himself and his family, to wit, at, &c. (*venue*) aforesaid.—[*If there be any occasion for an inducement to explain the libel, here insert it.*] Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff had been and was guilty of the offences and misconduct hereafter stated to have been charged upon and imputed to him by the said defendant, [*or, if the libel impute insolvency, say,* “had been and was in bad and insolvent circumstances, and incapable of paying his just and true debts,”] and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff in his aforesaid trade and business and otherwise, heretofore, to wit, on, &c. [*day of publication of the libel, or about it*] at, &c. (*venue*) aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the said plaintiff, and of and concerning him in his aforesaid trade and business, [*if there be occasion to refer to a special inducement before stated, do so here, saying,* “and of and concerning the said ———,”]

and it had better be omitted if the libel do any moral virtue; as if it charge him with not charge the plaintiff with the want of being in insolvent circumstances only.

a certain false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libelous matter, of and concerning the said plaintiff and of and concerning him in his aforesaid trade and business [*if there be occasion to refer to a special inducement before stated, do so here, saying*, "and of and concerning the said —"] as follows, that is to say, [*here set out the libel, with proper innuendoes, as to which, see the notes, ante 623 ; add other counts, as the case may suggest ; state the damages as follows :*—By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, [*or, if the libel impute insolvency, say*, "to whom the integrity and good and solvent circumstances of the said plaintiff were unknown,"] have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the said plaintiff to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the said defendant [*or, if the libel impute insolvency, say*, "to have been and to be in bad and insolvent circumstances, and incapable of paying his just debts,"] and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to deal or have any transaction with the said plaintiff, in his aforesaid trade and business, or otherwise, as they were before used and accustomed to have, and otherwise would have had, to wit, at, &c. [*here add special damage, if any.*] To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

For
libel.

Damage.

For that whereas the said plaintiff, before the committing of the grievances by the said defendant as hereinafter mentioned, had been and was accustomed to employ himself as a servant, and gain his living by that employment, and had been retained and employed by, and in the service of the said defendant, as his [footman] and servant, and in that capacity had behaved and conducted himself with [good temper, activity, and civility (*l*),] and never was, or until the *time of the committing such grievances, was suspected to have been, or to be [bad tempered, lazy, or impertinent (*l*),] to wit, at, &c. (*venue*). By means of which said several premises, the said plaintiff, before the committing of such grievances by the said defendant, had not only deservedly gained the good opinion of all his neighbors, and divers other good and worthy subjects of this realm, but had also supported himself, and would thereafter have supported himself, by his honest, faithful, diligent, and attentive exertions in the service of his masters and employers, had not such grievances been committed as hereinafter mentioned, to wit, at, &c. (*venue*) aforesaid. And

6. For a libel upon plaintiff, in his employment as a servant, against his master, in a letter to a person who was about to employ him, who, in consequence refused to take him into his service (*k*).

[*631]

(*k*) This action is not sustainable unless express malice can be proved, see Bul. N. P. 9.—1 T. R. 110.—3 B. & P. 587. And see fully the law in 1 Stark. on slander, 2d

ed. 293 to 300. 8 B. & C. 578 ; and 9 Id. 403.

(*l*) These words must depend on the terms used in the libel.

FOR
LIBELS.

whereas also the said plaintiff, before and at the time of the committing of such grievances, had quitted and left the service of the said defendant, and had been recommended to, and was likely to be retained and employed by, and in the service of, one E. F. as a [footman] and servant, for certain wages, to be therefore paid to the said plaintiff, to wit, at, &c. (*venue*). Yet the said defendant, well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in his said character, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, and particularly with the said E. F. and to cause it to be suspected and believed that the said plaintiff was not fit to be employed as a servant, and that he was [bad tempered, and a lazy and impertinent fellow,] and thereby to prevent the said E. F. from retaining and employing the said plaintiff in his service, as he otherwise might and would have done, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff, and to deprive him of the means of supporting himself by honest and industrious employment, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, wrongfully and unjustly did compose and publish a certain false, scandalous, malicious, and defamatory libel of and concerning the said plaintiff, and of and concerning him in his said employment, and as such servant, containing therein the false, scandalous, malicious, and defamatory and libellous matter following, of and concerning the said plaintiff, and of and concerning him in his said employment, as such servant as aforesaid, that is to say, [*here set out the libel with proper innuendoes, which in the case from which this form was drawn, was as follows*: he (meaning the said plaintiff) is a bad-tempered, lazy, impertinent fellow.]-[*Add other*

Damages. counts as the case may suggest, and a count stating the libel to be of and concerning plaintiff, without reference to his character of servant.]-By means of the committing of which said grievances the said plaintiff hath been, and is greatly injured in his said good character, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, insomuch that divers of those neighbors and subjects, and in particular the said E. F. to whom the [good-temper, fidelity, activity, and civility, (*m*)] of the said plaintiff, in the capacity of a servant, and otherwise, were unknown, have, on occasion of the committing of the said grievances, from thence hitherto suspected and believed, and the said E. F. still doth suspect and believe the said plaintiff to have been and to be

[*682] *a bad-tempered, lazy, and impertinent person (*n*),] and unfit to be retained or employed in the capacity of a servant. And also by reason thereof, the said E. F. afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, refused and declined to retain and employ the said plaintiff in his service as a [footman] or otherwise, as he otherwise might and would have done; and by reason thereof, he the said plaintiff hath not only lost and been deprived of the support, sustenance, wages, gains, and emoluments, which might and would otherwise have arisen and accrued to him, from and by reason of his being so retained and employed as last aforesaid, but hath from thence hitherto remained and continued, and still is out of employ, and deprived of the opportunity of supporting

(*m*) These averments must depend on the words used in the libel.

(*n*) These averments must depend on the words used in the libel.

himself by honest and industrious means, and hath been and is, by means of the said several premises, otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

FOR
LIBEL.

[*Proceed as usual, as in the form, ante, 620, to the asterisk, 622, mutatis mutandis, and then as follows :*]—"In a certain newspaper called the — (the title of the newspaper,) falsely and maliciously, &c."—[*Proceed as usual to set out the libel.*]

7. For a libel in a newspaper (*o*).

[*Proceed as usual, as in the form, ante, 620, to the asterisk, 622, mutatis mutandis, and then as follows :*]—"In the form of a letter addressed to one E. F. falsely and maliciously, &c."—[*Proceed as usual to set out the libel.*]

8. For a libel in a letter (*o*).

[*Proceed as usual, and after the statement of the defendant's malicious intent, as ante, 622, or ante, 627 *mutatis mutandis, proceed thus :*] "falsely, wickedly, and maliciously did [compose and] publish, and cause and procure to be [composed and] published of and concerning the said plaintiff, [and of and concerning," &c. if any special inducement to be referred to,] a certain false, scandalous, malicious, and defamatory libel, in a certain part of which said libel there was and is contained, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, [and of and concerning, &c. if any special inducement to be referred to,] that is to say, [here set out the libellous paragraph, with innuendoes, as usual, then proceed thus :] and in another part of which said libel there was and is contained, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, [and of and concerning, &c. if any special inducement to be referred to,] that is to say, [here set out the libellous paragraph, with innuendoes, as usual :] and in part, &c. [so proceeding on to state any other libellous paragraph, and conclude as in other cases.]

9. For a libel containing distinct passages of libellous matter (*p*).
[*633]

[*Commencement and conclusion as usual, as ante, 596.*]—For that whereas the said plaintiff now is, good (*r*), true, honest, just, and faith-

FOR
VERBAL
SLANDER.

(*o*) There is no necessity for this averment, though it is usual. In *Richmond v. —*, M. T. 1830, the declaration stated that the defendant "published a certain libel, &c. in the *Times*," without saying "in a certain newspaper called the *Times*," and the court held this sufficient.

(*p*) It is not necessary to set out the whole of the obnoxious publication, it is sufficient to extract the obnoxious passages, provided their sense be clear and distinct, 8 Mod. 339.—1 Stark. on Slander, 2d edit. 380. But where distinct passages are extracted from the same libel, and set out in

the declaration, care should be taken to distinguish them, as in the above form, or otherwise, for if the facts were to be set out continuously, and the sense were thereby to be altered, the variance would, it seems, be fatal, 1 Campb. 350.—Ry. & Moo. C. N. P. 112.—1 Stark. on Slander, 380, 381. See *query*.

(*q*) As to the mode of framing declarations for slander in general, see ante, vol. i. 428 to 438, and the notes to the form, ante, 620.

(*r*) That there is no necessity for this general inducement, see ante, 620, note.

10. For slanderous words, in directly accusing the plaintiff of a specific offence (*q*).

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VERBAL
SLANDER.

[*634]

Special
inducement.

[*635]

ful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (*venue*).—And whereas also the said plaintiff hath not ever been guilty, or, until the time of the speaking and publishing of the several false, scandalous, malicious, and defamatory words, [*or say*, “committing of the said several grievances”] by the said defendant, as *hereinafter mentioned, been suspected to have been guilty of theft, [*the crime charged*] or of any other crime as hereafter stated to have been charged upon and imputed to him by the said defendant. By means whereof the said plaintiff, before the committing of the said several grievances by the said defendant, as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c. (*venue*) aforesaid.—[*Here state the special inducement necessary to explain the slander, and as to which inducement, see ante, 621, and vol. i. p. 429. In the case upon which this precedent was framed, the inducement was as follows:—*And whereas also before and at the time of the committing of the grievances by the said defendant, as hereinafter mentioned, divers goods and chattels, to wit, two spoons and six linen cloths of one E. F. of the value to wit, of £5, had been and were feloniously stolen, taken, and carried away, to wit, at, &c. (*venue*) aforesaid.]—Yet the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously (*s*) intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that he the said plaintiff had been and was guilty of [theft], as hereafter stated to have been charged upon and imputed to him by the said defendant, and to subject him to the pains and penalties by the laws of this kingdom, made and provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin him the said plaintiff, heretofore, to wit, on, &c. [*day of speaking the words, or about it. The precise day stated need not be proved*] at, &c. (*venue*) aforesaid, in a certain discourse, which the said defendant then and there had of and concerning the said plaintiff, and of and concerning the said [theft of the said goods and chattels,] in the presence and hearing of [one G. H. and of] divers (*t*) good and worthy subjects of our lord the *king, then and there, in the presence and hearing of the said last-mentioned subjects *falsely and maliciously (*u*) spoke and published, of and concerning the said plaintiff (*w*)

(*s*) As to the statement of the defendant's malicious intent, see ante, 622, note (*u*).

(*t*) It is said that if the words are laid to be spoken before E. F. and others, it is sufficient to prove that they were spoken in the presence of others only, Bul. N. P. 6.

(*u*) As to the statement of the malicious intent, see ante, 662, note (*u*). The decla-

ration may be either, that the defendant “falsely spoke” the words, or that he spoke “the false words,” 1 Keble, 273.

(*w*) The declaration must show, by a colloquium or otherwise, that the words were spoken of and concerning the plaintiff, see ante, vol. i. 432.

FOR
VERBAL
SLANDER.

and of and concerning the said [theft of the said goods and chattels (x), the false, scandalous, malicious (y), and defamatory words following (z), that is to say, [he (a) (meaning the said *plaintiff (b) had a hand in the affair (meaning the said theft of the said goods and chattels), and thereby then and there (meaning that the said plaintiff had been and was guilty of feloniously stealing, taking, and carrying away the said goods and chattels).]—*Add such other counts as the slander may suggest. The following may be the form of a second or subsequent count for slander, indirectly accusing the plaintiff of an offence, and which is explained by an inducement in some prior count of the declaration.*]—And afterwards, to wit, on the day and year last aforesaid, at &c. (*venue*) aforesaid, in a certain other discourse which the said defendant then and there had of and concerning the said plaintiff, and of and concerning the said, &c. [*the matter alluded to in the inducement*] in the presence and hearing of divers other good and worthy subjects of this realm, the said defendant further contriving and intending as aforesaid, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said, &c. [*the matter alluded to in the inducement*] the false, scandalous, malicious, and defamatory words following, (that is to say) &c. [*Here set out the slander with proper innuendoes. Conclude, stating the damage thus:*]—By means of the speaking and publishing of which said several false, scandalous, malicious, and defamatory words, [*or, "committing of which said several grievances"*] by the said defendant as aforesaid, the said plaintiff hath been, and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the

Second
count.

Damage.

(x) This averment is material when the words are actionable only with reference to some prior inducement in the declaration, see ante, vol. i. 432.—2 Saund. 307 a, note 1.

(y) This allegation is a sufficient averment of malice, ante, 622, n.—1 Saund. 249 a, n. 2. 1 East, 563, but the word "*false*" is not necessary, Rep. temp. Hardw. 340.

(z) Verbal slander should be stated in this manner, and it would be improper to state that the words were "*in substance and to the effect following*," ante, vol. i. 434.—Rep. temp. Hardw. 306—3 B. & A. 503. "These words, *vel consimilia*," would be too uncertain, Cro. Eliz. 645. The words themselves should be stated, 3 M. & S. 110.—6 Taunt. 169; and a count merely alleging that the defendant, "in a certain discourse, &c. falsely and maliciously charged and asserted, and accused the plaintiff of being in insolvent circumstances," and stating special damage, without setting out the words, was held insufficient, and the judgment was arrested, 3 M. & S. 110. But sometimes a general statement would be cured by verdict, 3 D. & R. 519.—2 B. & C. 519, S. C.—Ante, vol. i. 434, note.

(a) The slanderous words should be stated as they were uttered, ante, vol. i. 434. Proof

of words spoken in the *third* person will not support a declaration for words spoken in the *second* and *vice versa*, 4 T. R. 217. Bul. N. P. 5. Nor will words spoken by way of interrogation support a charge of words spoken affirmatively, 8 T. R. 150. The plaintiff need not prove all the words laid, if they do not constitute one entire charge, and the non-proof would not alter its meaning, though he must prove such of them as will be sufficient to maintain his action, and it will not suffice to prove equivalent expressions, ante, vol. i. 435.—Though some of the words spoken may not be actionable, yet if they be spoken at the same time as those which are actionable, they may all be stated in one count, 10 Rep. 131 a.—2 Saund. 307 a, n. 1.—3 Wils. 185.—Dyer, 75 a. But if words which are not actionable be stated by themselves in a distinct count, and entire damages be given, judgment will be arrested, *id.* *ibid.* It has been held, that words not stated in the declaration, may, though actionable in themselves, be given in evidence, in aggravation of damages, Peake C. N. P. 125, 22, 166.—Bul. N. P. 7—1 Camp. 48. 9.

(b) As to the use and necessity for an innuendo, see ante, vol. i. 436.

FOR
VERBAL
SLANDER.

[*637]

innocence and integrity of the said plaintiff in the premises were unknown have, on account of the speaking and publishing of which said several false, scandalous, malicious, and defamatory words, [or, "committing of the said grievances"] by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been, and to be a person guilty of [theft], so as aforesaid charged upon and imputed to him by the said defendant, and have by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, *and still do refuse to have any transaction, acquaintance, or discourse, with him the said plaintiff, as they were before used and accustomed to have and otherwise would have had, and also, by reason of the premises, &c. [*Here state any special damage that may have arisen to plaintiff in consequence of the slander.*].—And also by means of the premises the said plaintiff hath been, and is otherwise much injured and damnified, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

11. For charging plaintiff with perjury on the execution of a writ of inquiry, with a special inducement to explain the words (c).

[*638]

[*Commence with the usual inducement of the plaintiff's good character, as in the preceding form and then proceed:*].—And whereas also before the speaking of the several false, scandalous, malicious, and defamatory words by the said defendant of and concerning the said plaintiff, in the — counts hereinafter mentioned, a certain action was depending in his majesty's court of exchequer at Westminster, wherein one W. H. was the plaintiff, and one W. S. the defendant, and in which said suit, before the speaking and publishing of the same words, to wit, on, &c. a certain inquisition of damages sustained by the said W. H. was in due form of law taken before the sheriff of, &c. by the oath of twelve good and lawful men of his bailiwick, at, &c. — on the taking of which said inquisition as aforesaid, he the said plaintiff was duly sworn, and did take his corporal oath upon the Holy Gospel of God, before the said sheriff, he the said sheriff then and there having sufficient and competent power and authority to administer an oath to the said plaintiff in that behalf, and the said plaintiff being so sworn, and having so taken his corporal oath, was then and there examined, and did give his evidence as a witness on the taking of the said inquisition, to wit, at, &c. (*venue*) aforesaid; and the said plaintiff further saith, that the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and intending to injure the said plaintiff in his aforesaid good name, fame, and character, and bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, and to cause it to be suspected and believed by those neighbors and subjects, that he the said plaintiff had been, and was guilty of perjury, *and to subject him to the pains and penalties by the laws of this kingdom made and provided against, and inflicted upon persons guilty thereof, and also to vex, harass, oppress, impoverish, and wholly ruin him the said plaintiff heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, in a certain discourse which the said defendant then and there had with the said plain-

(c) See the notes to the preceding form, and another form for a libel, charging plaintiff with perjury, ante, 630.

FOR
VERBAL
SLANDER

tiff, in the presence and hearing of divers good and worthy subjects of this realm, the said defendant, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said inquisition so taken as aforesaid, and of and concerning the said evidence so given by the said plaintiff as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say, &c. [*here set out the words, with innuendoes.*].—By means &c. [*as in the preceding form, to the end.*]

[*Commencement and conclusion as usual, as ante, 596.*].—For that whereas the said plaintiff now is a good (e), true honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known to be a person of good name, fame, and credit, to wit, at, &c. (*venue.*) And whereas also the said plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the said defendant, as hereinafter mentioned, been suspected to have been guilty of [*perjury, the offence charged,*] as hereafter stated to have been charged upon and imputed to the said plaintiff by the said defendant, or of any other such crime. By means of which said premises, the said plaintiff before the committing of the several grievances by the said defendant, as hereafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c. (*venue*) aforesaid. Yet the said defendant well knowing the premises, but greatly *envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously (f) intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects that the said plaintiff had been and was guilty of [*perjury,*] as hereafter stated to have been charged upon and imputed to him, and to subject him to the pains and penalties by the laws of this kingdom made and provided against, and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin him, heretofore, to wit, on, &c. (*day of speaking the words, or about it. The precise day stated need not be proved,*) at, &c. (*venue*) aforesaid, in a certain discourse which the said defendant then and there had of and concerning the said plaintiff (g), in the presence and hearing of divers good and worthy subjects of our lord the now king, and then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff (g), the

12. For slanderous words, directly accusing the plaintiff of perjury or other specific offence (d).

[*639]

(d) See the notes to the preceding form.

(f) See note (u), ante, 622.

(e) That there is no necessity for this inducement of general good character, see ante, 620, notes.

(g) See ante, 635, notes (w) & (z). Vol. i. 432.

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Second
count.

Damage.

[*640]

Special
damage.

false (h), scandalous, malicious, and defamatory words following, that is to say, [*here set out the words, with proper innuendoes as thus, he (meaning the said plaintiff) is perjured.*—]*[Add such other counts as the words may suggest. The following is the form of a second or subsequent count:]*—And afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, in a certain other discourse which the said defendant then and there had in the presence and hearing of divers other good and worthy subjects of this realm, the said defendant further contriving and intending as aforesaid, then and there in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say; [*here set out the words in another shape; conclude with stating the damage, which may be thus:*—]By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in his good name, fame and credit, *and brought into public scandal, infamy, and disgrace with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects to whom the innocence and integrity of the plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the said plaintiff to have been, and to be, a person guilty of [perjury,] so as aforesaid charged upon and imputed to him by the said defendant, and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse to have any transaction, acquaintance, or discourse with the said plaintiff as they were before used and accustomed to have, and otherwise would have had; and also, by means of the premises, &c. [*here state the special damage, if the plaintiff has sustained any,*] and also by means of the premises, the said plaintiff hath been and is otherwise greatly injured and damnified, to wit, at, &c. (venue) aforesaid. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

13. For words slandering plaintiff in his office, as for accusing a justice of peace, with having pocketed fines, forfeited by persons convicted by him (i).

[*641]

For that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and now is an honest, upright, and faithful subject of this realm, and at the several times hereinafter mentioned, and for a long time before, was and still is one of his Majesty's justices of the peace (k), assigned to keep the peace of our said lord the king, in and for the county of S. and hath always, during the time of his being such justice, hitherto behaved and conducted himself righteously, faithfully, properly, and honestly, in the execution of his said office of justice of the peace, and never was guilty of the offences or misconduct hereinafter stated to have been charged upon *and imputed

(h) See ante, 622, note (u); 635, notes (w) & (z).

(i) Words imputing corruption to a magistrate are actionable, 4 Rep. 19.—Cro. Jac. 90; though words imputing want of ability do not appear to be so, 2 Salk. 695.—See also Holt, 632.—Cro. Car. 14, 223.—3 Wils. 177. An indictment will not lie

unless the words are spoken to the justice in the execution of his office, 2 Campb. 142.—Stra. 1157.—And see further, Burn's Justice, vol. iii. 476, 477, 26th edit.

(k) This is a better averment than that plaintiff was "duly qualified," ante, vol. i. 430.

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to him by the said defendant, nor until the time of the committing of the grievances by the said defendant as hereinafter mentioned, was ever suspected of any such offences or misconduct; by reason whereof the said plaintiff had deservedly acquired the honor, esteem, and good will of all his neighbors and others, good and worthy subjects of our said lord the king, to whom he was known, to wit, at, &c. (*venue*). Nevertheless the said defendant, well knowing the premises, but contriving, and wickedly and maliciously intending to injure the said plaintiff in his good name, credit, and reputation, and to bring the said plaintiff into great disgrace, scandal, and distrust, as such justice as aforesaid, amongst all his neighbors and other good and faithful subjects of our said lord the king, on, &c. at, &c. (*venue*) aforesaid, in a certain discourse which the said defendant then and there had of and concerning the said plaintiff, and of and concerning the said plaintiff in the execution of his said office of justice of the peace, in the presence and hearing of the said subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning him in the exercise of his said office of justice of the peace, in the presence and hearing of the said last-mentioned subjects, these false, scandalous, and malicious words following, that is to say, &c.—[*Here set out the words, with proper innuendoes, and add such other counts as may be requisite, and conclude with the following damage:*]—By means of which said premises the said plaintiff hath been, and is greatly injured in his aforesaid good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects to whom the integrity of the said plaintiff were unknown, have, on occasion of the committing of the said several grievances, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been, and to be a person guilty of the offences and misconduct so as aforesaid mentioned to have been charged upon and imputed to the said plaintiff by the said defendant, and thereby, and otherwise by means of the premises, the said plaintiff hath been, and is greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.—[*If any special damage here state it.*]—To the damage of the said plaintiff of £— and therefore he brings his suit, &c.

Damage.

For that whereas the said plaintiff now is a good (*m*), true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, and esteemed, and accepted, by and amongst all his neighbors and others, good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (*venue*). And whereas also the said plaintiff, before, and at the time of the committing of the several grievances by the said defendant as here-

14. For words slandering plaintiff in his profession, as for slandering an attorney (l).

(l) Words which impute the want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession or trade in which the party is engaged are actionable, 1 Mal. Ent. 244.—3 Wils. 59, 187.—2 Bla. Rep. 750.—7 Moore, 200.—3

B. & B. 297, S. C.—3 B. & A. 702.—2 Car. & P. 146.—See the form of declaration for a libel on an attorney, ante, 629.

(m) That this general inducement of good character is unnecessary, see ante, 620, n.

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inafter mentioned, had been and was, and still is an attorney of the court of our said lord the king, before the king himself, [or, *if in C. P.* "before his majesty's justices of the Bench,"] and hath always used, exercised, and carried on, and still doth use, exercise, and carry on the profession and business of an attorney (n), with honesty, integrity, credit, and reputation, and hath not ever been guilty, or until the time of the committing of the said grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty of the dishonesty or misconduct as hereinafter mentioned, to have been charged upon and imputed to him by the said defendant, to wit, at, &c. (*venue*). By means of which said premises, the said plaintiff, before the committing of the several grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit, of all his neighbors and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c. (*venue*). And also by reason of the premises, the said plaintiff, in the way of his aforesaid profession and business, was daily and honestly acquiring great gains and profits therein, to wit, at, &c. (*venue*).—[*If any special inducement be necessary to explain the words, here insert it.*]—Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and falsely and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, injury, and disgrace, with and amongst all his neighbors, and other good and worthy subjects, of this kingdom, and to injure the said plaintiff in his said profession and business of attorney as aforesaid, and to cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff had conducted himself improperly and dishonestly, and without integrity, in his said profession and business, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff, heretofore, to wit, on, &c. [*on or about the day when the words were spoken*], at, &c. (*venue*), in a certain discourse which the said defendant then and there had, in the presence and hearing of divers good and worthy subjects of our lord the now king, then and there, in the presence and hearing of the said subjects, falsely and maliciously spoke and published, of and concerning the said plaintiff, in the way of his said profession and business (o), these false, scandalous, malicious, and defamatory words following, that is to say, &c.—[*Here state the words in as many different forms as possible, in order to meet every probable circumstance of the case.*]—[*Add such other counts as the case may suggest, and see the form of a second or subsequent count, ante, 639, mutatis mutandis.*—Con-

(n) A simple statement that plaintiff exercised his profession is sufficient, without alleging he was "duly qualified," &c. ante, vol. i. 430. It need not, it seems, be expressly averred, that "at the time of the speaking the words," &c. plaintiff exercised the profession. If it be alleged that he "was and is an attorney, &c. and hath for a long time carried it on, &c." it will suffice, 2 Roll. Rep. 84—Ante, vol. i. 430.—Where an averment of extrinsic matter is material, the allegation, that the slander applies to such extrinsic matter is matter of

description, and must in general be proved as laid, though unnecessarily minute. Thus, in slander of an attorney, if, after stating he was an attorney, it be averred he had conducted a particular suit, &c. and then state that the slander was published of and concerning his conduct in that suit, &c. it is essential to prove the existence of the suit, &c. and that the scandal had reference to the particular occasion stated, ante, vol. i. 430, and the authorities there collected.

(o) That this averment is divisible, see ante, vol. i. 430.

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Damage.

clude with the following averment of damage.]—By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff, hath been and is greatly injured in his said good name, fame, and credit, and also greatly injured in his said profession and business, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the said plaintiff to have been, and to be a person guilty of dishonesty and fraudulent practices, and to have acted dishonestly and improperly in his said profession and business of an attorney as aforesaid, and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any acquaintance or discourse with the said plaintiff, or to employ or have any transaction with the said plaintiff, in the way of his said profession and business, as they were before accustomed to have, and otherwise would have had. And by reason of the premises, the said plaintiff has been greatly vexed, harassed, oppressed, and impoverished, and has also lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him, in his said profession and business and otherwise, [*here add any special damage plaintiff has sustained*], and the said plaintiff, by means of the premises hath been, and is otherwise much injured and damnified therein, to wit, at, &c. (*venue*). To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

[*After the usual averment of the plaintiff's good and chaste character, and her innocence of the offence imputed to her, as ante, 627 a.*]—And whereas also the said plaintiff at the time of the committing of the grievances by the said defendant hereinafter mentioned, and long before, did use and exercise the business and employment of a domestic governess and instructress of children and young persons, living and residing together with such children and young persons, and thereby acquired great gains, profits, and advantages, and had always conducted herself with decorum, chastity, modesty, and propriety.—And whereas also the said plaintiff, before the speaking and publishing of the words hereinafter mentioned, had lived in the families of divers persons, to wit, the said defendants, one Mrs. — &c. &c. respectively, as such governess, and at the time of the committing of the grievances by the said defendant, as hereinafter mentioned, lived in the family of the said Mrs. — &c. to wit, at, &c. (*venue*). Yet the defendant well knowing the premises, and greatly envying the happy state and condition of the said plaintiff, but contriving and falsely and maliciously intending to injure and prejudice her in her good name, fame, and credit, and in her aforesaid business, and to be reputed an indecorous, unchaste, immodest, and improper person, and unfit to be employed as such governess, on, &c. at, &c. (*venue*) in a certain discourse which he the said defendant then and there had with one R. J. of and concerning

15. For accusing a governess of fornication (p).

FOR
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the said plaintiff, and of and concerning her in her said business, and of and concerning her behavior while she lived with the said defendant, falsely and maliciously, in the presence and hearing of the said R. J. spoke and published these several false, scandalous, malicious, and defamatory words of and concerning the said plaintiff, and of and concerning her in her said business, and her behavior while she lived with the said defendant, following, that is to say, &c.—[*here set out the words, with innuendoes, and add such other counts as may be useful; state the damage, as ante, 628, observing the notes, and any other special damage which the plaintiff may have sustained. See a form of special damage post, 641 m.*]

16. For words slandering plaintiff in his trade as by calling him a rogue, &c. (q).

[*Commencement and conclusion as usual, as ante, 596.*]—For that whereas the said plaintiff now is a good (r), true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (venue). And whereas also the said plaintiff was, before and at the time of the committing of the grievances by the said defendant, as hereinafter mentioned, and from thence hitherto hath been, and still is, a — (s) and has always exercised and carried on, and still doth exercise and carry on the same trade and business with integrity, honesty, and propriety of conduct, to wit, at, &c. (venue) aforesaid. And whereas also the said plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the said defendant, as hereinafter mentioned, been suspected to have been guilty, of the offences and misconduct as hereinafter stated to have been charged upon and imputed to him by the said defendant, or of — or any other offences or misconduct whatever. By means of which said premises the said plaintiff, before the committing of the said several grievances by the said defendant, as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy subjects of this realm to whom he was in any wise known; and had also thereby acquired, and was then daily and honestly acquiring great gains and profits in his trade and business to the comfortable support of himself and his family, and the great increase of his riches, to wit, at, &c. (venue) aforesaid. [*Here insert a special inducement, if any be requisite, to explain the slanderous words.*]—Yet the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wicked-

(q) Observe the general notes to the form, ante, 633. Words which impute to a person in his trade, however inferior, (1 Lev. 115.—5 B. & C. 160,) of fraudulent or dishonorable conduct, or of being in insolvent circumstances, are actionable, Lord Raym. 1480.—3 Bing. 104. It is said, however, that an action is not sustainable for saying a tradesman has charged an exorbitant sum for his goods, &c. unless fraud be

imputed, &c. Bac. Ab. Slander, B. 4. If defamatory words be spoken of two persons, affecting them in their joint trade, they may join in an action for the injury, 3 B. & P. 150.

(r) That this general inducement of good character is unnecessary, see ante, 630, note.

(s) As to the averment of the plaintiff's trade, see ante, vol. i. 430.

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ly and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects that the said plaintiff had been and was guilty of the offences and misconduct hereinafter stated to have been charged upon and imputed to him by the said defendant, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff in his said trade and business, and otherwise, &c. heretofore, to wit, on, [*day of speaking the words, or about it,*] at, &c. (*venue*) aforesaid, in a certain discourse which the said defendant then and there had, of and concerning the said plaintiff, and of and concerning him in his said trade and business, [*and if the words refer to matter stated in a special inducement, say "and of and concerning the said, &c."*] in the presence and hearing of divers good and worthy subjects of our lord the king, and then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning him in his said trade and business [*and of and concerning the said, &c.*] the false, scandalous, malicious, and defamatory words following, that is to say, "he" [meaning the said plaintiff] "is a great rogue and keeps false books." [*Here set out the slanderous words with proper innuendoes, and as to which innuendoes see ante, vol. i. 436 ; add one or more other counts as the case may suggest. The following is the form of a second or subsequent count :*]—And afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, in a certain other discourse which the said defendant then and there had of and concerning the said plaintiff, and of and concerning him in his said trade and business, in the presence and hearing of divers other good and worthy subjects of this realm, the said defendant further contriving and intending as aforesaid, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning him in his said trade and business, the false, scandalous, malicious, and defamatory words following (that is to say) [*here set out the words with proper innuendoes, properly varying them from the first count ; conclude with the following damage :*]—By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the said defendant, and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse to deal or have any transaction, acquaintance, or discourse with the said plaintiff in his said trade and business, or otherwise, as they were before used and accustomed to have, and otherwise would have had.—[*Here insert any*

Second
count.

Damage.

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special damage plaintiff may have sustained in consequence of the slanderous words, and if the damage be the loss of customers it may be stated as follows: "and also by means of the premises divers persons, to wit, A. B. and Co. and C. D. and E. F. who respectively, before the times of the committing of the said grievances had been and were customers of, and used and accustomed to deal with the said plaintiff in the way of his aforesaid trade and business, to the great profit and advantage of the said plaintiff, have from thence hitherto wholly neglected and refused, and still do neglect and refuse to continue as such customers, or to deal with the said plaintiff:"] and also, by means of the premises, the said plaintiff hath been and is otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

17. For words imputing insolvency to plaintiff, in the way of his trade (d).

For that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, a — and has always exercised, followed, and carried on, and still doth exercise, follow, and carry on, the same trade or business with integrity and punctuality of dealing, always well and truly, and punctually, paying and discharging his just debts, to wit, at, &c. (*venue*) aforesaid, and, until the time of committing the said grievances, has not ever been suspected to be unable or unwilling to pay his just debts.—By means of which said several premises the said plaintiff, before the committing of the grievances by the said defendant hereinafter mentioned, not only deservedly obtained the good opinion of all his neighbors, and other good and worthy subjects of this realm, but had also thereby acquired, and was then daily and honestly acquiring great gains and profits in his said trade or business, to the comfortable support of himself and his family, and the great increase of his riches, to wit, at, &c. (*venue*) aforesaid. [*If any special inducement be necessary, here state it. In the case upon which this form was framed, the inducement was as follows:*—And whereas also the said plaintiff, before the committing of the said grievances, had bought of one R. M. a large quantity of goods and chattels, to wit, [one ton weight of cheese] at and for a certain price or sum of money to be paid by the said plaintiff to the said R. M. at a certain time not elapsed at the time of the committing of such grievances, to wit, at, &c. (*venue*) aforesaid.] Yet the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his aforesaid good name, fame, and credit, and to bring him into great scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, and to cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff was poor, and in indigent and bad circumstances, and incapable of paying his just debts, and debts to be by him contracted, and thereby and otherwise to injure the said plaintiff in his aforesaid trade and business, and otherwise, [and to deprive him of the benefits of his said bargain with the said R. M.] and to vex, harass, oppress, impoverish, and wholly ruin him, heretofore, to wit, on, &c. at, &c. (*venue*) in a certain dis-

(d) Observe the note to the preceding form.

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course which the said defendant then and there had of and concerning the said plaintiff, and of and concerning him in the way of his aforesaid trade and business, falsely and maliciously spoke and published, in the presence and hearing of [one E. F. and] divers other persons of and concerning the said plaintiff, and of and concerning him in the way of his aforesaid trade and business, the false, scandalous, malicious, and defamatory words following; that is to say, &c. [*set out the words fully, with innuendoes, and such other counts as the case may suggest.*].—By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is not only greatly injured in his aforesaid good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors and other good and worthy subjects of this realm, to whom he was in any wise known, insomuch that divers of those neighbors and subjects, to whom the integrity and good circumstances of the said plaintiff were unknown, have, on occasion of the committing of the said grievances, from thence hitherto suspected and believed, and still do suspect and believe, the said plaintiff to have been and to be in indigent and bad circumstances, and incapable of paying his just debts, and to have been insolvent, and to be likely to remain insolvent, and have thereby, and on no other account whatsoever, refused to deal or have any transaction with the said plaintiff in his aforesaid trade or business or otherwise; and thereby also one E. F. who, before and at the time of the committing of the said grievances, had been used and accustomed to deal with, and who otherwise would have continued to have dealt with the said plaintiff in the way of his aforesaid trade and business, hath from thence hitherto wholly neglected and refused so to do, and thereby also, afterwards, and before the time appointed for the payment of the said price of the said goods and chattels, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, when the said plaintiff requested the said R. M. to deliver the said goods and chattels to the said plaintiff, he the said R. M. wholly refused to deliver the same, or any part thereof, to the said plaintiff, unless the said plaintiff would, before such delivery, pay the price thereof; and thereupon afterwards, and before the time appointed by the said contract for payment of the said price of the said goods and chattels, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, in order to procure the delivery thereof, was forced and obliged to pay, and did then and there pay to the said R. M. a large sum of money, to wit, the sum of £— and the said plaintiff, by means of the premises, hath been and is otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

General
damage.Special
damage.

For that whereas the said plaintiff, before and at the time of the said defendant's committing the grievances hereinafter mentioned was, and from thence hitherto hath been, and still is, lawfully possessed of certain rooms, with the appurtenances, at, &c. (*venue*) and during all that time kept the same, for the purpose of persons bathing therein, for certain reward to the said plaintiff in that behalf, to wit, at, &c. (*venue*) aforesaid, whereby the said plaintiff had acquired, and was then daily and honestly acquiring sundry great gains and profits, to the comfortable support of himself, and to the great increase of his riches, to wit, at, &c. (*venue*)

18. By the keeper of bathing rooms for words imputing a propensity to commit an unnatural crime, spoken in answer to

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a question
put to de-
fendant
by a third
person.

Second
count.

Damage
general
and spe-
cific.

aforesaid. And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, one E. F. had been and was, and still is, suspected by divers persons, subjects of this realm, to have been guilty of sodomitical practices. Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the said plaintiff in his aforesaid good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, and cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff had been, and was, guilty of sodomy and sodomitical practices and to subject him to the pains and penalties of this kingdom, made and provided against, and inflicted on persons guilty thereof, heretofore, to wit, on, &c. at, &c. (*venue*) in a certain discourse which he the said defendant then and there had in the presence and hearing of one J. S. in answer to a certain question then and there put to him by the said J. S. why he the said defendant had not returned to sleep at the said plaintiff's house, falsely and maliciously spoke and published of and concerning the said plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say, &c. [*Here set out the slander, with innuendoes*]; with this, that the said plaintiff will verify that the said defendant thereby then and there meant to insinuate, and have it understood by the said J. S. that the said plaintiff had been suspected to have been, and had been, guilty of sodomy and sodomitical practices, and so the said J. S. then and there understood the said words, to wit, at, &c. (*venue*) aforesaid. And afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, in a certain other discourse which the said defendant then and there had with the said J. S. in presence and hearing of divers good and worthy subjects of this realm, the said defendant, further contriving and intending as aforesaid, then and there, in the presence and hearing of the said last-mentioned subjects, in answer to a certain question then and there put him by the said J. S. that is to say, why he the said defendant had not returned to the said plaintiff, he the said defendant then and there, in the presence and hearing of the said J. S. then and there falsely and maliciously spoke and published, of and concerning the said plaintiff, these other false, scandalous, malicious, and defamatory words following, that is to say:—[*here state other words, and add such other counts as may be useful; state the damage thus:*] By means of the committing of which said several grievances by the said defendant, the said plaintiff not only had been and is greatly injured in his aforesaid good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the said premises were unknown, have, on occasion of the speaking and committing of the said grievances, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been and to be a person guilty of sodomitical practices, and have, on that account, from thence hitherto shunned and avoided the company and conversation of the said plaintiff, and have wholly refused, and still do refuse to have any acquaintance or discourse with him, as they were before used

FOR
VERBAL
SLANDER.

and accustomed to do, and would have done again, had not the said grievances been so committed as aforesaid, but also, by reason and by means of the committing the said grievances, and on no other account whatsoever, the Rev. Mr. C. and family, Mr. L., Mr. A., Mr. P., &c. &c. and divers other persons who would otherwise have frequented and bathed in and from the said rooms, with the appurtenances, of the said plaintiff, and paid him certain reward in that behalf, have, on occasion of the committing of the said grievances by the said defendant, wholly declined and neglected so to do; and the said plaintiff hath thereby lost and been deprived of divers great gains and profits which might and would have otherwise arisen and accrued to him from the said persons so bathing in the said rooms, with the appurtenances, as aforesaid, and the said plaintiff hath been, and is, by reason of the committing of the said several grievances, otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

For that whereas the said plaintiff now is a good (*u*), true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, and esteemed, and accepted, by and amongst all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. (*venue*). And whereas also the said plaintiff hath not ever been guilty, or, until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty, of the offences and misconduct as hereinafter stated to have been charged upon and imputed to the said plaintiff by the said defendant. By means of which said premises the said plaintiff, before the committing of the said grievances by the said defendant as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy subjects of this realm, to whom he was in any wise known, to wit, at, &c. (*venue*) aforesaid. Yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbors and subjects, that the said plaintiff had been and was guilty of the offences and misconduct hereafter stated to have

19. For
slander
actionable
only by
reason of
special de-
mages (*w*).

(*u*) That this averment of general good character is unnecessary, see ante, 320.

(*w*) Though the law will not permit the inference of damage in general, yet when damage has *actually* been sustained, the party aggrieved may sustain an action for the malicious publication of any untruth, 1 Lev. 53—1 Sid. 79, 80.—Com. Dig. Action on case for Defamation, D. 30.—1 Stark. on Slander, 2d ed. 190, *et seq.* The special damage sufficient to support an action, must be a certain, actual loss, (as of a particular marriage) or the acquaintance or

friendship of some *specified* person, 1 Rol. Ab. 36. 2 B. & P. 284. 3d edit. 372.—1 Taunt. 39—8 T. R. 130. When *probable* damage may be sufficient, as to say to a father of an heir apparent, that he is a bastard, &c. see 1 Rol. Ab. 38.—1 Lev. 261.—3 Bla. Com. notes by Chitty, 123 c. The special damage must be incident to and a natural consequence of the words spoken, and not the consequence of the unlawful act of a third person, 8 East, 1—Ante, vol. i. 440 to 444.

FOR
VERBAL
SLANDER.

been charged upon and imputed to him by the said defendant, and vex, harass, oppress, impoverish, and wholly ruin the said plaintiff, heretofore, to wit, on, &c. [*the day of speaking the words or about it*] at, &c. (*venue*) aforesaid, in a certain discourse which he the said defendant then and there had with the said plaintiff, of and concerning him the said plaintiff, in the presence and hearing of divers good and worthy subjects of our lord the king, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published, of and concerning the said plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say, "he," [meaning the said plaintiff] "is a rogue." [*Here set out the words, with proper innuendoes; add the following general damage:*—By means of the committing of which said several grievances by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been and to be a person guilty of the offences and misconduct so as aforesaid charged upon and imputed to him by the said defendant, and have, by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the said plaintiff, as they were before used and accustomed to have and otherwise would have had: and also, by means of the premises [*here state the special damage see several statements of special damage, in the preceding forms, and another, infra; conclude thus:*—And also, by means of the premises, the said plaintiff hath been and is otherwise greatly injured and damnified, to wit, at, &c. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

Special
damage
that plain-
tiff lost -
acquaint-
ances, &c.
(2).

By means of which said premises the said plaintiff hath been and is greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, friends and acquaintance, insomuch that divers of those friends and neighbors, and especially A. B., C. D., E. F., &c, [*the persons hereinbefore in that behalf named,*] have wholly refused to permit any intercourse or society with him, or to receive and admit him into their respective houses or company, or to find or provide for him, meat, drink, or any other benefit and advantages in any manner whatsoever, as they before that time had done, and otherwise would have continued to have done, whereby the said plaintiff hath lost all those valuable benefits and advantages, being to him theretofore of great value, to wit, of the value of £— and hath been and is greatly reduced and prejudiced in his fortunes and pecuniary circumstances, and obliged to incur a much greater expense in his necessary living and supporting himself, to a large amount, to wit, to the annual amount of £— than he theretofore had done, and otherwise would have

(2) This was held sufficient, see 1 Taunt. 40.

continued to do, and hath been and is greatly impoverished, and all his friends have wholly withdrawn their friendship and acquaintance, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

FOR
SLANDER
OF TITLE.

For that whereas the said plaintiff, before and at the time of the committing of the grievances by the said defendant hereinafter mentioned, was seised as of fee (*y*), of and in the reversion of and in certain land with the appurtenances, situate, lying and being in the parish of — in the county of — immediately expectant upon the death of one E. F. who was then seised of the same premises in her demesne as of freehold, for the term of her natural life, to wit, at, &c. (*venue*). And whereas the said plaintiff, before and at the time of the committing the grievances hereinafter mentioned, was desirous of selling his said estate and interest by public auction, and for that purpose, he the said plaintiff, before and at the time of the committing of the said grievances, to wit, on, &c. at, &c. (*venue*) caused his said estate and interest to be, and the same then and there were put up and exposed to sale by public auction, by one G. H. as the auctioneer and agent of the said plaintiff, in order that the same might be then and there sold for the said plaintiff, yet the said defendant well knowing the premises, but contriving and falsely and fraudulently intending to injure the said plaintiff, and to cause it to be suspected and believed, that he the said plaintiff had no title, estate, or interest of, in, or to the said land with the appurtenances, and to hinder and prevent the said plaintiff from selling or disposing of his said estate or interest in the same, and to cause and procure the said plaintiff to sustain and be put to divers great expenses attending the said exposure to sale, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff heretofore, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, wrongfully and injuriously, falsely and maliciously, caused and procured a certain person, to wit, one W. M. to attend and be present at and upon such exposure to sale of his the said plaintiff's estate and interest as aforesaid, and then and there upon such exposure to sale, and before the said estate and interest had been sold and disposed of, falsely and maliciously caused and procured the said W. M. to assert and represent, and the said W. M. did then and there accordingly, in the presence and hearing of divers liege subjects of our said lord the king, then and there present at and upon such exposure to sale as aforesaid, of and concerning the said plaintiff, and of and concerning the said G. H. so being such auctioneer as aforesaid, and of and concerning the said land with the appurtenances, and the said plaintiff's estate and interest therein, that, &c. [*here set out the words.*—And whereas also, the said defendant afterwards, to wit, on,

20. For slander of title, in procuring a third person to attend at a public auction room, and slander plaintiff's title to the estate he was about to sell there (z).

Second count

(y) Where in declaration for slander of title, it was stated that plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant (from whom he derived that interest) he had a clear right to dispose of the whole of that interest, but only a doubtful right to dispose of any portion of it; and the plaintiff averred, that he had put up his said interest to auction, and that defendant published a libel of and concerning his

right to sell the said interest, the evidence being, that he offered for sale a portion of that interest only, it was held a fatal variance, 2 B. & B. 486.—3 Dow. & Ry. 728, S. C.

(z) See other forms and law, 8 Wentw. 297.—3 Taunt. 246.—1 M. & S. 304, 639.—4 Burr. 2421.—1 Rep. 177. b—Vin. Ab. Sland. of Title, pl. 16.—1 Stark. on Slander, 2d edit. 192, 3.

FOR
SLANDER
OF TITLE

Damage.

&c. aforesaid, at, &c. (*venue*) aforesaid, further intending and contriving as aforesaid, then and there falsely and maliciously caused and procured a certain person to wit, the said W. M. to attend and be present at and upon the said exposure to sale of the said plaintiff's estate and interest, and then and there, at and upon such exposure to sale, and before the said estate and interest had been sold or disposed of, falsely and maliciously caused and procured the said W. M. to assert and represent, and the said W. M. did then and there represent, and assert in the presence and hearing of divers other subjects of our said lord the king, then and there present, at and upon such exposure to sale as aforesaid, of and concerning the said plaintiff and the said G. H. and of and concerning the said land, and the estate and interest of the said plaintiff therein, that, &c. [*stating the words, with the appropriate innuendoes.*]—By means of the committing of which said several grievances by the said defendant as aforesaid, divers of the said liege subjects of our said lord the king, who were so present at and upon the said exposure to sale as aforesaid, and who were then and there about to be and become purchasers of the said estate and interest of the said plaintiff, and who might, and would otherwise have bid for and purchased the same, and especially I. K. who was then and there about to bid for and who would otherwise have purchased the same, were then and there deterred and prevented from bidding for, and becoming the purchasers of the said estate and interest of the said plaintiff, and then and there, and from thence hitherto have respectively wholly declined to purchase the same, and thereby the said plaintiff was then and there hindered and prevented from selling and disposing of his said estate and interest, and hath thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but hath been forced and obliged to pay, lay out, and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £—, in and about the said exposure to sale, and expenses incidental thereto, to wit, at, &c. (*venue*) aforesaid.

21. For saying to a person who was about to hire plaintiff's ship that she was broken, and unfit to proceed to sea, whereby he refused to hire the ship (a).

For that whereas the said plaintiff, before and at the time of the said defendant's committing the grievance hereinafter mentioned, at, &c. (*venue*) was possessed, as of his own property, of a certain ship or vessel called, &c. and which said ship or vessel one P. B. before and at the time of the committing the grievances hereinafter mentioned, was about to hire, and would, had not such grievances been committed, have hired of the said plaintiff to go and proceed on a certain voyage for certain freight and reward to be therefore paid to the said plaintiff, nevertheless the said defendant, well knowing the premises, but contriving, and wrongfully and maliciously intending to injure the said plaintiff, and to induce the said P. B. not to hire the said ship or vessel as aforesaid, and thereby to deprive the said plaintiff of all the profits, emoluments, rewards, and advantages he would have derived and acquired from the said ship or vessel being hired as aforesaid, heretofore, to wit, on, &c. at, &c. (*venue*) in a certain discourse which the said defendant then and there had with the said P. B. of and concerning the said ship or vessel, in the presence and hearing

(a) See the last form and notes.

FOR
SLANDER.

of the said P. B. falsely and maliciously spoke and published, of and concerning the said ship or vessel, the false, scandalous, and malicious words following, that is to say, &c. thereby then and there meaning that the keel and floors of the said ship or vessel were broken at the time when he the said defendant had seen the same, whereas in truth and in fact, at no time when he the said defendant saw the said ship or vessel, nor when he spoke and published the said slander as aforesaid, her keel was in any place hove up eighteen inches in a straight line, nor the splice or scuff of the said keelson as aforesaid, nor was the said ship or vessel in any manner so imperfect as the said defendant so asserted and alleged as aforesaid. By means of the speaking and publishing of which said several false, scandalous, and malicious words as aforesaid, the said defendant giving credit to, and believing that the said representations and assertions were true, afterwards, to wit, &c. aforesaid, at, &c. (*venue*) aforesaid, wholly refused to hire the said ship or vessel as aforesaid, and thereby the said plaintiff lost and was deprived of all the profits, emoluments, rewards, and advantages he would have derived, of and from the said ship or vessel having been so hired as aforesaid; and the said plaintiff hath been also, by means of the speaking and publishing the said several words as aforesaid otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.

[*Proceed as usual, as in the above form, to the statement of the colloquium inclusive, and then proceed thus:*—In an ironical manner falsely and maliciously spoke and published of and concerning the said plaintiff, the ironical, false, scandalous, malicious, and defamatory words following, that is to say, he (meaning the said plaintiff) is no thief, (thereby then and there meaning that the said plaintiff had been and was a thief, and the said subjects of our said lord the king then and there understood that that was the meaning of the said words.)—[*Conclude as in other cases.*]

22. For slander, where the words are spoken ironically (b).

[*Proceed as usual, as in other cases, until the colloquium, and instead of the usual colloquium and averment of speaking the words, proceed as follows:*—to wit, on, &c. at, &c. (*venue*) in a certain discourse which he the said defendant then and there had with the said plaintiff, of and concerning the said plaintiff, in the presence and hearing of divers good and worthy subjects of our lord the now king, and in answer to the following question, then and there, in the presence and hearing of the said last-mentioned subjects, put by the said plaintiff to the said defendant, that is to say, "What do you (meaning the said defendant) mean to say I (meaning himself the said plaintiff) am a sheep-stealer;" then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke, and published, to, and of and concerning the said plaintiff, these false, scandalous, malicious, and defamatory words following, that is to say, "Yes, you (meaning the said plaintiff) are," thereby then and there meaning that the said plaintiff had been and was guilty of sheep-stealing.—And afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, in a certain other discourse which the said defendant then and there had with the said plaintiff, of and concerning the

23. For slander, where it is to be collected from a question and answer (c).

Second count.

(b) If words are spoken ironically, there must be an express averment that they were so spoken, 11 Mod. 86.

(c) It is requisite to state the slander in this case, as in the above form, see 8 T. R. 150.—4 B. & C. 247.

FOR
SLANDER.

said plaintiff, in the presence and hearing of divers good and worthy subjects of our lord the now king, and in answer to a certain question whereby the said plaintiff did then and there, in the presence and hearing of the said last-mentioned subjects, interrogate and ask of the said defendant, whether the said defendant meant to say that the said plaintiff was a sheep-stealer, then and there, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke, and published, to, and of and concerning the said plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say, "Yes, you (meaning the said plaintiff) are," thereby then and there meaning that the said plaintiff had been and was guilty of sheep-stealing.

[*642]
FOR
CRIMINAL
CONVER-
SATION
(d).

*[*Commencement as ante*, 596.]—For that whereas the said defendant contriving, and wrongfully, wickedly, and unjustly intending to injure the said plaintiff and to deprive him of the comfort, fellowship, society, aid, and assistance of E. F. the wife of the said plaintiff, and to alienate and destroy her affection for the said plaintiff, heretofore, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P. or by original, say*, "before the commencement of this suit,"] at, &c. (*venue*) wrongfully (*e*), wickedly, and unjustly debauched and carnally knew the said E. F. then and there, and still being the wife (*f*) of the said plaintiff, and thereby the affection of the said E. F. for the said plaintiff, was then and there *alienated and destroyed, and also, by means of the premises, the said plaintiff hath thence hitherto

(d) See form in trespass, post, 855, which is most usually adopted. See the points relating to this action in Selw. N. P. Adultery.—Bul. N. P. 26.—Bac. Ab. Marriage, E. 2.—3 Bla. Com. 139. May change venue, see 10 East, 32. I have not met with any printed form in which the declaration for Crim. Con. was framed *in case*; the injury has always been described, as committed with *force*, the law supposing force and constraint, the wife having no power to consent, 3 Bl. Com. 139. 7 Mod. 79.—Bac. Ab. Marriage, E. 2; and in 2 New Rep. 485.—2 M. & S. 436, 7, the action was considered as *properly* in trespass. The action, however, is in effect *in case*, 6 East, 387, 251, because, *first*, the wrong complained of is not immediate, but consequential, the gist of the action not being the supposed assault on the wife, but the consequent corruption of the body and mind of the wife. 6 East, 389; *secondly*, that the plaintiff may declare with a *quod cum*, which is improper in trespass; *thirdly*, that the injury may be stated to have been committed "on divers days and times, &c." which is improper in trespass for an assault, 6 East, 391, 395; *fourthly*, that the plea of the Statute of Limitations, is not guilty within six years. 2 Burr. 753.—6 East, 387, and not as in trespass for an assault, within four

years. 2 Salk. 420. And *lastly*, that the plaintiff is entitled to full costs, though he should not recover 40*s.* damages. 3 Wils. 319.—1 Salk. 206.—2 Ld. Raym. 831. When it may be doubtful whether the criminal conversation can be proved, and the defendant has been guilty of enticing away, or harboring the wife, it may be advisable to add counts for such injuries, and which may be framed as in the form in Willea, 578, 9, 80: and it may be advisable in that case to frame the count as in the form, post, 645.

(e) In an action for debauching a wife or servant, it is not necessary to allege, or prove, that the defendant *knew* that the female was the wife or servant of the plaintiff, though in an action for seducing away or harboring a wife or servant, such allegation and evidence are necessary. Peake, C. N. P. 55.—Peake's Law of Ev. 134.—Willes, 577.

(f) In an action for Crim. Con. the plaintiff must prove an actual marriage. 4 Burr. 2057. Peake's Law of Evid. 300. Phil. on Evid. 7th edit. 206.—Selw. N. P. 14, 16: but in an action of trespass by husband and wife, for the battery of the wife, it is sufficient to prove reputation of marriage. Stra. 480.

wholly lost and been deprived of the comfort, fellowship, society, aid, and assistance of the said E. F. his said wife, in his domestic affairs, which the said plaintiff during all that time ought to have had, and otherwise might and would have had, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of £—, and therefore he brings his suit, &c.

FOR
CRIMINAL
CONVER-
SATION.

[*Commencement as ante, 596.]—For that whereas the said defendant, contriving, and wrongfully and unjustly intending to injure the said plaintiff, and to deprive him of the service and assistance of E. F. the daughter and servant of the said plaintiff, heretofore, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [or, if in C. P. by original, say, “before the commencement of this suit,”] at, &c. (*venue*) debauched and carnally knew the said E. F. then and there, and from thence, for a long space of time, to wit, hitherto, being the [daughter and] servant (*h*) of the said plaintiff, whereby the said E. F. became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for the space of nine months then next following, at the expiration whereof, to wit, on, &c. at, &c. (*venue*) aforesaid, she the said E. F. was delivered of the child with which she was so pregnant as aforesaid. By means of which said several premises, she the said E. F. for a long space of time, to wit, from the day and year first above mentioned, hitherto, became and was

FOR DE-
BAUCHING
DAUGH-
TERS, &c.
For de-
bauching
a daugh-
ter and
servant
(*g*).
[*644]

(*g*) As to actions by a parent or master, in that character, See Bac. Ab. Master, and Servant, O.—Peake's Law of Ev. 333.—2 New R. 476.—1 Phil. Evid. 7th edit. 215. This action lies for debauching an adopted daughter, 11 East, 23. For the battery of a servant it is clear, that trespass *vi et armis* is proper, though the injury to the master is not immediate, but consequential, ante, 642, n. a.—6 East, 390. A parent in that character merely, cannot support an action for debauching or beating his daughter, which is only sustainable in respect of the supposed loss of service, some slight evidence of which must in general be adduced. 5 East 45.—5 T. R. 360.—2 T. R. 168.—Peake's C. N. P. 55, 233.—Sir T. Raym. 259.—9 Rep. 113 a. Holt, C. N. P. 451.—See 2 Star. 493. The declaration may be *vi et armis*, 3 Wils. 18; and in 2 New Rep. 476, the court said, that form of action is proper, but it may be framed in *case* when the action is merely for the seduction and loss of service. 2 T. R. 167.—6 East, 587, but where the offence is accompanied with an illegal entry into the father's house, he may declare in trespass for the entry, and allege the seduction and loss of service as consequential. 2 T. R. 167.—2 N. R. 476.—2 M. & S. 438, where see a form in trespass, post, 855. The daughter is a good witness, 2 Stra 1064, though she need not be called

as a witness for plaintiff, Holt, C. N. P. 451. The not calling her, however, renders the plaintiff's case open to observation. The daughter cannot be cross-examined as to illicit intercourse with other men, and evidence of a promise of marriage is not admissible, and the plaintiff cannot call witnesses to the girl's good character, unless the defendant has by evidence attacked it. 3 Campb. 519.—1 Campb. 463. Evidence of mental pain is admissible, 3 Esp. 119; and the state and situation of the family may be proved in aggravation of damages, id.—It may also be proved in aggravation of damages that the defendant professed to visit the family, and was received as the suitor of the daughter, 5 Price, 641. Expenses actually incurred (such as physician's fee,) and paid, may be proved and recovered, 1 Stark. C. N. P. 287. The defendant may, in mitigation of damages, adduce any evidence of the improper, negligent, and imprudent conduct of the plaintiff himself; and where he knew that the defendant was a married man, and allowed his visits in the probability of a divorce, Lord Kenyon held the action could not be supported, Peake's Rep. 240.

(*h*) It is not necessary to allege, or prove, that the defendant knew that the female was the daughter or servant of the plaintiff, ante, 643, note.

FOR DE-
BAUCHING
DAUGH-
TERS, &c.

unable to do or perform the necessary affairs and business of the said plaintiff, so being her [father and] master as aforesaid, and thereby the said plaintiff, during all that time, lost and was deprived of the service of his said [daughter and] servant, to wit, at, &c. (*venue*) aforesaid; and also, by means of the said several premises, the said plaintiff was forced and obliged to, and did necessarily pay, lay out, and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £— in and about the nursing and taking care of the said E. F. his said [daughter and] servant, in and about the delivery of the said child, to wit, at, &c. (*venue*) aforesaid. To the damage, &c.—[*Conclusion as ante*, 596.]

[*If the female were not the daughter of the plaintiff, omit the words "Daughter" and "Father" throughout: or, in cases where the legitimacy may be questionable, a count, omitting those words which are not necessary (see ante, 643, note.—Peake, C. N. P. 55) should be added.*]

[*645]
FOR ENTI-
CING
AWAY AP-
PRENTICE-
S.

By a mas-
ter, for
enticing
away his
servant or
appren-
tice (i).

*[*Commencement as ante*, 596.]—For that whereas, before and at the time of the committing of the several grievances, by the said defendant as hereinafter mentioned, one E. F. was, and from thence hitherto hath been, and still is, the servant (or "apprentice") of the said plaintiff, in his trade or business of a —, which the said plaintiff then exercised and carried on, and still doth exercise and carry on, to wit, at, &c. (*venue*); yet the said defendant well knowing the premises (*k*), but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in his aforesaid trade and business, and to deprive him of the service of the said E. F. as such servant (or, "apprentice") as aforesaid, and of the profits, benefits, and advantages, which might, and would otherwise have arisen and accrued to him from such service whilst the said E. F. *was such servant (or "apprentice") of the said plaintiff as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, unlawfully, wrongfully, and unjustly enticed, persuaded, and *procured* the said E. F. so then

(i) See form, Lill. Ent. 72. As to this action in general, see Bac. Ab. Master and Servant, O.—3 Bla. Com. 142—Cowp. 54.—2 H. Bl. 511.—2 Esp. Rep. 734.—6 Mod. 183.—1 Burn, J. 26th ed. 175. Case is the usual and proper form of action, for the reasons stated, ante, 642, note. 1 Salk. 380.—Ld. Raym. 1116. Cowp. 54.—2 Saund. 169. As to when plaintiff may waive the tort, and sue in assumpsit for money had and received, see Skin. 579.—1 Taunt. 112.—3 M. & S. 191.—1 Burn, J. 26th edit. 174.—Ante, vol. i. 113. The defendant cannot avail himself of any objection to the indenture of apprenticeship, or contract of hiring, 2 Hen. Bla. 511.—7 T. R. 310, 311, 314.—1 Anstr. 256. An apprenticeship *de facto* would always suffice as against a wrong-doer, though there were no legal apprenticeship, 6 Mod. 69.—1 Salk. 68. It was indeed held in 4 Taunt. 876, that no action can be maintained for harboring an apprentice as such, if the master to whom he was bound was then not a house-keeper, and of the age of twenty-four years. It

should be observed, however, that this decision was before the passing of the 54 Geo. 3. c. 96. Sometimes, by way of inducement, the indentures of apprenticeship, or contract of hiring, are stated at length; but this appears unnecessary and injudicious, see the precedents, 2 Saund. 169.—8 Wentw. Index, 31. It is necessary to allege and prove, that the defendant *knew* that the third person was the apprentice, or servant, of the plaintiff, Peake, C. N. P. 55.—Peake's Law of Evid. 334.—3 Bla. Com. 142.—Willes, 582; but it is not necessary to state what means of enticement the defendant adopted, Willes, 577. The damage *per quod servitium amisit* must be alleged and proved, 5 East, 39.—Burr. 1352.—3 Bla. Com. 142. In this action the measure of damages is not to be ascertained at the actual loss plaintiff sustained at the time, but for the injury done, by causing the servant, &c. to leave plaintiff's employment, 4 Moore, 12.

(k) This is necessary, see n. (i), supra.

being the servant (or "apprentice") of the said plaintiff as aforesaid, to depart from and out of the service of the said plaintiff, by means of which said enticement, persuasion, and procurement, and on no other account whatsoever, the said E. F. so being such servant (or "apprentice") as aforesaid, then and there, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, unlawfully, wrongfully and unjustly, and without the license or consent, and against the will of the said plaintiff, departed from and out of the service of the said plaintiff, and hath remained and continued absent from such service for a long space of time, to wit, from thence hitherto, whereby the said plaintiff hath, for and during all that time, lost, and been deprived of the service of the said E. F. in his aforesaid trade and business, and of all the profits, benefits, and advantages which might and would otherwise have arisen and accrued to him from such service, and hath been and is otherwise greatly injured in his aforesaid trade and business, to wit, at, &c. (*venue*) aforesaid.—And whereas also the said E. F. heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, then and still being the servant (or "apprentice") of the said plaintiff, unlawfully, wrongfully, and unjustly, without the license or consent, and against the will of the said plaintiff, departed and went away from and out of the service of the said plaintiff, and afterwards, to wit, on the day and year aforesaid, there went and came to the said defendant; yet the said defendant well knowing the said E. F. to be the servant (or "apprentice") of the said plaintiff, but contriving, and wrongfully and unjustly intending to injure the said plaintiff, and to deprive him of the service of the said E. F. his said servant (or "apprentice") and of all the profits, benefits, and advantages, which might and would otherwise have arisen and accrued to him from such service, then and there, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, unlawfully, wrongfully, and unjustly received (*n*) the said E. F. so then being the servant (or "apprentice") of the said plaintiff as aforesaid, into the service of the said defendant, and harbored, detained, and kept the said E. F. in his said service for a long space of time, to wit, from the day and year last aforesaid hitherto, whereby the said plaintiff, for and during all that time, lost and was deprived of the service of the said E. F. and of all the profits, benefits, and advantages, which might and would otherwise have arisen and accrued to him from such service, to wit, at, &c. (*venue*) aforesaid.—*Add third count, as suggested in note, and conclude as ante, 596.*

FOR
ENTICING
AWAY
APPREN-
TICES.

Second
count for
harboring
(l).

[*647]

FOR
CARELESS
DRIVING.
Against
owners of
a stage-
coach,
for over-
loading
and im-
properly
driving
same,
whereby
the coach
was over-
turned,
and plain-
tiff's leg
broken
(n).

For that whereas the said defendants, before and at the time of committing the grievances hereinafter mentioned, were owners and proprietors of a certain stage coach, for the carriage and conveyance of passengers

(l) As to this count, see 6 T. K. 221.

(m) Add a third count, omitting this allegation, and only state that after notice and request not to do so, defendant harbored, &c. see ante, 546, note.

(n) See forms and notes in assumpst, an-

te, 362, and those, post, 651. It is best to declare in case to avoid a plea in abatement for nonjoinder, ante, vol. i. 99, 165. All the proprietors may be joined, though one only was driving, 4 B. & C. 213.—See further, ante, 362, notes.

FOR
CARELESS
DRIVING.

[*648]

Damages.

Second
count.

from, &c. to, &c. (o) for hire and reward to the said defendants in that behalf, to wit, at, &c. (venue) and the said defendants being such owners and proprietors of the said coach as aforesaid, thereupon heretofore, to wit, on, &c. to wit, at, &c. (venue) the said plaintiff, at the special instance and request of the said defendants, became and was an [outside] passenger upon [or in] the said coach, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from, &c. aforesaid, to, &c. aforesaid, for a certain fare and reward to the said defendants in that behalf, and the said defendants then and there received the said plaintiff as such outside passenger as aforesaid, and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely (p) carried and conveyed by and upon the said stage coach on the said journey, from, &c. aforesaid, to, &c. aforesaid; yet the said defendants not regarding their duty in that behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and upon the said stage coach on the said journey, from, &c. aforesaid, to, &c. aforesaid, but wholly neglected *so to do, and suffered and permitted one of the wheels of the said coach to be so insufficiently secured, that the same then and there came off, and also suffered and permitted the said coach to be then and there so greatly overloaded, that by reason thereof, afterwards, and whilst the said coach was proceeding with the said plaintiff thereon, in and along the king's highway, on the said journey from, &c. aforesaid, and before the arrival thereof at, &c. aforesaid, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, the said coach then and there became and was overturned, and by means whereof one of the legs of the said plaintiff became and was fractured and broken, and the said plaintiff was otherwise greatly bruised, wounded, and injured: and also by means of the premises the said plaintiff became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto during all which said time the said plaintiff suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits, and advantages, which he might and otherwise would have derived and acquired, and thereby also the said plaintiff was forced and obliged to and did then and there pay, lay out, and expend, divers large sums of money, amounting in the whole to the sum of £— in and about the endeavoring to be cured of the said fractures, bruises, and injuries, so received as aforesaid; and also thereby the said plaintiff was hindered and prevented from continuing his said journey, and was kept and detained at a certain inn (q), to wit, at — in the county of — a long time, to wit, for the space of — weeks, and during that time there incurred great expenses, in the whole amounting to a large sum of money, to wit, the sum of £— in and about his necessary support and maintenances, to wit, at, &c. (venue) aforesaid.—And whereas also heretofore, to wit, on the day and year aforesaid, to wit, at, &c. (venue) afore-

(o) The places from which plaintiff went and was to go. As to what a variance, see ante, 357, note. If any doubt exist, it would be better to omit the *termini* alto-

gether.

(p) See 1 C. & P. 636.

(q) All these averments should correspond with the facts.

FOR
CARELESS
DRIVING.

[*649]

said, the said plaintiff, at the special instance and request of the said defendants became and was a passenger by a certain other coach, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from, &c. aforesaid, to, &c. aforesaid, for certain reward to the said defendants in that behalf, *and thereupon it then and there became and was the duty of the said defendants, to use due and proper care that the said plaintiff should be safely and securely carried and conveyed by the said last-mentioned coach on the said journey from, &c. aforesaid, to, &c. aforesaid; yet the said defendants, not regarding their duty in this behalf, did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed by the said last-mentioned coach on the said journey from, &c. aforesaid, to, &c. aforesaid, but wholly neglected so to do; and by reason thereof, afterwards, and whilst the said last-mentioned coach was proceeding with the said plaintiff as a passenger thereby, in and along the king's highway, on the said journey from, &c. aforesaid, and before the arrival thereof, at, &c. aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said last-mentioned coach was overturned, and by means whereof one of the legs of the said plaintiff then and there became and was fractured and broken, and the said plaintiff was then and there otherwise greatly bruised, wounded, and injured, and also, by means of the premises, the said plaintiff became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time the said plaintiff suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs and business by him, during all that time, to be performed and transacted, and lost and was deprived of divers great gains, profits, and advantages, which he might and otherwise would have derived and acquired from the same, and thereby also the said plaintiff was forced and obliged to, and did then and there pay, lay out, and expend divers other large sums of money, amounting in the whole to the sum of £— in and about the endeavoring to be cured of the said last-mentioned bruises, fractures, and injuries, so received as last aforesaid; and also thereby the said plaintiff was hindered and prevented from continuing the said journey, and was kept and detained [at a certain inn,] to wit, at — in the county of — a long time, to wit, for the space of — weeks, and during that time there incurred great expense, in the whole amounting to a large sum of money, to wit, the sum of £— in and about his necessary support and maintenance, to wit, at, &c. (*venue*) aforesaid. And whereas also the said defendants, before the committing *of the grievances hereinafter next mentioned, were the owners and proprietors of a certain other stage coach by them the said defendants used and employed for the carriage and conveyance of passengers, at and for certain hire and reward to them in that behalf, to wit, at, &c. (*venue*), and the said defendants being such owners and proprietors of the said last-mentioned coach as aforesaid, the said plaintiff heretofore, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, at the special instance and request of the said defendants, became and was a passenger by the said last-mentioned coach, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from, &c. aforesaid, to, &c. aforesaid, for certain hire and reward to the said defendants, in that behalf; and although the said plaintiff was

Third
count.

[*650]

FOR
CARELESS
DRIVING.

then and there received by the said defendants as such passenger by the said last-mentioned coach as aforesaid, to be carried and conveyed thereby as aforesaid, yet the said defendants not regarding their duty in that behalf, so carelessly, negligently, unskilfully and improperly loaded, drove, managed, and conducted the said last-mentioned coach, that afterwards, and whilst the said last-mentioned coach was proceeding with the said plaintiff, as such passenger as aforesaid, on the said journey, from, &c. aforesaid, to, &c. aforesaid, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, the said last-mentioned coach was, by and through the carelessness, negligence, and improper conduct of the said defendants, overturned and thrown down, with the said plaintiff therein as aforesaid; by means whereof one of the legs of the said plaintiff became and was fractured, bruised, and broken, and the said plaintiff was otherwise greatly injured, wounded, and cut, insomuch that the said plaintiff then and there became and was sick, sore, lame, and disordered for a long space of time, to wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain, and was hindered and prevented from carrying on, transacting, and proceeding in his lawful and necessary affairs and business by him during that time to be performed and transacted, and thereby lost and was deprived of divers great gains and profits, which had been accustomed to arise and accrue, and which otherwise would have continued to arise and accrue to the said plaintiff from the transacting and carrying on of the same, and also, by means of the premises last aforesaid, the said plaintiff was forced and obliged to and did then and there pay, lay out, and expend, divers large sums of money, amounting in the whole to the sum of £— in and about the curing and endeavoring to cure the said last-mentioned fractures, bruises, cuts, and wounds, to wit, at, &c. (*venue*) aforesaid.—[*Add other counts as the case may suggest.*]

Against
the propri-
etor of a
stage-
coach for
negligent-
ly driv-
ing,
whereby
coach was
overturn-
ed, and
plaintiff's
wife so
much
hurt, that
she, after
being ill
for some
time, died
(7).

For that whereas, before and at the time of committing the grievances by the said defendant, as hereinafter next mentioned, the said defendant was owner of a certain stage-coach, by him used and employed in carrying passengers from, &c. to, &c. (*s*) and divers other places, to wit, at, &c. (*venue*), and being such owner of the said stage-coach, the said defendant, on, &c. to wit, at, &c. (*venue*) aforesaid, received [into] his said coach one E. F. the wife of the said plaintiff, as a passenger [therein] to be carried and conveyed thereby on a journey, to wit, from, &c. aforesaid, to &c. aforesaid, for certain fare and reward to the said defendant in that behalf, and by reason thereof the said defendant ought carefully to have conveyed, or caused to be conveyed, the said E. F. by the said coach, on the said journey from, &c. aforesaid, to, &c. aforesaid. Yet the said defendant, not regarding his duty in this behalf, conducted himself so carelessly, negligently, and unskilfully, in this behalf, that by and through the carelessness, negligence, unskilfulness, and default of himself and his servants, and for want of due care and attention to his

(7) Observe the notes to the preceding form, and form in *assumpsit*, ante, 356; and post, 651, in notes; where the liability of carriers will be found discussed. Damages in this case can only be recovered up to

the time of the death of the plaintiff's wife. See 1 Campb. 193.

(s) See as to what a variance, ante, 357. If any doubt, this averment as to the *termini*, had better be omitted.

duty in that behalf, the said coach afterwards, and whilst the same was carrying and conveying the said E. F. on the said journey as aforesaid, and before the arrival thereof at, &c. aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, was upset and thrown down, by means whereof the said E. F. then being therein, was greatly cut, bruised, and wounded, and divers bones of the body of the said E. F. were then and there broken, insomuch that the said E. F. thereby then and there became and was very sick, weak, and distempered, and remained and continued so weak and distempered, for a long space of time, to wit, from thence until the—— day of —— in the year aforesaid, to wit, &c. (*venue*) during all which time the said plaintiff lost and was deprived of the comfort and society of his said wife, and also her aid and assistance in the management of his domestic affairs, which he otherwise would have had and enjoyed, and was forced and obliged to lay out and expend, and did actually lay out and expend, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—— in and about the attempting the cure of his said wife, and the procuring necessary assistance and attendance for her during her said sickness, weakness, and distemper, which ensued in consequence of her being so overturned and wounded as aforesaid, and which continued until the said —— day of —— in the year aforesaid, on which said last-mentioned day the said E. F. of her said wounds died, to wit, at, &c. (*venue*) aforesaid.—[*Another count may be added, stating the grievances with less particularity.*]

FOR
CARELESS
DRIVING.

See the form of declaration, and notes, as to the defendant's liability in such cases, post, 719.

Against
the owner
of a coach
for the
negli-
gence of
his ser-
vant in
driving
same
against
plaintiff's
g'g, and
upsetting
him, &c.

II. FOR TORTS TO PERSONAL PROPERTY.

Declarations of this nature are principally against carriers, innkeepers, wharfingers, attornies, or other agents, or bailees—for deceit on the sale of goods, &c.—for negligence in driving carriages or navigating ships—for excessive or irregular distress or levies—for rescue of goods distrained for rent or damage feasant, or of prisoners—against sheriffs and other officers for escapes, false returns, &c.—for unduly exercising trades or imitating inventions—in trover—or for injuries to personal property in reversion.

*It is most usual to declare in assumpsit against attornies and agents, and see the forms and notes, ante, 371, see the printed forms in case, post, 655 to 679.—8 Wentw. Index, 29, 39, 47.—2 Wils. 325.—3 Wils. 443.—5 Burr. 2061.—2 Bla. Rep. 906.—1 T. R. 656, 101; but against bailees of different descriptions it is sometimes advisable to declare in case as in the following forms. The forms in assumpsit against bailees of different descriptions, ante, 333 to 342, may easily be varied into case, observing the form of the following *precedent:—See a form in case for the loss of a dog, and in trover, 1 T. R. 274; for negligence in shipping a hogshead, 3 East, 62; and for not accounting for the produce*

[*651]

FOR TORTS TO PERSONALTY. *of a bill of exchange, 6 East, 333.—1 New Rep. 43. These declarations must show a legal duty, or an express contract, founded on sufficient consideration, 12 East, 89. But care must be observed that no count be framed in substance in assumpsit, 6 B. & C. 268.—Post, 669 i, note (t).*

AGAINST CARRIERS BY LAND.

Against a carrier by land for losing a box (t).

[*652]

[Commencement as ante, 596.]—For that whereas the said defendant, before and at the time of the delivery of the goods and chattels to him, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, a common carrier (u) of goods and chattels for hire, to wit, from — to — (w), to wit, at, &c. And whereas also, the said plaintiff, whilst the said defendant was such common carrier as aforesaid, to wit, on, &c. at, &c. (*the real place*), to wit, at, &c. (*the venue, which is transitory*), caused to be delivered to the said defendant, and the said defendant then and there accepted and received of and from the said plaintiff, a certain [box (x),] containing divers goods and chattels, to wit, &c. [*specify the articles according to the exact description, or as in trover (y)*] of the said plaintiff, of great *value, to wit, of the value of £— to be safely and securely carried and conveyed by the said defendant, from — aforesaid to — aforesaid, and there, to wit, at, &c. (z) aforesaid, safely and securely to be delivered for (a) the said plaintiff, for certain reasonable reward (b) to the said defendant in that behalf. Yet the said defendant, not regarding his duty (c) as such common carrier as aforesaid, but contriving and fraudulently intending, craftily and subtly to deceive, defraud and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the said [box] and its contents aforesaid, from — aforesaid, to — aforesaid, nor there, to wit, at,

(t) See the old forms, Herne, 76.—Bro. Rep. 11; and see the forms in assumpsit, and the notes, ante, 356 to 365, which will, for the most part, be here applicable.—Bac. Ab. Carriers.—8 Wentw. Index, 43, 47, 48. And when it might be advisable to declare in case, instead of assumpsit, ante, 356, n. ante, vol. i. 99, 164.—2 Chit. Rep. 1; so as to prevent plea in abatement of other partners not joined. Formerly it was usual to declare setting out the custom of the realm, 1 Sid. 245.—Com. Dig. Action on the case for negligence, C. 2. But this custom being the common law need not be stated, Hob. 18.—1 Wils. 281.—Bac. Ab. Carriers, A. and see the forms, 3 Wils. 429.—The declaration must show a duty or a contract, 12 East, 89.—As to when the carrier's exceptions in the contract or notice should be noticed in the declaration, ante, 356, note; under this count the plaintiff cannot recover for a loss before the actual carriage of the goods commenced.—2 Stark. 461; he should declare against the defendant for not forwarding the parcel, &c. see form, post, 654. If a coachman lose a parcel, the master, and not the coachman, should be sued, 2 Stark. 82.—1 Price, 328.

(u) As to the necessity for this, see 6 Moore, 158.

(w) As to what would be a variance, see

ante, 357. If any doubt exist as to the termini, it would seem better to omit the averment as to it.

(x) Or, "*parcel*," according to the fact.

(y) It is said that the goods must be set out with the same certainty as in trover, 2 Vent. 78.—Com. Dig. Action on Case for Negligence, C. 2.

(z) In 7 B. & C. 301, where in case, the declaration stated that the plaintiff delivered a trunk to the defendant, to be put into a coach at Chester, in the county of Chester, to wit, at, &c. and safely carried to Shrewsbury, and that through the defendant's negligence it was lost; and it appeared in evidence that the trunk was delivered to the defendant at the city of Chester, which is a county of itself, separate from the county of Chester at large, but within its audit: it was held, that this was not a material variance, but that the declaration was supported by the evidence, as no evidence was given of the existence of any other place called Chester.

(a) Or "*to*" the said plaintiff, as the fact was.

(b) This suffices, without showing what reward, 13 East, 114, note.—2 New Rep. 458.—2 Ld. Raym. 115.

(c) The declaration must state a breach of duty, according to the fact, 2 Stark. 247.

AGAINST
CARRIERS
BY LAND.

— aforesaid, safely or securely deliver the same for (a) the said plaintiff, but on the contrary thereof, the said defendant, so being such common carrier as aforesaid, so carelessly and negligently (d) behaved and conducted himself in the premises, that by and through the carelessness, negligence, and default of the said defendant in the premises, the said [box], and its contents aforesaid, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (venue) aforesaid.— And whereas also, heretofore, to wit, on the day and year aforesaid, to wit, at, &c. (venue) aforesaid, the said plaintiff, at the special instance and request of the said defendant, caused to be delivered to the said defendant a certain other [box] containing certain *other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said first count mentioned, of the said plaintiff, to be taken care of, and safely and securely carried and conveyed by the said defendant to — aforesaid, and there, to wit, at — aforesaid, to be safely and securely delivered by the said defendant for the said plaintiff, within a reasonable time then next following, for certain hire and reward to the said defendant in that behalf; and although the said defendant then and there accepted, and had and received the said last-mentioned [box] and its contents aforesaid, for the purpose and on the terms aforesaid, and although a reasonable time for the carriage, conveyance, and delivery thereof as aforesaid hath long since elapsed, yet the said defendant, not regarding his duty in that behalf, but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff in this respect, did not nor would, within such reasonable time as aforesaid, or at any time afterwards, (although often requested so to do) take care of, or safely or securely carry and convey the said last-mentioned [box] and its contents aforesaid, to — aforesaid, nor there, to wit, at — aforesaid, safely or securely deliver the same for the said plaintiff, but hath hitherto wholly neglected and refused so to do; and by means of the negligence and improper conduct of the said defendant in that behalf, the said last-mentioned [box] and its contents aforesaid, have not been delivered to or for the said plaintiff at — aforesaid, or elsewhere, and are wholly lost to the said plaintiff, to wit, at, &c. (venue) aforesaid.—[Add a general count for negligence, like the fourth count in the next precedent; add a count in trover if there be any evidence of conversion, 3 East, 70. Trover lies against a carrier, though he, by mistake, deliver goods to a wrong person, Peake C. N. P. 42.—2 B. & A. 703.—1 M. & P. 357.—Jones on Bailm. 96 to 99; but trover cannot be supported against a carrier, or wharfinger, where the goods have been stolen or lost, 5 Burr. 2825.—1 Vent. 223.—Conclude as ante, 506.]

Second
count for
not carry-
ing within
a reason-
able time,
and for
losing the
box (e).
[*653]

For that whereas the said defendants, before and at the time of the delivery of the goods and chattels to them, and the committing of the grievances as hereinafter next mentioned, were the owners and proprietors of a

Against
coach pro-
prietors,
for the
loss of a
parcel
which
they en-
gaged to
carry with
a passen-
ger (f).

(d) This is a sufficient averment to admit of proof of gross negligence, 2 Moore, 18.

(e) See the counts in 3 Wils. 429. As the above count states the loss of the goods, it is sustainable, though case for a mere

nonfeasance might not be sustainable, 6 East, 333.—3 Wils. 348.—5 T. R. 143.—1 New R. 43.—1 T. R. 274.

(f) Observe the notes to the preceding form.

AGAINST
CARRIERS
BY LAND.

certain common stage coach, to wit, a certain coach going and passing from a certain place (*g*) called [the Green Man, in the county of Middlesex,] to [Uxbridge, in the same county,] and divers other places, for the carriage and conveyance thereby of passengers and their luggage, for reasonable hire and reward to the said defendants in that behalf, to wit, at, &c. (*venue*). And whereas also, whilst the said defendants were such owners and proprietors, to wit, on, &c. (*day of loss, or about it*) at, &c. (*venue*) aforesaid, they the said defendants received [into] the said stage coach the said plaintiff, as a passenger therein, to be carried and conveyed thereby from the said place called [the Green Man, to Uxbridge] aforesaid, together with a certain [trunk,] containing divers goods and chattels, to wit, [*here specify them according to their exact description, or as in trover*] of the said plaintiff, of great value, to wit, of the value of £— to be carried and conveyed by the said coach from the said place called the [the Green Man] to [Uxbridge] aforesaid, and there, to wit, at [Uxbridge] aforesaid, safely and securely to be delivered for the said plaintiff, at and for certain reasonable hire and reward to the said defendants in that behalf. Yet the said defendants, not regarding their duty in that behalf, but contriving, and fraudulently intending, craftily and subtly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the said [trunk] and its contents aforesaid from the said place called [the Green Man] to [Uxbridge] aforesaid, nor there, to wit, at [Uxbridge] aforesaid, safely or securely deliver the same for the said plaintiff: but on the contrary thereof, they the said defendants so carelessly and negligently behaved and conducted themselves in the premises, that by and through the carelessness, negligence, and default of the said defendants in the premises, the said [trunk] and its contents aforesaid, being of the value aforesaid, then and there became, and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And whereas also the said defendants, before and at the time of the delivery of the goods and chattels to them, and of the grievances as hereinafter next mentioned, were common carriers of passengers and luggage in and by a certain coach, for reasonable hire and reward to the said defendants in that behalf, to wit, at, &c. (*venue*). And whereas also, whilst the said defendants were such common carriers as aforesaid, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, they the said defendants, as such common carriers as aforesaid, received into the said coach the said plaintiff, as a passenger therein, to be carried and conveyed to [Uxbridge] aforesaid, together with a certain [trunk,] and divers goods and chattels, of the like number, quantity, quality, description, and value as those in the said first count mentioned, of the said plaintiff, to be carried and conveyed by the said coach to [Uxbridge] aforesaid, and there, to wit, at [Uxbridge] aforesaid, safely and securely to be delivered for the said plaintiff, at and for certain reasonable hire and reward to the said defendants in that behalf. Yet the said defendants, not regarding their duty as such common carriers as aforesaid, but contriving, and fraudulently intending, craftily and subtly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would safely or securely carry, or convey the said [trunk] and the said last-mentioned goods and chattels, to [Uxbridge] aforesaid, nor there, to wit, at [Uxbridge] aforesaid, safely or securely deliver the same for the said

Second
count, sta-
ting the
termini of
the jour-
ney, with
less par-
ticularity.

(*g*) See the note, ante, 357.

plaintiff; but on the contrary thereof, the said defendants so carelessly and negligently behaved and conducted themselves in the premises, that by and through the carelessness, negligence, and default of the said defendants in the premises, the said [trunk] and the said last-mentioned goods and chattels became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—And whereas also, heretofore, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, the said plaintiff, at the special instance and request of the said defendants, caused to be delivered to the said defendants, a certain other [trunk] containing certain other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description, and value as those in the said first count mentioned, of the said plaintiff, to be taken care of, and safely and securely carried and conveyed by the said defendants, to [Uxbridge] aforesaid, and there, to wit, at [Uxbridge] aforesaid, to be safely and securely delivered by the said defendants, for the said plaintiff; and although the said defendants then and there accepted, and had and received the said last-mentioned [trunk] and its contents aforesaid, for the purpose aforesaid, and undertook *the carriage, conveyance, and delivery thereof as aforesaid, and although a reasonable time for the carriage, conveyance, and delivery thereof as aforesaid, hath long since elapsed, yet the said defendants, not regarding their duty in that behalf, but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said plaintiff, in this respect, did not nor would, within such reasonable time as aforesaid, or at any time afterwards, although often requested so to do, take care of, or safely or securely carry or convey the said last-mentioned [trunk] and its contents aforesaid, to [Uxbridge] aforesaid, nor there, to wit, at, [Uxbridge] aforesaid, safely or securely deliver the same for the said plaintiff, but hath hitherto wholly neglected and refused so to do, and by means of this carelessness, negligence, and improper conduct of the said defendants in that behalf, the said last-mentioned [trunk] and its contents aforesaid, have not been delivered to or for the said plaintiff at [Uxbridge] aforesaid, or elsewhere, and are wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—And whereas also, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said defendants, at their special instance and request, had the care and custody of a certain other [trunk] together with divers other goods and chattels, of the number, quantity, quality, description, and value as those in the said first count mentioned, of the said plaintiff. Yet the said defendants, not regarding their duty in that behalf, did not nor would, whilst they so had the care and custody of the said last-mentioned [trunk] and goods and chattels, take due and proper care of the same, or any part thereof, but wholly neglected so to do, and took such bad care thereof, that afterwards to wit, on the day and year aforesaid, the said last-mentioned [trunk] and goods and chattels became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.

AGAINST
CARRIERS
BY LAND.

Third
count,
merely
stating
that de-
fendants
had plain-
tiff's par-
cel to car-
ry to its
destina-
tion, with-
out de-
scribing
them as
coach
owners, or
the termi-
nation of
the jour-
ney.

[*654]

Fourth
count for
not taking
care of
the parcel
generally.

For that, whereas, before and at the time of the delivery of the [parcel] and committing the grievances by the said *defendant as hereinafter next mentioned, the said defendant was the proprietor of a certain warehouse or coach-office, to wit, at, &c. (*venue*) for the receipt and booking of parcels and packages, goods and merchandizes, intended to be forwarded and

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Against
the propri-
etor of a
coach-of-
fice, for

AGAINST
CARRIERS
BY LAND.

neglect-
ing to for-
ward par-
cel, which
plaintiff
had book-
ed (A).

sent from, &c. to divers places in this kingdom, by divers coaches or other carriages for the carriage and conveyance of parcels, packages, goods, and merchandize for hire, from, &c. aforesaid, to such places as aforesaid, and for the delivery thereof to the coachmen, guards, or other persons having the care of such coaches or carriages, for the purpose of the same being forwarded, sent, and carried by such coaches or carriages, and the taking care thereof, previous to, and until the delivery of such parcels, packages, goods, and merchandize, to such coachmen, guards, or other persons as aforesaid, for the purpose aforesaid, for certain reasonable hire and reward to the said defendant in that behalf. And whereas heretofore, and whilst the said defendant was such proprietor of such warehouse or coach-office as aforesaid, to wit, on, &c. at the said warehouse, to wit, at, &c. (*venue*) the said plaintiff caused to be delivered to the said defendant at his said warehouse, to wit, at, &c. (*venue*) aforesaid, a certain parcel containing divers goods and merchandize, to wit, [*here specify them either according to their exact description, or as in trover.*] of the said plaintiff of great value, to wit, of the value of £— to be by the said defendant booked and delivered to the coachman, guard, or other person having the care of a certain coach for the carriage and conveyance of packages and parcels for hire, from, &c. aforesaid, to — for the purpose of the same being carried and conveyed by such coach to — aforesaid, and then and there, to wit, at — aforesaid, delivered for the said plaintiff, and in the mean time, and until the delivery thereof to the said coachman, guard, or other person having the care of the said last-mentioned coach, to be taken care of by the said defendant in his said warehouse, and then and there paid to the said defendant a certain sum of money, to wit, the sum of 2*d.* as and for his hire and reward in that behalf, and the said defendant then and there accepted and received the said package and its contents for the purpose aforesaid, and thereupon it then and there became and was the duty of the said defendant to deliver the same to the said coachman, guard, or other person having the care of the said last-mentioned coach for the purpose aforesaid, and in the mean *time, and until such delivery, to take due and proper care thereof. Yet the said defendant not regarding his duty in that behalf, but contriving and intending to deceive and defraud, and injure the said plaintiff, did not nor would deliver or cause to be delivered the said parcel and its contents to the coachman, guard, or any other person having the care of the said coach for the purpose aforesaid, and in the mean time, and until the delivery, take due and proper care thereof, but, on the contrary thereof, so carelessly, negligently, and improperly conducted himself in the premises, that by and through the negligence, carelessness, and default of the said defendant in the premises, the said parcel and its contents, being of the value aforesaid, after the delivery thereof to, and receipt by, the said defendant, as such proprietor of the said warehouse or office as aforesaid, for the purpose, and before the delivery thereof to the said coachman, guard, or other person having the care of the said coach as aforesaid, to wit, on the day and

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(A) As to the utility of this count, see 2 Stark. 461. A carrier, as such, is not bound to keep goods in a warehouse, until he has an opportunity of forwarding them; and if he does so at the request of the owner, he is

not answerable for loss by accidental fire, 4 T. R. 581. The book-keeper is not in general excused by the usual notice, see 3 C. & P. 76.

year aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[Add a count declaring against defendant as a warehouseman, (see form in *assumpsit*, ante, 353;) and a general count for negligence, as ante, 954, fourth count.]

AGAINST
CARRIERS
BY LAND.

For that whereas heretofore, to wit, on the [1st] day of [October,] in the year of our Lord [1812,] at London, to wit, at, &c. (*venue*) the said plaintiffs delivered to the said defendant, being then and there the master of a certain ship called [Susannah,] and the said defendant then and there, as such master of the said ship, received from the said plaintiffs, on board of the said ship, a large quantity, to wit, [fifty tons of hemp,] of the said plaintiffs, of great value, to wit, of the value of [£600,] to be by the said defendant carried and conveyed in the said ship from [London] aforesaid, to [Dartmouth, in the county aforesaid,] the act of God (*k*), the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever excepted, for a certain reasonable reward *to be therefore paid by the said plaintiffs to the said defendant; and whereas the said defendant afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, being then and there such a master as aforesaid, departed and set sail with the said ship, then and there having the said [hemp] on board of the same, to be carried and conveyed as aforesaid, except as aforesaid, from [London] aforesaid to [Dartmouth] aforesaid. And it then and there became and was the duty of the said defendant as such master of the said ship, so having the said [hemp] on board of the same as aforesaid, for the purpose aforesaid, by reason, and in respect thereof, to have proceeded with the said ship so having the said [hemp] on board of the same, from [London] aforesaid to [Dartmouth] aforesaid, the act of God, and such other matters and things excepted as are above mentioned to have been excepted, by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same. Yet the said defendant not regarding his duty in this behalf, but contriving and wrongfully intending to injure and prejudice the said plaintiff in this respect, did not proceed with the said ship from [London] aforesaid to [Dartmouth] aforesaid, although not prevented by the acts, matters, and things excepted as aforesaid, or any of them, by and according to the direct, usual, and customary way and passage, without any voluntary and unnecessary deviation or departure from, or delay or hinderance in the same, but on the contrary thereof, afterwards, and before the arrival of the said ship at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, without the knowledge, and against the will of the said plaintiffs, voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course, and passage, with the said ship, so having the said [hemp] on board of the same, to wit, unto [Portsmouth, in the county of Hants,] and did then there voluntarily and unnecessarily touch and stay with the said ship, at [Portsmouth] aforesaid, for a long space of time, to

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BY WA-
TER.

Against a captain on a coasting voyage, who had signed bill of lading, for deviating from voyage, whereby ship was exposed to storms, &c. (i).

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(i) See forms in *assumpsit*, ante, 365 n.; R. 47, S. C.

and 6 Moore, 158, 415. See a form in case against the owner for the loss of goods on a bill of lading, 8 B. & C. 166. 2 M. &

(k) Examine with the bill of lading, and let these averments correspond therewith.

AGAINST
CARRIERS
BY WA-
TER.

[*658]

Second
count.

wit, for the space of [twenty days] then next following, and although the said ship with the said [hemp] on board of her as aforesaid, did afterwards, to wit, on the same day and year aforesaid, proceed and sail from thence towards [Dartmouth] aforesaid, yet the said ship, so having the said [hemp] on *board of the same as aforesaid, was, by reason of such deviation, departure, touching, and staying as aforesaid, afterwards, and before her arrival at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, exposed to and assailed by a great storm, and a great and heavy sea, near to a certain part of the coast of England, and was thereby then and there driven on shore, wrecked, and greatly shattered and broken; and by means thereof the said [hemp] of the said plaintiffs was then and there wetted, damaged, spoiled sunk in the sea, and wholly lost to the said plaintiffs.—And whereas, also, afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiffs delivered to the said defendant, being then and there the master of a certain other ship, called [the Susannah;] and the said defendant then and there, as such master of the same ship, received from the said plaintiffs on board of the said last-mentioned ship, another large quantity, to wit, [fifty other tons of hemp,] of the said plaintiffs, of great value, to wit, of the value of other [£600,] to be by the said defendant carried and conveyed in the same ship from [London] aforesaid to [Dartmouth] aforesaid, the act of God, and such other matters and things excepted as are in the said first count mentioned to have been excepted, for a certain reasonable reward to be therefore paid by the said plaintiffs to the said defendant; and it was then and there the duty of the said defendant, as such master of the same ship, so having the same [hemp] on board of the same as aforesaid, for the purpose last aforesaid, by reason and in respect thereof, whensoever he should depart and set sail from [London] aforesaid with the same ship, so having the same [hemp] on board of the same, for the purpose of carrying and conveying the same from [London] aforesaid, as in that behalf aforesaid; and whilst he should have the same [hemp] on board of the same for that purpose, to have refrained and forbore from committing or being guilty of any voluntary and unnecessary deviation or departure with the same ship from the direct, usual, and customary way, course, and passage for ships from [London] aforesaid to [Dartmouth] aforesaid, or delay or hindrance in the same; yet the said defendant not regarding his duty in this behalf, but contriving and wrongfully intending to injure and prejudice the said plaintiffs in this respect, although he the said defendant afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, departed and set *sail from [London] aforesaid, with the same ship, so having the same [hemp] on board of the same, for the purpose of carrying and conveying the same as in that behalf aforesaid, afterwards, and before the arrival of the same ship at [Dartmouth] aforesaid, and whilst he had the same [hemp] on board the same for that purpose, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, without the knowledge, and against the will of the said plaintiffs, voluntarily and unnecessarily deviated and departed with the same ship, from and out of such usual and customary way, course, and passage for ships from [London] aforesaid to [Dartmouth] aforesaid, to wit, unto [Portsmouth] aforesaid, in the said county of Hants aforesaid, and did then and there voluntarily and unnecessarily touch and stay with

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BY WA-
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the same ship at [Portsmouth] aforesaid, for another long space of time, to wit, for the space of other [twenty days] then next following ; and although the same ship, with the same [hemp] on board of her as aforesaid, did afterwards proceed and sail from thence towards [Dartmouth] aforesaid, yet the same ship, so having the same [hemp] on board of the same as last aforesaid, was, by reason of such deviation, departure, touching, and staying as last aforesaid, afterwards, and before the arrival at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, exposed to and assailed by a great storm, and a great and heavy sea, near to a certain part of the coast of England, and was thereby then and there driven on shore, wrecked, and greatly shattered and broken ; by means whereof the same [hemp] of the said plaintiffs was then and there wetted, damaged, spoiled, sunk in the sea, and wholly lost to the said plaintiffs.—And whereas also, afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiffs delivered to the said defendant, being then and there the master of a certain other ship called [the *Susannah*,] and the said defendant then and there, as such master of the same ship, received from the said plaintiffs, on board of the said last-mentioned ship, another large quantity, to wit, [fifty other tons of hemp,] of the said plaintiffs, of great value, to wit, of the value of other [£600,] to be by the said defendant carried and conveyed, in the same ship, from [London] aforesaid to [Dartmouth] aforesaid, the act of God, and such other matters and things excepted, as are in the said first count mentioned to have been excepted, for a certain reasonable reward to be therefore *paid by the said plaintiffs to the said defendant ; and it was then and there the duty of the said defendant, as such master of the said ship, so having the said [hemp] on board of the same as aforesaid, for the purpose last aforesaid, by reason, and in respect thereof, whensoever he should depart and set sail from [London] aforesaid with the same ship, so having the same [hemp] on board of the same, for the purpose of carrying and conveying the same as in that behalf aforesaid, and whilst he should have the same [hemp] on board of the same, for that purpose, to have refrained and forbore from committing or being guilty of any voluntary, intentional, and designed deviation or departure with the same ship from the direct, usual, and customary way, course, and passage for ships from [London] aforesaid to [Dartmouth] aforesaid, without delay or hindrance in the same ; yet the said defendant, not regarding his duty in that behalf, but contriving and wrongfully intending to injure and prejudice the said plaintiffs in this respect, although he the said defendant afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, departed and set sail from [London] aforesaid with the same ship, so having the same [hemp] on board of the same, for the purpose of carrying and conveying the same as in that behalf aforesaid, afterwards, and before the arrival of the same ship at [Dartmouth] aforesaid, and whilst he had the same [hemp] on board of the same for that purpose, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, without the knowledge, and against the will of the said plaintiffs, voluntarily, intentionally, and designedly, deviated and departed with the same ship from and out of such usual and customary way, course, and passage for ships from [London] aforesaid to [Dartmouth] aforesaid, to wit, unto [Portsmouth] aforesaid, in the county of Hants aforesaid,] and did then and there vol-

Third
count.

[*660]

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BY WA-
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Fourth
count.

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untarily, intentionally, and designedly, touch and stay with the same ship at [Portsmouth] aforesaid, for a long space of time, to wit, for the space of [twenty days] then next following, and although the same ship, with the same [hemp] on board of her as aforesaid, did afterwards proceed and sail from thence towards [Dartmouth] aforesaid, yet the same ship, so having the same [hemp] on board of the same as last aforesaid, was, by reason of such deviation, departure, touching, and staying as last aforesaid, afterwards, and before her arrival at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, *at, &c. (*venue*) aforesaid, exposed to and assailed by a great storm, and a great and heavy sea, near to a certain part of the said coast of England, and was thereby then and there driven on shore, wrecked, and greatly shattered and broken; by means whereof the same [hemp] of the said plaintiffs was then and there wetted, damaged, spoiled, sunk in the sea, and wholly lost to the said plaintiffs. —And whereas, also, afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*). aforesaid, the said plaintiffs delivered to the said defendant, being then and there the master of a certain other ship called [the *Susannah*,] and the said defendant then and there, as such master of the same ship, received from the said plaintiffs, on board of the said last-mentioned ship, another large quantity, to wit, [fifty other tons of hemp,] of the said plaintiffs, of great value, to wit, of the value of other [£600,] to be by the said defendant carried and conveyed, in the same ship, from [London] aforesaid to [Dartmouth] aforesaid, the act of God, and such other matters and things excepted, as are in the said first count mentioned to have been excepted, for a certain reasonable reward to be therefore paid by the said plaintiffs to the said defendant, and it was then and there the duty of the said defendant, as such master of the same ship, so having the said [hemp] on board of the same as aforesaid, for the purpose last aforesaid, by reason and in respect thereof, whensoever he should depart and set sail from [London] with the same ship, so having the said [hemp] on board of the same, for the purpose in that behalf aforesaid, to have proceeded with the same ship, so having the same [hemp] on board of the same from [London] aforesaid to [Dartmouth] aforesaid, as soon as he should be reasonably able so to do, the act of God, and such other matters and things excepted, as are above mentioned to have been excepted; yet the said defendant, not regarding his duty in this behalf, but contriving and wrongfully intending to injure and prejudice the said plaintiffs in this respect, although the said defendant afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, departed and set sail from [London] aforesaid with the same ship, so having the same [hemp] on board of the same, for the purpose in that behalf aforesaid, did not proceed with the same ship, from [London] aforesaid to [Dartmouth] aforesaid, as soon as he was reasonably able so to do, although not prevented by the acts, matters, and things excepted as *aforesaid, or any of them, but on the contrary thereof, afterwards, and before the arrival of the same ship at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, without the knowledge, and against the will of the said plaintiffs, voluntarily and designedly deviated and departed with the same ship from and out of the usual and customary way, course, and passage from [London] aforesaid to [Dartmouth] aforesaid, to wit, unto [Portsmouth] aforesaid, for the purpose of there landing and de-

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BY WA-
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livering divers goods, wares, and merchandizes, which the said defendant had, before the sailing of the same ship as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, without the knowledge, and against the will of the said plaintiff, received on board of the same ship, to be carried and conveyed therein from [London] aforesaid to [Portsmouth] aforesaid, and there remained and continued, for the purpose of landing and delivering the same goods, wares, and merchandizes there, for a long space of time, to wit, for the space of [twenty days] then next following; by reason of which same deviation, departure, and remaining and continuing at [Portsmouth] aforesaid, the said ship was delayed from proceeding further towards [Dartmouth] aforesaid for a long space of time, to wit, for the space of such [twenty days,] to wit, at, &c. (*venue*) aforesaid; and although the same ship, with the same [hemp] on board of the same, did afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, proceed and sail from [Portsmouth] aforesaid towards [Dartmouth] aforesaid, yet the same ship, with the same [hemp] on board of the same, by reason of the said defendant not sailing and proceeding therewith from [London] aforesaid to [Dartmouth] aforesaid, as soon as he was reasonably able, but, on the contrary thereof, deviating, departing, touching, remaining, continuing, and being delayed, as in that behalf aforesaid, afterwards, and before her arrival at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, was exposed to and assailed by a great storm and a great and heavy sea, near to a certain part of the coast of England, and was thereby then and there driven on shore and greatly wrecked, shattered, and broken; by means whereof the same [hemp] of the said plaintiff was then and there wetted, damaged, spoiled, sunk in the sea, and wholly lost to the said plaintiffs.— And whereas also, afterwards, to wit, on the *same day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiffs delivered to the said defendant, being then and there master of a certain ship called [the *Susannah*,] and the said defendant then and there, as such master of the same ship, received from the said plaintiffs, on board the said last-mentioned ship, another large quantity, to wit, [fifty other tons of hemp] of the said plaintiffs, of great value, to wit, of the value of other [£600,] to be by the said defendant carried and conveyed, in the same ship from [London] aforesaid to [Dartmouth] aforesaid, for a certain reasonable reward, to be therefore paid by the said plaintiffs to the said defendant; and it was then and there the duty of the said defendant, as such master of the same ship, so having the said [hemp] on board of the same as aforesaid, for the purpose last aforesaid, by reason and in respect thereof, whensoever he should depart and set sail from [London] aforesaid, with the same ship, so having the same [hemp] on board of the same, for the purpose in that behalf aforesaid, to have proceeded with the same ship so having the same [hemp] on board the same, from [London] aforesaid to [Dartmouth] aforesaid as soon as he should be reasonably able so to do; yet the said defendant not regarding his duty in his behalf, but contriving and wrongfully intending to injure and prejudice the said plaintiffs in this respect, although the said defendant afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, departed and set sail from [London] aforesaid, with the same ship, so having the same [hemp] on board of the same, for the purpose in that behalf aforesaid, did not proceed with the

[*663]
Fifth
count.

AGAINST
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BY WA-
TER.

[*664]

same ship from [London] aforesaid to [Dartmouth] aforesaid, as soon as he was reasonably able so to do, but, on the contrary thereof, afterwards, and before the arrival of the same ship at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, without the knowledge, and against the will of the said plaintiffs, voluntarily and designedly deviated and departed with the same ship from and out of the usual and customary way, course, and passage from [London] aforesaid, to [Dartmouth] aforesaid, to wit, unto [Portsmouth] aforesaid, for the purpose of there landing and delivering divers goods, wares, and merchandizes, which the said defendant had, before the sailing of the same ship as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, without the knowledge and against the will of the said *plaintiffs, received on board of the same ship, to be carried and conveyed therein from [London] aforesaid to [Portsmouth] aforesaid, and there remained and continued for the purpose of landing and delivering the same goods, wares, and merchandizes there, for a long space of time, to wit, for the space of [twenty days] then next following; by reason of which same deviation, departure, and remaining and continuing in [Portsmouth] aforesaid, the same ship was delayed from proceeding further towards [Dartmouth] aforesaid, for a long space of time, to wit, for the space of such [twenty days,] to wit, at, &c. (*venue*) aforesaid; and although the same ship, with the same [hemp] on board of the same, did afterwards, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, proceed and sail from [Portsmouth] aforesaid, towards, [Dartmouth] aforesaid, yet the same ship, with the same [hemp] on board of the same, by reason of the said defendant's not sailing and proceeding therewith from [London] aforesaid to [Dartmouth] aforesaid, as soon as he was reasonably able, but, on the contrary thereof, deviating, departing, touching, remaining, continuing, and being delayed as in that behalf aforesaid, afterwards, and before her arrival at [Dartmouth] aforesaid, to wit, on the same day and year aforesaid, at, &c. (*venue*) aforesaid, was exposed to and assailed by a great storm, and a great and heavy sea, near to a certain part of the coast of England, and was thereby then and there driven on shore and greatly wrecked, shattered, and broken; by means whereof the same [hemp] of the said plaintiffs was then and there wetted, damaged, spoiled, sunk in the sea, and wholly lost to the said plaintiffs. [*Add a general count for negligence, like the fourth count, ante, 661.*] To the damage of the said plaintiffs of [£600] and therefore they bring their suit, &c.

Against a
carrier by
water, for
the loss of
goods, and
injuring
them in
unloading
(/).

For that whereas, on, &c. at, &c. (*venue*) the said plaintiff, at the special instance and request of the said defendant, then and there caused to be delivered to the said defendant divers goods and merchandizes, to wit, &c. [*here specify them either according to the exact description, or as in*

(1) Case is the most advisable form of action, if there be reason to expect a plea in abatement, see ante, 651, note. 6 Moore, 141.—2 Chit. Rep. 1. It may be advisable to insert, according to the fact, a count stating defendants to be owners of a general ship, carrying the goods of all who chose to send them, see 6 Moore, 158; otherwise the plea in abatement would be available,

as in 2 New Rep. 356, 454. As to how far owner and captain (a part-owner) may be sued in case, though a charter-party entered into, see ante, 221.—8 B. & C. 166.—2 M. & R. 47. S. C. and cases there cited. See form against owners of ships for the negligence of their captain in delaying voyage, &c. whereby goods were injured, 6 Moore, 415.—3 B. & B. 171, S. C.

trover] of great value to wit, of the value of £—, of lawful money of Great Britain, to be carried and conveyed by the said defendant, in and by a certain ship or vessel of the said defendant, called, &c. from [London] aforesaid, to [Hull, in the county of York;] and there, to wit, at [Hull] aforesaid, to be delivered to the said plaintiff for certain freight and reward to the said defendant in that behalf (the dangers of the seas, the king's enemies, and the act of God excepted (m),) and he the said defendant then and there took and received the same accordingly, for the purposes aforesaid. And although the said ship or vessel afterwards, to wit, on, &c. (n) safely arrived at [Hull] aforesaid and no dangers of the seas, nor the act of God, nor the king's enemies, prevented the safe carriage or delivery of the said goods and merchandizes as aforesaid, yet the said defendant not regarding his duty in that behalf, but contriving and fraudulently, intending, craftily and subtly, to deceive and defraud the said plaintiff in this behalf, did not deliver the said goods and merchandizes to the said plaintiff, but so negligently, carelessly, and improperly conducted himself in this behalf, that, for want of due care in the said defendant and his servants in that behalf, the said goods and merchandizes afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, became and were wholly lost to the said plaintiff, to wit at, &c. (*venue*) aforesaid. — And whereas also, on the day and year last aforesaid at, &c. (*venue*) the said plaintiff, at the like special instance and request of the said defendant, then and there delivered to the said defendant divers other goods and merchandizes of the like number, quantity, quality, description, and value, as those in the said first count mentioned of the said plaintiff, to be carried and conveyed by the said defendant in and by a certain other ship or vessel called — to [Hull] aforesaid, and there, to wit, at, &c. [Hull] aforesaid, to be delivered for the said plaintiff for certain freight and reward to the said defendant in that behalf, (the dangers of the seas, the *king's enemies, and the act of God excepted,) and the said defendant then and there took, accepted, and received the same accordingly for the purposes last aforesaid; and it then and there became and was the duty of the said defendant to take due and proper care of the said last-mentioned goods and merchandizes, and in and about the carriage and conveyance of the same, and the delivery thereof as aforesaid, yet the said defendant not regarding his duty in that behalf, but contriving and intending to injure the said plaintiff, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, took so little, and such bad and improper care of the said last-mentioned goods and merchandizes, and in and about the carriage and conveyance of the same and delivery thereof as aforesaid, that the same then and there, by reason of the bad and improper care of the said defendant in that behalf, and not by reason of any dangers of the seas, or the king's enemies, or the act of God, became and were wholly lost to the said plaintiff.—[*Add a general count for negligence, as in the fourth count, ante, 661; and a count in trover of any ground for supposing defendant has been guilty of a conversion.*]

AGAINST
CARRIERS
BY WA-
TER.

Second
count.

[*665]

For that whereas the said defendant, before and at the time of the

(m) Examine with and let these averments correspond with the bill of lading.

(n) The day of arrival or about it.

Against
the owner
of a ship,
for not ob-

ADVANCE
CARRIAGE
BY WA-
TER.

taining
the proper
cocquet
and docu-
ments ne-
cessary on
exporta-
tion of
goods,
whereby
they were
forfeited.

[*666]

delivery of the goods and chattels to him as hereinafter next mentioned, was the owner of a certain ship or vessel called, &c. to wit, at, &c. (*venue*); and whereas also the said plaintiff, whilst the said defendant was such owner of the said ship or vessel, to wit, on, &c. at [the port of Cork, in that part of the united kingdom of Great Britain and Ireland called Ireland,] to wit, at, &c. (*venue*) aforesaid, caused to be delivered to the said defendant, and the said defendant then and there accepted and received on board the said ship or vessel of and from the said plaintiff, divers goods and merchandizes, to wit, [one thousand boxes of candles,] of great value, to wit, of the value of £— to be safely and securely carried and conveyed therein by the said defendant, from [the port of C.] aforesaid, to certain parts beyond the seas, to wit, to [Kingston, in the island of Jamaica, and there, to wit, to [Kingston] aforesaid, to be delivered to the said plaintiff, for certain reasonable reward to be therefore paid to the said defendant in that behalf, *whereupon it then and there became and was the duty of the said defendant, as such owner of the said ship or vessel, safely and securely to convey and deliver the said goods and *merchandizes to the said plaintiff, at [Kingston] aforesaid, to wit, at, &c. (*venue*) aforesaid, and to prepare and provide all things necessary in that behalf, and, amongst other things, to procure a cocquet or clearance from the proper officer or officers of his Majesty's customs at the port of C. aforesaid, certifying that the said goods and merchandizes were laden on board the said ship or vessel, at the port of C. aforesaid; yet the said defendant, not regarding his duty as such owner of the said ship or vessel as aforesaid, in that behalf, did not nor would safely and securely carry and convey the said goods and merchandizes from the port of C. aforesaid, to [Kingston] aforesaid, nor there, to wit, at [Kingston] aforesaid, safely or securely deliver the said goods and merchandizes to the said plaintiff, although he was then and there ready and willing to have received the said goods and merchandizes at [Kingston] aforesaid; nor did the said defendant procure a cocquet or clearance from the proper officer of his Majesty's customs at [the port of C.] aforesaid, certifying that the said goods and merchandizes were laden on board the said ship or vessel at [the port of C.] aforesaid, but therein wholly made default and by and through the mere carelessness and negligence of the said defendant in the premises, and by reason of his not procuring a cocquet or clearance from the proper officer of his Majesty's customs at [the port of C.] aforesaid, certifying that the said goods and merchandizes were laden on board the said ship or vessel at the said last-mentioned port, the said goods and merchandizes being of the value aforesaid, were afterwards, to wit, on, &c. aforesaid, taken and seized as forfeited to our said lord the king, by certain officers of our said lord the king in parts beyond the seas, at [Kingston] aforesaid, to wit, at, &c. (*venue*) aforesaid, and thereby then and there became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*).—[*Second count same as the first, as far as the asterisk*, then proceed as follows:*]—Whereupon it then and there became the duty of the said defendant, as such owner of the said last-mentioned ship or vessel, to procure the proper document from the proper officer or officers of his Majesty's customs at [the port of C.] aforesaid, to authorize the exportation of the said last-mentioned goods and merchandizes from [the port of C.] aforesaid and the importation there-

Second
count.

of into the port of [Kingston] aforesaid; yet, &c.—[*Same as first, negative of duty.*—*Third count, same as the first, to the asterisk*.*]—Whereupon it then and *there became the duty of the said defendant, as such owner as last aforesaid, safely and securely to carry and convey the said last-mentioned good and merchandizes as last aforesaid, and to deliver the same to the said plaintiff, and the said G. A. as last aforesaid; yet, &c.—[*Conclude as ante, 666.*—*Add another count for negligence generally, like the fourth count, ante, 661.*]

AGAINST
CARRIERS
BY WA-
TER.

Third
count.
[*667]

[*Commencement as ante, 569.*]—For that whereas, by the law and custom of this realm, innkeepers, who keep common inns for the reception, lodging, and entertainment of travelers putting up at, and abiding in, the same, are bound to keep the goods and chattels brought by such travelers into, and being within their respective inns, safely, and without any diminution or loss. And whereas the said defendant, before and at the time of the loss hereinafter next mentioned, was, and from thence hitherto hath been, and still is, an innkeeper, and as such innkeeper, the said defendant hath, for and during all that time kept, and still doth keep, a certain common inn for the reception, lodging, and entertainment of travelers, that is to say, a certain inn, commonly called or known by the name and sign of — to wit, at, &c. (*venue*). And whereas also the said defendant, so being such an innkeeper, and so keeping the said inn as aforesaid, the said plaintiff, [or if his servant, “one E. F. the servant of the said A. B.”] heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, put up, and was then and there received into the said inn as a traveler by the said defendant, and then and there brought into the said inn a certain [box] containing certain goods and chattels, to wit, &c. [*enumerate *the chattels, either by their exact description, or as in trover*].—of the said plaintiff, of great value, to wit, of the value of £— and which said [box] and its contents aforesaid were then, and from thence, until, and at the time of the loss hereinafter mentioned within the said inn, and that the said plaintiff, [or “the said E. F. the servant of the said plaintiff,”] during all that time abided as a traveler therein, to wit, at, &c. (*venue*) aforesaid. Yet the said defendant, so being such innkeeper as aforesaid, not regarding his duty as such innkeeper, did not keep the said box and its contents aforesaid, so brought into and so being in the said inn as aforesaid, safely, and without diminution or loss, but on the contrary thereof, the said defendant and his servants so negligently and carelessly behaved and conducted themselves in that behalf, that afterwards, and whilst the said plaintiff, [or “the said E. F. the servant of the said plaintiff,”] so abided in the said inn as aforesaid, to wit, on the same day and year aforesaid, the said [box] and its

AGAINST
INNKEEP-
ERS.

Against
an inn-
keeper for
the loss of
a box (o).

[*668]

(o) Case is the best form of action. As to the liability, &c. of an innkeeper, see Bac. Ab. Inns—Com. Dig. Action on Case for Negligence, B. 1, &c. and Pleader, 2 Q. —5 T. R. 273.—4 M. & S. 306; and Burn's Justice, 26th ed. vol. i. 101 to 105.—For the printed declarations against innkeepers, see Rast. Ent. 104. Co. Ent. 347.—Thomp. 42.—1 Rich. C. P. 480.—Post, 668.—8 Wentw. Index, 44, 47, 48; and the ancient

mode of declaring, Bac. Ab. Inns, C. 6. An hotel-keeper is liable as an innkeeper, but he should be declared against as such, 2 Chit. Rep. 464.—2 B. & A. 283. In conformity to the usual practice, I have, in the above form, recited the custom of the realm, but this being the common law, seems to be unnecessary.—Ante, 651, note, and 1 Wils. 281.

AGAINST
INNKEEP-
ERS.

contents aforesaid were by and through the mere carelessness, negligence, and default of the said defendant and his servants in that behalf, wrongfully and unjustly taken and carried away by some person or persons to the said plaintiff, [or "to the said plaintiff, and E. F. his said servant,"] as yet unknown, and were, and still are thereby wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[Add a count for negligence generally, as ante, 661, fourth count. Also add a count in trover, if there be a probability of supporting it in evidence, ante, 653.—5 Burr. 2825.—1 Ventr. 223, and conclude as ante, 596.]

Against
an inn-
keeper for
refusing
to lodge
plaintiff
during the
night (p).

[*669]

For that whereas the said defendant, before and at the time of the committing the grievance hereafter mentioned, was an innkeeper, and did keep a common inn, for the accomodation of travelers, that is to say, a certain common inn, called, &c. ; and whereas, whilst the said defendant was such innkeeper, and so kept the said inn as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, the said plaintiff then and there, being a traveler, came and was received by the said defendant into the said inn, and then and there required the said defendant to suffer and permit the said plaintiff to stay and lodge at the said inn, for and during the *night of the same day, and although the said plaintiff was then and there ready and willing, and then and there offered to pay the said defendant a reasonable sum of money for such lodging, yet the said defendant not regarding his duty as such innkeeper, but contriving, and wrongfully and unjustly intending to injure the said plaintiff, and to put him to great trouble and expense, and inconvenience, did not nor would, at the said time when he was so requested as aforesaid, or at any time afterwards, suffer or permit the said plaintiff to stay or lodge at the said inn as aforesaid, during the time aforesaid, but wholly neglected and refused so to do, whereby the said plaintiff was forced and obliged to quit the said inn, and to go and travel in the night-time divers, to wit, [five] miles, in order to procure a lodging elsewhere ; and upon that occasion the said plaintiff was by means of the said several premises aforesaid, put to great trouble, inconvenience, and expense of his monies, and was and is otherwise greatly injured and damaged, to wit, at, &c. (*venue*) aforesaid.

AGAINST
ATTOR-
NIES.

Against
an attor-
ney for
negligent-
ly con-
ducting a
cause to
trial with-
out proper
evidence
(q).

For that whereas, before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, the said plaintiff, at the special instance and request of the said defendant, had retained and employed the said defendant as an attorney of the court of our said lord the king, before the king himself, to prosecute and conduct a certain action of [trover] in the same court by and at the suit of the said plaintiff against one E. F. for [taking away and converting to his own use certain goods and chattels claimed by him the said plaintiff to be his own proper goods and chattels,] for certain reasonable fees and reward, to be therefore paid by the said plaintiff to the said defendant ; and the said de-

(p) See the observations, 5 T. R. 143, 273.—8 Rep. 32.—2 Lord Raym. 909.—Ante, 667; and 1 Burn. J. 20th ed. vol. i. p. 101.

(q) The plaintiff may either declare in

assumpsit or case ; see the forms in assumpsit, and the notes, ante, 371 to 383, which will supersede the necessity of further notes here.

AGAINST
ATTOR-
NIES.

fendant then and there accepted and entered upon such retainer and employment, to wit, at, &c. (*venue*) and thereupon it then and there became and was the duty of the said defendant to prosecute and conduct the said action in a proper, skilful, and diligent manner. Yet the said defendant not regarding such his duty or his said retainer and employment, but contriving and intending to injure and aggrieve the said plaintiff in this behalf, did not nor would prosecute or conduct the said action in a proper, skilful, or diligent manner, and on the contrary thereof prosecuted and conducted the same action to trial in so improper, unskilful, and negligent a manner [in not having a certain instrument then prepared by the said defendant, and purporting to be a sale and assignment of the said goods and chattels by the said E. F. to the said plaintiff, stamped according to law, so that the same might have been given in evidence on the said trial of the said action,] that the said plaintiff by the said neglect and default of the said defendant in that behalf was [hindered and prevented from giving the same instrument in evidence upon the trial of the said cause,] and by reason thereof was afterwards, to wit, on, &c. (*day of nonsuit or about it*) at, &c. (*venue*) aforesaid, compelled to suffer himself the said plaintiff to be nonsuited in the said action whereby he the said plaintiff was not only hindered and prevented from recovering his said damages from the said E. F. by reason of [his taking away and converting the said goods and chattels] as aforesaid, but hath also been forced and obliged to pay and hath paid to the said E. F. a large sum of money, to wit, the sum of £100 for his costs and charges in and about his defense of the said action, and hath also paid to the said defendant another large sum of money, to wit, the sum of £100 for his costs and charges for the prosecution and conduct of the said action, to wit, at, &c. (*venue*) aforesaid.—[*Add the following general count.*]

And whereas also, before and at the time of the committing of the grievances by the said defendant hereinafter mentioned, the said plaintiff, at the special instance and request of the said defendant, had retained and employed the said defendant as an attorney of the court of our lord the king, before the king himself, [or if in *C. P.* instead of the words "before the king himself," say "of the bench,"] to prosecute, conduct, and manage, a certain action in the said court by and at the suit of the said plaintiff against one E. F. for the recovery of a certain sum of money, to wit, the sum of £— [*state a sufficient sum*] then alleged and claimed by the said plaintiff to be due and owing to him from the said E. F. [or if not for a debt, but for damages, say "for the recovery of certain damages amounting, to wit, to the sum of £—" (*state enough*) "then and there alleged and claimed by the said plaintiff to have been sustained by him by reason of certain acts and wrongs before then done and committed by the said E. F. to the said plaintiff's damage,"] for fees and reward to the said defendant in that behalf; and the said defendant then accepted and entered upon such retainer and employment, to wit, at, &c. (*venue*), and thereupon it then and there became and was the duty of the said defendant to prosecute, conduct, and manage the said action with due and proper care, skill, and diligence. Yet the said defendant not regarding such his duty or his said retainer and employment, but contriving and intending to injure and aggrieve the said plaintiff in this behalf, did not nor

General
count a-
gainst an
attorney,
for impro-
perly con-
ducting
an action.

AGAINST
ATTOR-
NEYS.

would prosecute, conduct or manage the said action with due and proper care, skill, and diligence, and on the contrary thereof prosecuted, conducted, and managed the said action in such a careless, unskilful, undue and improper manner, and with such want of due and proper care, skill, and diligence in that behalf, that the said action afterwards, to wit, on, &c. (*day of nonsuit or about it*) to wit, at, &c. (*venue*) aforesaid, became and was rendered wholly abortive and of no avail, and the said plaintiff then and there was forced and obliged to be and he then and there was non-suited [or *if a verdict found against him or otherwise, state the fact shortly accordingly.*] whereby the said plaintiff was and hath been hitherto not only hindered and prevented from recovering his said debt [or "damage"] from the said E. F. but is likely to lose the same, and also hath been forced and obliged to incur and pay, and hath incurred and paid, to the said E. F. a large sum of money, to wit, the sum of [£100] (*state enough*) for his costs and charges in and about his defense to the said action, and hath also incurred the loss of and paid to the said defendant another large sum of money, to wit, the sum of [£100] for the said plaintiff's costs and charges in and about the prosecuting and conducting the said action, to wit, at, &c. (*venue*) aforesaid.

Against
an attor-
ney, for
not caus-
ing a suffi-
cient title
to an es-
tate
bought by
plaintiff to
be con-
veyed to
him, *per*
quod he
could not
re-sell it
(z).

For that whereas, before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, to wit, on, &c. (*day of retainer of defendant or about it*) the said plaintiff had contracted and agreed with certain persons, to wit, E. F. and G. H. for the purchase from them of certain tenements and premises, with the appurtenances, situate in the county of I— in fee simple, at and for a large sum of money, to wit, &c. to be therefore paid for the same, which said tenements and premises, with the appurtenances, the said E. F. and G. H. then assumed to have sufficient power to sell and convey to the said plaintiff in fee simple, to wit, at, &c. And thereupon heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, at the special instance and request of the said defendant, retained and employed the said defendant as an attorney, to ascertain the title of the said E. F. and G. H. to the said tenements and premises, with the appurtenances, and to cause and procure an estate and interest therein, in fee simple, to be duly conveyed by the said E. F. and G. H. to the said plaintiff for reasonable fees and reward to the said defendant in that behalf, in a reasonable time then next following: and the said defendant then accepted and entered upon such retainer and employment, to wit, at, &c. (*venue*). And thereupon it then and there became and was the duty of the said defendant, under and by virtue of the said retainer, to use due endeavors to cause and procure a good and sufficient title to the fee simple of and to the said tenements and premises, with the appurtenances, to be conveyed to the said plaintiff in a reasonable time then next following. And although a reasonable time for the said defendant causing and procuring a good and sufficient title as aforesaid, hath long since elapsed, to wit, at, &c. aforesaid, whereof the said defendant hath always then had notice; yet the said defendant, not regarding such his duty or his said retainer and employment, but contriving and intending to injure,

(z) See the form and notes, ante, 379.

aggrieve, harass, and oppress the said plaintiff in this behalf, did not nor would use due endeavors to cause or procure a good and sufficient title to the fee-simple of and in the said tenements and premises, with the appurtenances, to be conveyed to the said plaintiff, within such reasonable time as aforesaid, or at any time since, but hath hitherto wholly neglected and refused so to do; and afterwards, to wit, on, &c. at, &c. aforesaid, wrongfully and injuriously caused and procured the said plaintiff to pay to the said E. F. and G. H. a large sum of money, to wit, the sum of £— as and for the purchase-money of the said tenements and premises, with the appurtenances, without having a good and sufficient title to the fee-simple of and in the same, conveyed to the said plaintiff, and by reason of the neglect and improper conduct of the said defendant in that behalf, the said plaintiff hath not obtained a good or sufficient title to the said tenements and premises, with the appurtenances, in fee simple, and thereby hath been hindered and prevented from selling and disposing thereof; and the said tenements and premises, with the appurtenances, have become and are of little use or value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.

AGGRIEVED
ATTOR-
NIES.

And whereas also, before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, to wit, on &c. to wit, at, &c. (*venue*) aforesaid, a certain person, to wit, the said H. C. was desirous of obtaining from the said plaintiff a loan of a certain sum of money, to wit, the sum of [£1000] upon interest, at and after the rate of £5 per cent. per annum, and then and there, as a security for the repayment thereof, and interest as aforesaid to the said plaintiff, proposed to encumber certain lands, tenements, and premises, situate in the county of I. And thereupon heretofore, to wit, on the day and year aforesaid, at, &c. aforesaid, the said plaintiff, at the special instance and request of the said defendant, retained and employed the said defendant as an attorney for fees and reward to him in that behalf, to ascertain the title of the said H. J. to the said lands, tenements, and premises, and to take due and proper care that the same should be a sufficient security for the repayment of the said sum of money and interest. And the said defendant then and there accepted and entered upon such retainer and employment, to wit, at, &c. (*venue*). And thereupon it then and there became and was the duty of the said defendant to use due and proper care, skill, and diligence in and about the ascertaining the title of the said H. J. to the said lands, tenements, and premises, and to take due and proper care that the same should be a sufficient security for the repayment of the said sum of money with interest. Nevertheless the said plaintiff in fact saith, that the said defendant, not regarding such his duty, or his said retainer and employment, but contriving and intending to injure and aggrieve the said plaintiff in this behalf, did not nor would take due and proper care to ascertain the title of the said H. J. to the said lands, tenements, and premises, nor take due and proper care that the same should be a sufficient security for the repayment of the said sum of [£1000] and interest thereon. And the said plaintiff further saith, that he, confiding in the performance of the said duty of the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, did lend and advance to the said H. J. the said sum of [£1000] upon the

General
count
against an
attorney
for negli-
gence in
investiga-
ting title.

AGAINST
ATTOR-
NIES.

security of certain lands, tenements, and premises, in the county aforesaid, as and for a sufficient security in that behalf; and the said defendant then and there, in pursuance of his said retainer, caused to be prepared and executed a certain indenture, and certain securities, relating to the supposed estate and interest of the said H. J. in the said last-mentioned lands, tenements, and premises, as and for such sufficient security for the repayment of the said sum of [£1000] and interest as aforesaid, the same being then and there, by reason of the said defendant's carelessness, unskilfulness, negligence, and improper conduct in the premises, a bad and insufficient security for the repayment of the said sum of [£1000] and interest as aforesaid, to wit, at, &c. aforesaid.

AGAINST
A BAILIFF.

Against a
broker
employed
to distrain
on plain-
tiff's ten-
ant, for
negli-
gence in
conduct-
ing the
distress,
whereby
the goods
were lost
to plain-
tiff.

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) the said plaintiff, at the special instance and request of the said defendant, had then and there retained and employed the said defendant as the broker, bailiff, and agent of the said plaintiff, (the said defendant then being a distraining broker) to seize and take divers goods and chattels, then being in and upon certain premises situate in the county of —, as for and in the name of a distress for certain arrears of rent, to wit, the sum of [£42] then claimed by the said plaintiff to be due and in arrear from one C. G. to the said plaintiff, for and in respect of the said premises, with the appurtenances, at and for reward, to be therefore paid to the said defendant by the said plaintiff, and the said defendant had then and there accepted such retainer and employment; and thereupon it then and there became and was the duty of the said defendant to take due and proper care of the said goods and chattels, whilst the same, after having been so distrained, should be in his hands and possession under the said distress, so that the said goods and chattels might be appraised, sold, and disposed of in satisfaction of the said arrears of rent, and the costs of the said distress, in due course of law, if not replevied. And although the said defendant, as such broker, bailiff, and agent of the said plaintiff, then and there seized and took the said goods and chattels in and upon the said premises, as and for such distress as aforesaid, and then and there had the said goods and chattels in his possession under the said distress, and therewith and thereout the said arrears of rent, and the costs of the said distress might have been satisfied, to wit, at, &c. aforesaid; yet the said defendant not regarding his duty in that behalf, but contriving and intending, craftily and subtly, to deceive and defraud the said plaintiff in this respect, did not nor would take due and proper care of the said goods and chattels, whilst the same remained and were in his possession under the said distress, and afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, took so little and such bad care of the said goods and chattels, that by and through the carelessness, negligence, and improper conduct of the said defendant in that behalf, the said goods and chattels were then and there by divers persons, without the knowledge and consent of the said plaintiff, wrongfully removed and taken away out of and from the said premises, and out of the custody of the said defendant, and became and were secreted and wholly lost to the said plaintiff, and the said plaintiff thereby lost the benefit and advantage he other-

wise might and would have derived and acquired from the said distress, and the said plaintiff thereby hath been, and is thereby hindered and prevented from recovering the said arrears of rent so due and owing to him the said plaintiff from the said C. G. and the costs of the said distress, and hath not received, and is likely to lose the said arrears of rent, to wit, at, &c. (*venue*) aforesaid.—And whereas also heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, at the like special instance and request, had then and there retained and employed the said defendant for reward to him, to make a distress upon such goods and chattels as the defendant might find in certain other premises, for rent, to wit, the sum of [£42.] then due from the said C. G. as tenant of such premises, to the plaintiff, the landlord thereof, and the said defendant had then and there accepted such retainer and employment; and thereupon it then and there became and was the duty of the said defendant to sell and dispose of any goods and chattels he might distrain as last aforesaid, and which by law he might be entitled to sell under the said last-mentioned distress in a careful and proper manner, and for the best price he could reasonably procure for the same, and to render to the said plaintiff a just, true, and reasonable account to the said plaintiff of the proceeds of the said last-mentioned goods and chattels on such sale thereof, under the said last-mentioned distress, when he the said defendant should be thereunto requested; and the said plaintiff avers, that the said defendant, by virtue of the said last-mentioned retainer, did afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, seize and distrain upon divers goods and chattels then found and being in and upon the said last-mentioned premises, for the said last-mentioned arrears of rent, the said last-mentioned goods and chattels then being of great value, to wit, of sufficient value to satisfy the said last-mentioned arrears of rent, and the costs of the said last-mentioned distress, and that afterwards, to wit, on, &c. aforesaid, the said defendant was legally entitled to sell the said last-mentioned goods and chattels under the said last-mentioned distress, to wit, at, &c. (*venue*) aforesaid, and did accordingly then and there dispose of the same for divers sums of money; nevertheless the said defendant not regarding his said last-mentioned duty, but contriving and intending, craftily and subtly, to deceive and defraud the said plaintiff, did not nor would on the occasion last aforesaid sell and dispose of the said last-mentioned goods and chattels in a careful and proper manner, and for the best price he might reasonably have procured for the same, and thereby the said last-mentioned goods and chattels then and there fetched much less than the amount of the said last-mentioned arrears of rent, and the costs of the said last-mentioned distress, and the said plaintiff is likely to lose the residue of such arrears of rent, to wit, at, &c. (*venue*) aforesaid; and the said plaintiff further saith, that the said defendant further contriving, as aforesaid, hath not, although afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do, as yet rendered to him a just and true, or reasonable account of the proceeds of the said last-mentioned goods on the said sale thereof, but hath wholly neglected and refused, and still doth neglect and refuse so to do, contrary to the said last-mentioned duty of the said defendant, to wit, at, &c. (*venue*) aforesaid.—And whereas also heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) afore-

AGAINST
A BAILIFF.

Second
count, for
not duly
selling the
goods.

Third
count, for

AGAINST
A BAILIFF.

careless-
ness gen-
erally.

Fourth
count,
for not
distrain-
ing.

said, the said plaintiff, at the like special instance and request of the said defendant, had then and there retained and employed the said defendant (for reward to him) as the bailiff and agent of the said plaintiff, to seize and distrain upon certain other goods and chattels, then being in and upon certain other premises, with the appurtenances, for a certain other sum of money, to wit, the sum of [£42,] then due and in arrear from the said C. G. to the said plaintiff, for rent of the said last-mentioned premises, and which said last-mentioned goods and chattels were then liable to such distress, and the said defendant had then and there accepted and entered upon such last-mentioned retainer and employment; and thereupon it then and there became and was the duty of the said defendant to conduct the said last-mentioned distress in a diligent, careful, and proper manner; and the said plaintiff avers, that the said defendant did then and there, under and by virtue of the said last-mentioned retainer and employment, seize and distrain divers goods and chattels, then being in and upon the said last-mentioned premises, for the said last-mentioned arrears of rent, and then and there, as such bailiff and agent of the said plaintiff, had the conduct of the said last-mentioned distress; nevertheless the said defendant not regarding his said last-mentioned duty, but contriving and intending craftily and subtly, to deceive and defraud the said plaintiff in this behalf, then and there conducted the said last-mentioned distress in so careless, negligent, and improper manner, that by reason of the carelessness, negligence, and improper conduct, and breach of duty of the said defendant in that behalf, the benefit of the said last-mentioned distress became and was wholly lost to the said plaintiff, and the said last-mentioned distress became ineffectual and inoperative, and the said last-mentioned arrears of rent, and the said costs of the said last-mentioned distress, were not satisfied by means of the said last-mentioned distress, as they otherwise might and would have been, and the said plaintiff is likely to lose the said last-mentioned arrears of rent, to wit, at, &c. (*venue*) aforesaid.—And whereas also heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, at the like special instance and request of the said defendant, had then and there retained and employed the said defendant (for reward to him) as the bailiff and agent of the said plaintiff, to make a distress for other rent, to wit, [£42] then due from the said C. G. to the said plaintiff, in respect of certain other premises, and the said defendant had then and there accepted and entered upon such last-mentioned retainer and employment, and it then and there became and was the duty of the said defendant to use due and proper care and diligence in and about the making of the said distress as aforesaid; and the said plaintiff avers, that under the said last-mentioned retainer the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, entered upon the said last-mentioned premises to make the said last mentioned distress, and although there then and there were on the said last-mentioned premises divers goods and chattels which were liable to be seized and distrained by the said defendant, and which he might have distrained for the said last-mentioned arrears of rent on the occasion last aforesaid, whereof the said defendant then and there had notice, and although it then and there was the duty of the said defendant to seize the said last-mentioned goods and chattels under the said last-mentioned distress, yet the said defendant not regard-

ing his duty in that behalf, but contriving and intending to deceive and injure the said plaintiff, then and there wrongfully and negligently omitted to seize and distrain the said last-mentioned goods and chattels under the said last-mentioned distress, and wrongfully and negligently seized other goods and chattels, evidently of insufficient value to satisfy the said last-mentioned arrears of rent, and the expenses of the said last-mentioned distress, whereby the said plaintiff lost the benefit he might and otherwise would have derived from the said last-mentioned distress, and the greater part of the said last-mentioned arrears of rent is still unsatisfied to the said plaintiff, and he is likely to lose the same, to wit, at, &c. (*venue*) aforesaid.

AGAINST
A BAILIFF.

[*Commencement as ante*, 596.]—For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) the said plaintiff, at the special instance and request of the said defendant, caused to be delivered to the said defendant, certain goods and chattels, to wit, &c. [*specify them according to their exact description, or as in trover*] of the said plaintiff, of great value, to wit, of the value of £— to be by the said defendant, **[here state shortly the purpose for which the goods were delivered, as thus, mutatis mutandis, safely and securely loaded on board a certain ship or vessel at, &c. for the said plaintiff,] for reasonable reward (b) to the said defendant in that behalf, and the said defendant then and there had and received the said goods and chattels for the purpose aforesaid.*—Yet the said defendant not regarding his duty in that behalf, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, by himself and his servants in that behalf, conducted himself so carelessly, negligently, and improperly, in and about the [loading of the said goods and chattels on board the said ship or vessel,] that by and through the mere negligence and improper conduct of the said defendant and his servants in that behalf, the said goods and chattels then and there became and were greatly broken, damaged, and destroyed, and wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Add the general count for negligence, post*, 671. — *It is advisable in general against a bailee to add a count, stating that the defendant "had the loading of the hogshead, &c." or the performance of the matter which it was his duty to perform, which count may be framed as in Govett v. Radnidge, 3 East, 62; and if there be any evidence of a conversion, a count in trover should be added, and conclude as ante*, 596.]

AGAINST
BAILEES
IN GENERAL.

Against a
bailee
with or
without
reward,
for negli-
gence,
stating
particular
purpose of
bailment
(a).

[*670]

(a) See the use of declaring in case instead of assumpsit, ante, 651; as to the different description of bailees, ante, 333, and the several forms, 334 to 342, which may be readily altered to a declaration in case. See other printed forms, ante, 651.—8 Wentw. Index, 22. Morg. 422, 426, 445. Care should be taken not to frame the count in such a way as to make it in assumpsit, and then adding a count in case or trover, for that would constitute a misjoinder. Thus, in a declaration in case, one count stated that plaintiff, at request of defendant, had caused to be delivered to him cer-

tain boars, pigs, &c. to be taken care of by defendant for plaintiff, for reward to him, defendant in consideration thereof, undertook and agreed with the said plaintiff to take care of the boars, &c. and re-deliver the same on request. Held, on motion in arrest of judgment, that this was a count in assumpsit, and could not be joined with counts in case. 6 B. & C. 268.

(b) If no reward were to be paid, this should be omitted, Coggs v. Bernard, 2 Ld. Raym. 909—1 Hen. Bla. 158.—5 T. R. 143; ante, 344, as to *mandatum* being the second description of bailment.

AGAINST
BAILEES
IN GENERAL.

Against a
bailee
without
reward,
for not
taking
care of
goods, and
re-deliv-
ering on
request
(c).

[*671]

Second
count for
not taking
care of,
generally.

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) the said plaintiff, at the special instance and request of the said defendant, had caused to be delivered to the said defendant, divers goods and chattels, to wit, [a certain chair, and the dressing and furniture belonging to the same,] of the said plaintiff, of great value, to wit, of the value of £— of lawful money of Great Britain, to be taken care of and safely and securely kept by the said defendant for the said plaintiff, and to be re-delivered by the said defendant to the said plaintiff, when the said defendant should be thereunto afterwards requested; and the said defendant then and there had and received the said goods and chattels for the purpose aforesaid, and it thereupon then and there became and was the duty of the said defendant to take due and proper care of the said goods and chattels, and safely and *securely keep the same for the said plaintiff, and to re-deliver the same to the said plaintiff when he the said defendant should be thereunto afterwards requested. And although the said defendant was afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, requested by the said plaintiff to re-deliver the said goods and chattels to the said plaintiff, yet the said defendant, not regarding his duty in that behalf, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, did not nor would take due and proper care of the said goods and chattels, or safely or securely keep the same, or any part thereof, for the said plaintiff, nor did nor would, when he was so requested as aforesaid, or at any time before or afterwards, re-deliver the same to the said plaintiff, but on the contrary thereof, the said defendant so carelessly behaved and conducted himself with respect to the said goods and chattels, and took so little and such bad care thereof, that by and through the carelessness, negligence, and improper conduct of the said defendant, the said goods and chattels being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. — And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said defendant, at his special instance and request, had the care of certain other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the said first count mentioned, of the said plaintiff; and thereupon it then and there became and was the duty of the said defendant, whilst he so had the care of the said goods and chattels, to take due and proper care thereof. Yet the said defendant, not regarding his duty in that behalf, did not nor would whilst he so had the care of the said last-mentioned goods and chattels, take due and proper care of the same, but wholly neglected so to do, and took such bad care thereof, that afterwards, to wit, on the day and year aforesaid, the said last-mentioned goods and chattels became and were greatly damaged and injured, and wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. [*Third count in trover.*]

Against
the bailee
of a lease,

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) the said plaintiff, at the special instance and request of the said defendant, deliver-

(c) See the notes to the preceding form.

ed to the said defendant a certain indenture of lease of certain premises, with the appurtenances, *situate in the county of — of great value, to wit, of the value of £— to be taken care of, and safely and securely kept by the said defendant for the said plaintiff, and to be re-delivered by the said defendant to the said plaintiff, when he the said defendant should be thereunto afterwards requested. And the said defendant then and there had and received the said lease, for the purpose aforesaid. Yet the said defendant, not regarding his duty in that behalf, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) fraudulently and unlawfully pawned and delivered the said lease to a certain person, to wit, to one I. B. as a pledge and security for the payment of a large sum of money, to wit, the sum of £— to the said I. B. by the said defendant; and the said plaintiff, by means of such fraudulent and improper conduct of the said defendant, and in order to procure a return of the said lease, afterwards, to wit, on, &c. at, &c. (*venue*) was forced and obliged to, and did commence and prosecute a certain suit in the Court of Exchequer of our said lord the king, at Westminster, in the county of Middlesex, against the said I. B. and against certain other persons, to wit, &c. and such proceedings were thereupon had, in order to regain the possession of the said lease, that he the said plaintiff was forced and obliged to, and did necessarily lay out and expend divers large sums of money, amounting in the whole to the sum of £— in and about the costs and expenses of the suit, and the procuring the said lease to be delivered to him as aforesaid, to wit, at, &c. (*venue*) aforesaid.—[*Second count in trover, stating the method of conversion to be by pledging, &c. and the obligation of expending large sums of money.— Third count in trover generally.*]

AGAINST
BAILERS
IN GENERAL.

—
for pawning it,
whereby plaintiff
was obliged to ex-
pend money.

For that whereas the said defendant, before and at the time of committing the greivances hereinafter next mentioned, was a miller, to wit, at, &c. (*venue*) and thereupon heretofore, to wit, on, &c. at, &c. aforesaid, the said plaintiff caused to be delivered to the said defendant a large quantity, to wit, — loads, containing respectively a large quantity, to wit, [four measures of wheat] of the said plaintiff, of great value, to wit, of the value of £— of lawful money of Great Britain, to be ground by the said defendant, as such miller as aforesaid, for the said plaintiff, for certain reasonable reward to be therefore paid by the said plaintiff to the said defendant; and although the said defendant then and there accepted and received the said wheat of and from the said plaintiff, for the said purpose as aforesaid, yet the said defendant, not regarding his duty in that behalf, but contriving and falsely and fraudently intending to injure the said plaintiff, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, wrongfully and injuriously converted and disposed of a great part, to wit, [five loads] of the said wheat, of great value, to wit, of the value of £— to his own use, and also then and there falsely, deceitfully, wrongfully, and injuriously, mixed with the residue of the said wheat of the said plaintiff, divers large quantities of other wheat, of bad, smutty, and inferior quality to the said wheat of the said plaintiff, and caused and procured the said wheat, so mixed as aforesaid, to be ground together, by means whereof the said plaintiff was not only deprived and defrauded of the said wheat which the said defendant so converted and disposed of to his own use as aforesaid, but also by means of the premises,

Against a
miller, for
mixing
corn sent
him to be
ground,
with other
corn of in-
ferior
quality.

AGAINST
BAILLEES
IN GENERAL.
RAL.

Second
count.

the residue of the said wheat of the said plaintiff then and there became and was greatly spoiled and lessened in value, and rendered of little use and value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) the said plaintiff, at the special instance and request of the said defendant, caused to be delivered to the said defendant a certain other large quantity, to wit, [ten loads] of other wheat of the said plaintiff, of great value, to wit, of the value of £— to be ground by the said defendant for the said plaintiff. Yet the said defendant, not regarding his duty in that behalf, but contriving and falsely and fraudulently intending to injure and damnify the said plaintiff, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) wrongfully and injuriously converted and disposed of a great part, to wit, [five loads] of the said last-mentioned wheat, the same being of great value, to wit, of the value of £— to his own use, and also then and there wrongfully and injuriously caused and procured to be mixed with the residue of the said last-mentioned wheat, divers large quantities of wheat of an inferior quality to the said last-mentioned wheat of the said plaintiff, by means whereof, the said plaintiff was not only deprived and defrauded of the said last-mentioned wheat, which the said defendant so converted and disposed of to his own use as aforesaid, but also, by means of the premises, the residue of the said last-mentioned wheat of the said plaintiff, became *and was greatly spoiled and lessened in value, and rendered of little use or value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Third count in trover.*]

[*673]

Against
the ac-
ceptor of a
bill of ex-
change,
for cancel-
ling his ac-
ceptance,
whereby
plaintiff
could not
get the
bill dis-
counted.

For that whereas the said plaintiff heretofore, and before and at the time of the committing of the grievances hereinafter mentioned, was lawfully possessed of and entitled unto a certain bill of exchange, bearing date, &c. and drawn by one E. M. upon and accepted by the said defendant, and whereby the said E. M. then and there required the said defendant, three months after date thereof, to pay to the order of him the said E. M. the sum of £— and the said defendant then and there accepted the said bill of exchange, and which said bill of exchange had been duly indorsed and delivered by the said E. M. to the said plaintiff; and the said plaintiff, by reason thereof became and was lawfully entitled to receive the money in the said bill of exchange specified, when the same should become due and payable, according to the tenor and effect thereof; and whereas also, afterwards, and after the said bill of exchange was so accepted by the said defendant, and indorsed to the said plaintiff as aforesaid, and before the same became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. (*venue*) aforesaid, the said plaintiff applied to and was then treating and about to agree with one G. H. for the discounting of the same bill of exchange by the said G. H. for the said plaintiff; and thereupon, previous to the agreement for discounting the said bill of exchange being entered into and finally concluded, the said plaintiff suffered and permitted the said G. H. to take the said bill of exchange, in order that the said G. H. might make inquiries of and concerning the same; and the said plaintiff further saith, that the said defendant, whilst the said G. H. so had the said bill of exchange in his possession and custody for the purpose aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, contriving and intending to injure the said plaintiff,

and to hinder and prevent the said plaintiff from getting the said bill of exchange discounted, or otherwise transferring the same, wrongfully and unjustly, and without any reasonable cause whatever, and without the license or consent, and against the will of the said plaintiff, defaced, erased, and cancelled his said acceptance of the said bill of exchange; by means whereof the said bill of exchange became and was of much less value than it otherwise would have been to the said plaintiff, and the said plaintiff hath *thence hitherto been wholly unable to get discounted, or otherwise to transfer, the said bill of exchange, and the same hath become and is of no use or value to the said plaintiff, and the said plaintiff hath been and is, by means of the premises, otherwise greatly injured, to wit, at, &c. (*venue*) aforesaid.—And whereas also heretofore, to wit, on, &c. at, &c. (*venue*) the said plaintiff was lawfully entitled to receive, when due, the payment of a certain sum of money, to wit, the sum of £— payable by virtue of a certain other bill of exchange, then indorsed to the said plaintiff, and accepted by the said defendant. Yet the said defendant, contriving to injure the said plaintiff, afterwards, and before the said last-mentioned bill of exchange became due and payable, and whilst the said plaintiff was entitled to the said last-mentioned bill of exchange, to wit, on, &c. at, &c. (*venue*) aforesaid, wrongfully and injuriously, and without the license or consent of the said plaintiff, cancelled and erased the acceptance by the said defendant, before then made on the said last-mentioned bill of exchange, by means whereof the said plaintiff hath been prevented and is unable to negotiate the said last-mentioned bill of exchange, and the same hath become and is of little or no value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Add a count in trover for the bill.*]

AGAINST
DEBTORS
IN CON-
GAL.

[*674]

Second
count,
more gen-
eral.

For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) it was agreed between the said plaintiff and the said defendant, that the said defendant should lend unto the said plaintiff a certain sum of money, to wit, the sum of £— of lawful money of Great Britain, to be returned when the said plaintiff should be thereunto requested; and that a certain [cow with calf, and a certain yearling calf,] of great value, to wit, of the value of, &c. of the said plaintiff, should be a security to the said defendant for the repayment of the said sum of money, when the said defendant should require the same, but that the said [cow with calf, and the said yearling calf,] should remain in the possession of the said plaintiff until such default, and that after such default the said defendant should have power and authority to take away from the possession of the said plaintiff, and to dispose of the said [cow with calf, and yearling calf;] and the said plaintiff further saith, that afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*), the said defendant lent and advanced the said sum of £— to the said plaintiff, on the terms aforesaid; and that afterwards, to wit, on, &c. at, &c. *(*venue*) the said defendant did give notice to the said plaintiff to repay the said sum of £— on or before the — day of —, &c.; yet the said defendant, contriving and intending to injure the said plaintiff in this behalf, before the said — day of —, &c. the time so appointed by the said defendant for the repayment of the said sum of money, to wit, on, &c. at, &c. (*venue*) did wrongfully and unjustly take and drive away the said [yearling calf, and cow with her calf,]

For tak-
ing away
and sell-
ing, be-
fore de-
fault of
payment,
a cow
which had
been de-
posited
with the
defendant
as a secu-
rity for
the pay-
ment by
plaintiff of
a sum of
money on
a future
day.

[*675]

AGAINST
SHIPPERS
IN GENERAL.

Second
count.

Third
count.

[*676]

and from and out of the possession of the said plaintiff, and did sell and dispose of the same for certain small sums of money, and converted and disposed thereof to his own use, although the said plaintiff, afterwards, and before the said — day of — to wit, on, &c. at, &c. (*venue*) aforesaid, was ready and willing, and then and there tendered and offered to pay to the said defendant the said sum of £— whereby the said plaintiff hath been and is greatly injured, to wit, at, &c. (*venue*) aforesaid.— And whereas also, at the time of the committing the grievances hereinafter next mentioned, it had been agreed between the said plaintiff and defendant, that a certain [cow with calf, and a certain yearling calf,] should stand as a security to the said defendant for the payment to him by the said plaintiff of a certain sum of money, to wit, the sum of £— when he the said defendant should require payment of the same, to wit, at, (*venue*) aforesaid. Yet the said defendant, contriving and intending to injure the said plaintiff in this behalf, before the time appointed by the said defendant for the payment by the said plaintiff of the said last-mentioned sum of £— had elapsed, to wit, on, &c. at, &c. (*venue*) aforesaid, sold and disposed of the said [cow with calf, and the said yearling calf,] and converted and disposed thereof to his own use, whereby the said plaintiff hath been and is greatly injured, to wit, at, &c. (*venue*) aforesaid.— And whereas also the said plaintiff, heretofore, to wit, on, &c. at, &c. (*venue*) at the special instance and request of the said plaintiff, caused to be delivered to the said plaintiff a certain [cow, &c.] of the said plaintiff, of great value, to wit, of the value of £— to be by the said defendant kept as a security for a certain sum of money, to wit, the sum of £— of like lawful money, to be paid by the said plaintiff to the said defendant; and although the said defendant then and there received the said [cow, &c.] for the purpose aforesaid, yet the said defendant not regarding his duty in that behalf, afterwards, to wit, on, &c. at, &c. (*venue*) without the license and consent of the said plaintiff, wrongfully and injuriously *did sell and dispose of the said [cow, &c.] whereby they were wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid.—[*Fourth count in trover.*]

Against a
coal meter
for not
properly
measuring
coals,
and not
rendering
a true ac-
count of
coals de-
livered,
whereby
plaintiff
paid for
more than
he received.

For that whereas the said defendant, before and at the several and respective times of committing the several grievances in this and the next count mentioned, was one of the meters appointed to measure and superintend the delivery of coals, from and on board of ships laden therewith, in the pool or River Thames, in the port of London, and as such meter had been and was, before the committing of the grievances hereinafter next mentioned, to wit, on, &c. at, &c. (*venue*) duly stationed in and on board of a certain ship or vessel called the —, then being in the said pool or River Thames, duly to measure and superintend the delivery of a certain cargo of coals, then being in and on board of the said ship or vessel, to the respective buyers thereof, and it thereupon then became and was the duty of the said defendant as such meter as aforesaid, justly, truly, and without fraud, to measure and superintend the delivery of the said cargo to the respective buyers thereof, and to make just and true returns thereof, and of the several quantities from time to time delivered to them, in order that they might thereafter be duly debited and be charged for the same, and the duty thereon due and payable. And whereas the said plaintiff heretofore, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid,

AGAINST
BAILEES
IN GENERAL.

bargained for and bought a certain part, to wit, one fourth part of the said cargo of coals to be thereafter delivered to him the said plaintiff from and out of the said ship or vessel, and a certain quantity of coals was thereupon, afterwards, to wit, on, &c. aforesaid, measured and delivered from and out of the said ship or vessel, and her aforesaid cargo, as and for a part of the said cargo so by him bargained for and bought as aforesaid by and under the metage, measurement, and superintendence of the said defendant as such meter as aforesaid, to wit, at, &c. (*venue*) aforesaid. Yet the said defendant, not regarding his duty as such meter as aforesaid, but contriving, and wrongfully intending to injure the said plaintiff, did not justly, truly, and without fraud, measure and superintend the delivery of the said coals, which were so measured and delivered unto the said plaintiff as aforesaid, nor make a just and true return of the last-mentioned cargo or quantity thereof, according to his aforesaid duty in that behalf, but omitted and neglected so to do, and therein failed and made default, and on the contrary *thereof, the said defendant as such meter as aforesaid, afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, did falsely and fraudulently measure and deliver the said last-mentioned coals, and suffer and permit the same to be measured and delivered unto the said plaintiff from and out of the said ship or vessel, and her aforesaid cargo, as and for, and as then and there being, divers, to wit, 12 chaldrons and one vat of such parcel of the said coals so bargained for and bought by him the said plaintiff as aforesaid, and did afterwards, to wit, on, &c. aforesaid, as such meter as aforesaid, falsely and fraudulently return the said coals which were so measured and delivered to the said plaintiff as aforesaid, as then and there being 12 chaldrons and one vat of coals, in order that the said plaintiff, as such buyer thereof as aforesaid, might be debited for the same, and be charged with, and become liable to pay duty thereon accordingly; whereas in truth and in fact the said coals so measured and delivered to the said plaintiff as aforesaid, as and for 12 chaldrons and one vat of coals as aforesaid, were not nor did contain 12 chaldrons and one vat of coals, but only a much less quantity, to wit, 420 bushels of coals, to wit, at, &c. aforesaid, whereby, and by reason of which said several premises, he the said plaintiff was hindered and prevented from receiving, and lost and was deprived of the difference in the quantity between the said coals so measured and delivered to him as aforesaid, and 12 chaldrons and one vat of the said coals, so by him bought as aforesaid, being divers, to wit, 21 bushels of coals, and was afterwards debited, and forced and obliged to, and did pay for the said coals so to him measured and delivered as aforesaid, as being 12 chaldrons and one vat of the said coals so by him bought as aforesaid, together with the duty thereon accordingly, and was thereby obliged to, and did lay out and pay divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £— more than was justly due and payable from him, for and in respect of the said coals so delivered to him as aforesaid, and the duty thereon accordingly, to wit, at, &c. (*venue*).—[*Second count nearly similar to the foregoing, stating that the defendant took upon himself, as such meter as aforesaid, the measurement of the coals, yet took so little and such bad care in the metage, that the plaintiff paid for more coals than were delivered as before.—Third and fourth counts nearly the same as the second.*]

[*677] *

Fifth
count.

ADAMPT
BANKERS
IN CASE
BAL.

fore the committing of the grievances hereinafter next mentioned, *the said plaintiff had purchased a certain other quantity of coals, parcel of the cargo of a certain other ship or vessel called, &c. at the time of the committing of the grievances hereafter next mentioned, lying in that part of the river Thames called the pool. And whereas also, before and at the time of the committing of the grievances hereinafter next mentioned, the said defendant was one of the laboring coal meters before then appointed to measure coals, delivered in the pool aforesaid, and as such meter had been and was then stationed and employed to measure the said last-mentioned coals from and on board the said last-mentioned ship, to him the said plaintiff in that behalf, for certain metage and reward in that behalf due and payable, and the said defendant had, before and at the time of committing of the said grievance hereafter next mentioned, undertaken the admeasurement of the said last-mentioned coals, yet the said defendant not regarding his duty in that behalf, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, so negligently, inattentively, and improperly conducted himself, in and about the measuring of the said coals, so purchased by the said plaintiff as last aforesaid, from and out of the said last-mentioned ship to the said plaintiff, that by and through the negligent, inattentive, and improper conduct of the said defendant as such meter as last aforesaid, in that behalf, the said quantity of coals so purchased by him the said plaintiff as last aforesaid, was not measured from and out of the said last-mentioned ship or vessel, to him the said plaintiff, but on the contrary thereof, afterwards, to wit, on, &c. aforesaid, by means of the said improper conduct of the said defendant, a much less quantity of coals than the said quantity so purchased by the said plaintiff as last aforesaid, was delivered to him the said plaintiff from the said last-mentioned ship, as being the said quantity of coals so purchased by him the said plaintiff as last aforesaid, and as having been justly measured from the said last-mentioned ship to him the said plaintiff, by means of which said improper conduct of the said defendant in that behalf, the said plaintiff lost and was deprived of the full and just quantity of coals so by him purchased as last aforesaid, and was called upon for, and forced and obliged to pay for a greater quantity of coals than was in fact delivered to him, under his said last-mentioned purchase, to wit, at, &c. (*venue*) aforesaid.—[*Sixth count in trover generally.*]

For putting plaintiff's mare, taken damage feasant, into defendant's farm yard, whereby the mare was gored and died.

[*679]

For that whereas the said defendant, before the committing of the grievances hereinafter mentioned, to wit, at, &c. (*venue*) took and distrained a certain [mare] of the said plaintiff, of great value, to wit, of the value of £— as doing damage to the said defendant, and then impounded the said [mare] as such distress for such damage, in a certain private pound, that is to say, in a certain farm and premises, with the appurtenances, of the said defendant, situate and *being at, &c. to wit, at, &c. (*venue*) aforesaid, and thereupon it then and there became and was the duty of the said defendant to take due and proper care of the aforesaid [mare,] whilst the same was so impounded by him in such pound as aforesaid; nevertheless the said defendant, not regarding his duty in that behalf, but contriving, and falsely and fraudulently intending to injure and damnify the said plaintiff, whilst the said [mare] was so impounded as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, so carelessly and neg-

ligerly behaved and conducted himself, that the said [mare] then and there became and was greatly gored, torn, and lacerated, insomuch that the said [mare] afterwards, to wit, on the day and year aforesaid, died, and was wholly lost to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And whereas also afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said defendant had the care and custody of a certain [mare] of the said plaintiff, of great value, to wit, of the value of £—yet the said defendant, not regarding his duty in that behalf, then and there so negligently, carelessly, and improperly behaved and conducted himself in the taking care of the said last-mentioned [mare] that by reason of the carelessness and improper conduct of the said defendant in that behalf, the said [mare] then and there became and was greatly hurt and wounded, and by means thereof afterwards, to wit, on the day and year aforesaid, died, to wit, at, &c. (*venue*) aforesaid.—[*Third count in trover.*]

AGAINST
BAILLEES
IN GENERAL.

Second
count.

[*Commencement as ante*, 596.]—For that whereas the said plaintiff heretofore to wit, on, &c. at, &c. (*venue*) at the special instance and request of the said defendant, bargained with the said defendant to buy of the said defendant a certain [horse,] at and for a certain price or sum of money, to wit, the sum of £—, and the said defendant by then and there falsely and fraudulently warranting the said [horse] to be [sound and quiet in harness,] then and there sold (e), the said [horse] to the said plaintiff, for the said sum of £— which was then and there paid by the plaintiff to the said defendant; whereas, in truth and in fact, the said [horse] was, at the time of the said warranty and sale thereof, [unsound, unsteady, restive, and ungovernable in harness, and hath from thence

FOR
DECEIT.
For a false
warranty
of a horse
(d).
[*680]

(d) As to what constitutes a good cause of action for deceit, see 3 Chit. Com. Law, 306.—Chitty, jun. on Contracts, 223. 2 Stark. 561. As to warranties in general, ante, 279, n. If there was no warranty, but only a false representation, not connected with the contract, the declaration should be in case for the deceit, 4 Camp. 22.—12 East, 11. The general rule is, that whatever a seller represents at a sale is a warranty. If a person, at the time of his selling a horse say, "I never warrant, but he is sound as far as I know," this is a qualified warranty, and may be sued on in assumpsit, showing that defendant knew of the unsoundness, 4 C. & P. 45. In some cases, though there be a warranty and stipulation that the vendor will take back the article, yet the vendee may sue for the deceit, 2 Stark. 162. Some deceit, for the purpose of putting the plaintiff off his guard, must be proved, unless there was a warranty, 1 Stark. 75.—3 Campb. 156. A vendor must either be silent or speak the truth, 2 Stark. 565. A vendor may repudiate a contract on the ground of fraud, but to entitle him so to do the vendee must be put

in *statu quo*. Therefore, if the vendor have derived any benefit from the contract, he should sue for the deceit, and, in such case, he cannot, in an action for the price of the thing sold, &c. resist the action on account of the fraud, see ante, 279. See the use of declaring in case, 3 East, 62; and the precedents in 3 Wils. 40 to 43.—3 East, 446.—8 Wentw. Index, 28, 29, 30.—2 Rich. C. P. 165.—12 East, 632.—Morg. 255, 257.—Pl. A. 240.—1 Rol. Ab. 91, 1. 10. pl. 8.—2 Marsh. 217.—Post, 631, &c. of declarations for deceit on the sale of goods, &c. and ante, 279 to 287, in *notis*. In this action upon an express warranty, the *sciaster* need not be alleged, nor, if stated, need it be proved, 2 East, 446. It seems an indictment will lie against two or more persons for conspiracy to cheat and defraud a man by selling him an unsound horse, 1 Stark. 402.—2 B. & A. 204.

(e) It is proper to say *warrantizando vendidit*, in order that it may appear that the warranty was at the time of the sale, Com. Dig. Action on the Case for Deceit, F. 2. See also 12 East, 632.

FOR
DECEIT.

[*681]

hitherto so remained and continued. And the said plaintiff in fact saith, that the said defendant, by means of the premises, on the day and year aforesaid, at, &c. (*venue*) aforesaid, falsely and fraudulently deceived the said plaintiff on the sale of the said [horse] as aforesaid, and thereby the said [horse] afterwards, to wit, *on the day and year aforesaid, not only became of no use or value to the said plaintiff, but also then and there greatly kicked, hurt, injured, and spoiled a certain other horse of the said plaintiff, of great value, to wit, of the value of £— and thereby also the said plaintiff was then and there put to great expense of his monies, in the whole amounting to a large sum of money, to wit, the sum of £— in and about the feeding and taking care of and selling and disposing of the said [horse] to wit, at, &c. (*venue*) aforesaid.

Second
count (f).

And whereas also the said plaintiff heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, bargained with the said defendant to buy of the said defendant a certain other [horse,] and the said defendant, by then and there falsely warranting the said last-mentioned [horse] to be sound, falsely and fraudulently induced the said plaintiff then and there to buy, and the said plaintiff did then and there buy of the said defendant, the said last-mentioned [horse,] for a certain other large sum of money, to wit, the sum of £— of like lawful money, whereas in truth and in fact the said last-mentioned [horse], at the time of the said last-mentioned warranty and sale, was not sound, but then was, and thence hitherto hath been, and still is, unsound, and of no use or value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. And so the said plaintiff saith, that the said defendant falsely and fraudulently deceived the said plaintiff on the sale of the said last-mentioned horse as aforesaid, to wit, at, &c. (*venue*) aforesaid.—[*Conclude as ante*, 596.]

For deceit
of warrant-
ty on the
exchange
of a horse.

[*682]

For that whereas the said plaintiff heretofore, to wit, on, &c. at, &c. (*venue*) at the special instance and request of the said defendant, bargained with the said defendant to exchange with the said defendant a certain [horse] of the said defendant for a certain [horse] of the said plaintiff, of great value, to wit, of the value of £— and for a certain sum of money, to wit, the sum of £— to be therefore paid and delivered by the said plaintiff to the said defendant, together with the said [horse] of the said plaintiff, in exchange for the said [horse] of the said defendant, and the said defendant, by then and there warranting the said [horse] of the said defendant, to be sound, then and there *falsely and fraudulently sold and exchanged the same [horse] with the said plaintiff for the said [horse] of the said defendant, and for the said sum of money, to be paid and delivered by the said plaintiff to the said defendant, together with the said [horse] of the said plaintiff as aforesaid; and the said plaintiff, confiding in the said warranty, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, delivered his said [horse] to the said defendant, in exchange for the said [horse] of the said defendant; whereas in truth and in fact, at the time of the making of the said false warranty as aforesaid, and of the said exchange as aforesaid, the said [horse] of the said defendant was not sound, but, on the contrary thereof,

FOR
DECEIT.Second
count.

then was, and still is, unsound and hath become and is of no use or value to the said plaintiff; and also, by means of the premises, the said plaintiff hath lost and been deprived of the use of his said [horse] to wit, at, &c. (*venue*) aforesaid; and so the said plaintiff saith, that the said defendant, on the said sale and exchange, falsely and fraudulently deceived and defrauded the said plaintiff as aforesaid, to wit, at, &c. (*venue*) aforesaid.— And whereas also, the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, at the like special instance and request of the said defendant, bargained with the said defendant to exchange with the said defendant a certain [gelding] of the said plaintiff, and a certain sum of money, to wit, the sum of £— for a certain [gelding] of the said defendant; and the said defendant then and there, well knowing the said last-mentioned [gelding] of the said defendant to be unsound, then and there by falsely and fraudulently warranting his said last-mentioned [gelding] to be sound, exchanged the same with the said plaintiff for his said [gelding] and for the said last-mentioned sum of money; whereas in truth and in fact the said last-mentioned [gelding] of the said defendant, at the time of the said exchange thereof, was unsound, and hath become and is of no use or value to the said plaintiff, to wit, at, &c. (*venue*) aforesaid; and the said plaintiff saith, that the said defendant, on the day and year aforesaid, falsely and fraudulently deceived the said plaintiff, on the said last-mentioned exchange, to wit, at, &c. (*venue*) aforesaid.—[*Third count in trover.*]

For that whereas the said plaintiffs, heretofore, to wit, on, &c. at, &c. (*venue*) at the special instance and request of *the said defendants, bargained with the said defendants, to buy of them the said defendants a certain cable, at and for a certain price or sum of money, to wit, the sum of, &c. of lawful money of Great Britain: and the said defendants then and there, by falsely and fraudulently warranting the said cable to be a new British-made cable, then and there sold the said cable to the said plaintiffs, for the said sum of £— then and there paid by the said plaintiffs to the said defendants for the same; whereas in truth and in fact the said cable, at the time of the said warranty and sale, was not a new British-made cable, but was then and there a cable made of the materials of an old rotten un-laid Russian cable, and of half clean hemp, and other toppings, and hemp from which the staple part thereof had been taken away by the manufacturer, contrary to the statute in such case made and provided. And the said plaintiffs in fact say, that the said defendants, by means of the premises, on the day and year aforesaid, at, &c. aforesaid, falsely and fraudulently deceived them the said plaintiffs on the sale of the said cable as aforesaid. By means whereof the said plaintiffs, confiding in the said warranty, used and employed the said first-mentioned cable as a cable in and for a certain ship or vessel of the said plaintiffs called the *Shakspeare*; and afterwards, to wit, on, &c. whilst the said ship or vessel was anchored by the said last-mentioned cable, in a certain place called *Yarmouth Roads*, the said last-mentioned cable, from its being so made as aforesaid, then and there broke, and the said ship or vessel was in imminent peril of being wrecked, and the lives of the crew thereof were greatly endangered; and also thereby the said plaintiffs were forced and obliged to, and necessarily did, lay out and ex-

For falsely warranting a cable to be made of sound and good materials, whereas it was made of an old rotten un-laid Russian cable, whereby plaintiff sustained special damage.

[*683]

**FOR
DEBIT.**

**Second
count.**

[*684]

**Third
count.**

**Fourth
count.**

**Fifth
count.**

[*685]

pend a large sum of money, to wit, the sum of £—, of like lawful money, in and about purchasing and getting on board the said ship or vessel, a certain other cable for the said ship or vessel, in the place of the said first-mentioned cable, and also thereby the said ship or vessel was greatly delayed in a certain voyage in which she was then engaged, and the said plaintiffs lost and were deprived of divers large profits and gain, which they otherwise would have made from the earnings of the said ship or vessel, to wit, at, &c. aforesaid.— And whereas also the said plaintiffs, heretofore, to wit, on, &c. at, &c. (*venue*).—[*Second count like the first, stating the cable to be made of old, bad, and improper materials, and that thereby defendants deceived plaintiffs: and that whilst said *last-mentioned ship or vessel was using the cable, it broke, &c. as in the first count.*]— And whereas also, the said plaintiffs, heretofore, to wit, on the said, &c. at, &c. (*venue*) aforesaid, bargained with the said defendants, to buy of them the said defendants a certain other cable, and the said defendants, by then and there falsely warranting the said last-mentioned cable to be a new *British-made* cable, falsely and fraudulently induced the said plaintiffs then and there to buy, and the said plaintiffs did then and there buy of the said defendants, the said last-mentioned cable, at and for a certain other sum of money, to wit, the sum of £— of like lawful money, whereas in truth and in fact, the said last-mentioned cable, at the time of the said last-mentioned warranty and sale, was not a new *British-made* cable, but had been, and then and there was made of old, bad, and improper materials, *contrary to the Statute in such case made and provided*, to wit, at, &c. (*venue*) aforesaid; and the said plaintiffs, in fact say, that the said defendants falsely and fraudulently deceived them the said plaintiffs on the sale of the said last-mentioned cable as aforesaid, to wit, at, &c. aforesaid.— [*Fourth count same as third, omitting the word British, and the words "contrary to the form of the Statute in such case made and provided."*]—And whereas also, heretofore, to wit, on the said, &c. at, &c. (*venue*) aforesaid, the said defendants were possessed of a certain other cable, and well knowing that the said last-mentioned cable was made of old, bad, and improper materials, did, nevertheless, falsely, fraudulently, and deceitfully represent the said last-mentioned cable to be a new *British-made* cable, and did then and there, by means of such false, fraudulent, and deceitful representation, induce the said plaintiffs to buy the said last-mentioned cable, of and from the said defendants, at and for a certain sum of money, to wit, the sum of £— of like lawful money, whereas in truth and in fact, at the time of the said representation and sale, the said last-mentioned cable was not a new *British-made* cable, but on the contrary thereof, was then and there made of old, bad, and improper materials as aforesaid, to wit, at, &c. (*venue*) aforesaid; by means whereof the said plaintiffs, *confiding in the said representation*, used and employed the said last-mentioned cable as a cable in and for a certain other ship or vessel of the said plaintiffs, and afterwards, to wit, on the said, &c. while the said last-mentioned ship or vessel was *anchored by* the said last-mentioned cable, in Yarmouth Roads aforesaid *the said last-mentioned cable, from its being so made as aforesaid then and there broke, and the said last-mentioned ship or vessel was in imminent peril of being wrecked, and the lives of the crew thereof greatly endangered, and also thereby the said plaintiffs were forced and obliged to, and necessarily did, lay out and

expend a large sum of money, to wit, the sum of £— of like lawful money, in and about purchasing and getting on board the said last-mentioned ship or vessel a certain other cable, in the place of the first-mentioned cable, and also thereby the said last-mentioned ship or vessel was greatly delayed in a certain voyage in which she was then engaged, and the said plaintiffs lost and were deprived of divers large profits and gains, which they otherwise would have made, from the earnings of the said last-mentioned ship or vessel, to wit, at, &c. (*venue*) aforesaid.—And whereas also, heretofore, to wit, on the said, &c.—[*Sixth count nearly similar to the fifth, omitting the words British-made, and stating that, "whilst the said ship was using the said last-mentioned cable, instead of being anchored."*—And whereas also the said plaintiff, heretofore, to wit, on the said &c. aforesaid, at, &c. (*venue*) aforesaid, bargained with the said defendants to buy of the said defendants a certain other cable, as and for a cable fit to be used for a ship, or vessel, *and made of good and lawful materials*, and the said defendants then and there, well knowing the said last-mentioned cable to be unfit to be used for a ship or vessel, *and to be made of bad and unlawful materials*, then and there fraudulently and deceitfully sold the said last-mentioned cable as and for a cable fit to be used for a ship or vessel, *and made of good and lawful materials*, at and for a certain other sum of money, to wit, the sum of £— of like lawful money; whereas in truth and in fact the said last-mentioned cable, at the time of the said sale thereof was unfit to be used for a ship or vessel, *and was then and there made of bad and unlawful materials*, whereby the said last-mentioned cable became and was of no use or value to the said plaintiffs, to wit, at, &c. (*venue*) aforesaid.—[*Eighth count similar to the seventh, omitting the words in italics.*]

384
D'Écart.

Sixth
count.

Seventh
count.

For that whereas, before the committing of the grievance by the said defendant hereinafter next-mentioned, to wit, *on, &c. at, &c. (*venue*) the said plaintiff, at the special instance and request of the said defendant, bargained for, and agreed to buy of the said defendant, and the said defendant then and there sold to the said plaintiff, a large quantity, to wit, [two chaldrons and a half of coals, wharf measure,] at and for a certain price or sum of money, to wit, at and after the rate or price of £— of lawful money of Great Britain, for each and every chaldron thereof; and the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, fraudulently and deceitfully contriving, and craftily and subtly intending to deceive and defraud the said plaintiff in this behalf, did fraudulently and deceitfully deliver to the said plaintiff a certain quantity of coals, as and for the said quantity of coals so bargained for and sold to the said plaintiff as aforesaid, whereas in truth and in fact the said coals so delivered to the said plaintiff by the said defendant as aforesaid, at the time of the delivery thereof as aforesaid, were different in the full quantity which they ought to have contained, and wanted of the said quantity which they ought to have contained, divers, to wit, twenty bushels of coals, as the said defendant then and there well knew; and so the said plaintiff saith, that the said defendant falsely and fraudulently deceived and defrauded the said plaintiff in the said sale,

For de-
ceitfully
selling a
smaller
quantity
of coals
than pre-
tended
(g).

[*686]

(g) As to these counts, see 3 Stark. 23.

FOR
DECEIT.

Second
count.

[*687]

Third
count (h).

and thereby he the said plaintiff lost, and was deprived of all the benefit and advantage which he might and would otherwise have derived and acquired from the said sale, and hath been, and is, by means of the premises otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.—And whereas also, the said plaintiff afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, at the like special instance and request of the said defendant, bargained with the said defendant to buy of the said defendant, a certain other large quantity of coals, [as and for thirty sacks of coals,] at and for a reasonable price to be therefore paid for the same; and the said defendant then and there, well knowing the said last-mentioned quantity of coals to be a less quantity of coals than [thirty sacks of coals] so agreed to be bought by the said plaintiff as last aforesaid, to wit, that the same only contained [twenty-four sacks of coals,] then and there sold and delivered the said quantity of coals to the said plaintiff as and for the said quantity of [thirty sacks of coals,] and thereby falsely and fraudulently deceived and defrauded the *said plaintiff, to wit, at, &c. (*venue*) aforesaid.—And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, at the special instance and request of the said defendant, bargained for and agreed to buy of the said defendant, and the said defendant then and there sold to the said plaintiff, a large quantity, to wit, [two chaldrons and a half of coals, wharf measure,] at and for a certain price then and there agreed upon, to be delivered by the said defendant to the said plaintiff on certain premises of the said plaintiff, situate at — in the county aforesaid, *within a reasonable time then next following*, and although the said plaintiff hath always been ready and willing to pay for the said last-mentioned coals according to the terms of the said last-mentioned sale; and although a reasonable time for the delivery of the said last-mentioned coals hath long since elapsed, whereof the said defendant hath always had notice, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not, although he was afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, requested by the said plaintiff so to do, as yet delivered the said last-mentioned quantity of coals as aforesaid, but hath hitherto wholly neglected and refused so to do, and on the contrary thereof, afterwards, to wit, on the day and year aforesaid, at — to wit, at, &c. (*venue*) aforesaid, fraudulently and deceitfully offered and endeavored to deliver to the said plaintiff a much less quantity of coals than the said coals so bargained for as last aforesaid, to wit, [twenty-four sacks of coals,] as and for the same quantity of coals so bargained for as last aforesaid, to wit, at, &c. (*venue*) aforesaid.—[*Another count is trover.*]

For deceitfully
selling
land as
and for a
greater
quantity
than it really
was
(i).

For that whereas the said plaintiff, on, &c. at, &c. (*venue*) bargained with the said defendant to buy of him a certain piece or parcel of ground of the said defendant called, &c. situate and being in the parish of —

(h) This count is frequently adopted, but *semble* it is rather the subject of an action of assumpsit for nonfeasance, and if so, the misjoinder would be fatal.

(i) See the form, ante, 685, and note, against vendor, for not making out a good title, &c. and as to when party may recover back deposit.

in the county of — and the said defendant then and there, to wit, at, &c. (*venue*) aforesaid, well knowing the said close to contain a much less quantity than [three acres] of land, to wit, the quantity of [two acres and a half] of land only, by then and there, to wit, at, &c. (*venue*) aforesaid, falsely and fraudulently warranting the said close to contain [three acres] of land, then and there, to wit, at, &c. (*venue*) falsely, fraudulently, and deceitfully, sold the said close to the said plaintiff, at and for a certain sum of money, to wit, the sum of £— of lawful money of Great Britain to be therefore paid by the said plaintiff to the said defendant, and which was then and there, to wit, at, &c. aforesaid, accordingly paid for the same; whereas in truth and in fact the said close, so as aforesaid sold by the said defendant to the said plaintiff, did not contain [three acres] of land, but on the contrary thereof, contained a much less quantity than [three acres] of land, to wit, the quantity of [two acres and a half] only; by means of which premises the said plaintiff lost great gains and profits which he otherwise would have made and derived from the purchase of the said close, and was put to great charge and expense, to wit, at, &c. (*venue*); and so the said plaintiff in fact saith, that the said defendant, on, &c. aforesaid, falsely and fraudulently deceived him, to wit, at, &c. aforesaid.—And whereas also the said plaintiff, on the day and year aforesaid, at, &c. (*venue*) aforesaid, bargained with the said defendant to buy of him a certain other close or parcel of ground, called, &c. situate and being, &c. and the said defendant, well knowing that one R. M. surveyor of lands by profession, had never at any time declared that the said last-mentioned close, upon an admeasurement thereof by the said R. M. to contain the [three acres of land without the half ditches,] by then and there, to wit, at, &c. (*venue*) aforesaid, falsely and fraudulently representing and affirming to the said plaintiff, that the said R. M. had, before that time, declared that the said last-mentioned close, upon an admeasurement thereof by the said R. M. to contain [three acres of land without the half ditches,] then and there, to wit, at, &c. (*venue*) aforesaid, falsely, fraudulently, and deceitfully, sold the said last-mentioned close to the said plaintiff, at and for a certain other sum of money, to wit, the sum of £— of like lawful money to be therefore paid by the said plaintiff to the said defendant, and which was then and there, to wit, at, &c. (*venue*) aforesaid, accordingly paid for the same, whereas in truth and in fact, the said R. M. never had at any time declared that the said last-mentioned close, upon an admeasurement thereof by him the said R. M. had been found by the said R. M. to contain *[three acres of land without the half ditches,] but on the contrary thereof, the said R. M. had always declared that the said last-mentioned close, on an admeasurement thereof by the said R. M. had been found by him to contain a much less quantity than [three acres of land without the half ditches,] to wit, at, &c. (*venue*) and so the said plaintiff in fact saith, that the said defendant, on, &c. aforesaid, again falsely and fraudulently deceived him, to wit, at, &c. (*venue*).

FOR
DECRET.Second
count.

[*688]

[*Commencement in case as usual, as ante, 596.*—For that whereas, before and at the time of the committing of the grievances by the said defendant, as hereinafter next mentioned, the said defendant was possessed of a certain public house, called and known by the sign of the ["Sun,"

Declara-
tion in
case for
misrepre-
senting

and carried on therein the trades and businesses of a publican and victualer, and dealer in wines and spirits, to wit, at, &c. (*venue*).—And the said defendant then and there represented to the said plaintiff, that he was possessed of a certain lease, of and in the said premises, to wit, for the term of —, &c. (*according to the fact*); and the said defendant being desirous of selling and disposing of the said lease and the goodwill of the said premises, and trades and business, heretofore, to wit, on, &c. (*day of misrepresentation, or about it,*) at, &c. (*venue*) aforesaid, wrongfully and injuriously contriving and intending to deceive, defraud, and injure the said plaintiff in this behalf, then and there falsely, fraudulently and deceitfully, represented and asserted to the said plaintiff, that [*let the misrepresentations here stated agree as nearly as possible with the misrepresentations made use of, and which in the case upon which this form was drawn were as follows:* the said public house was then and there doing between seven and eight butts a month, and about £30 or £40 in spirits,] whereupon, heretofore, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, confiding in the said representations and assertions of the said defendant, at the special instance and request of the said defendant, bargained with him, to buy of him, the said defendant's interest in the said unexpired lease of his said premises, and the said goodwill, at and for a certain sum, to wit, the sum of £300, and the household furniture, fixtures, utensils, and effects, then upon the said premises, at and for a large sum of money, to wit, the sum of £225. And the said defendant, by then and there falsely, fraudulently and deceitfully, pretending and representing to the said plaintiff, that the said false, fraudulent, and deceitful representation of the said defendant was true, then and there sold the said lease and premises and goodwill to the said plaintiff, at and for the said sum of money, to wit, the said sum of £300. And the said plaintiff, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, paid the said defendant the said sum of money for the same; whereas in truth and in fact, the said trades and businesses of the said public-house had not been, nor were they before or at the time of the making of the said false representation and assertion, between seven and eight butts a month, but had been and were much less, to wit, one butt a month; and whereas, in truth and in fact, there had not then been sold or disposed of at the said public-house, to the amount of from £30 to £40 in spirits, but on the contrary, much

(k) This form was adopted in a case wherein the plaintiff succeeded. It may be readily altered to meet any similar case. Where the vendor of a public house made, pending the treaty, certain deceitful misrepresentations respecting the amount of the business done in the house, and the rent received for a part of the premises, whereby the plaintiff was induced to give a large sum for the premises, it was held, that the latter might maintain an action on the case for the deceitful representations, although they were not noticed in the conveyance of the premises, or in a memorandum of the bargain, which was drawn up after these representations were made. 3 B. & C. 623. —5 D. & R. 490, S. C. Where in an action

on the case for a deceit, the plaintiff declared that he had employed the defendant to obtain a lease for him; that the defendant fraudulently represented to him that a premium of £150 was to be paid for it, whereas only £100 were to be paid, by means of which fraudulent representation the defendant obtained from him the sum of £50, and converted it to his own use, it was held that these allegations were sufficient, without farther stating that the £50 so obtained was over and above the £100 to be paid for the lease, 2 Marsh. 217. — 6 Taunt. 522, S. C.; and see 3 Lord Raym. 1118, quoted in 2 B. & C. 625, as to evidence, in reduction of damages, in respect of the value of the premises, see R. & M. C. N. P. 303.

less spirits, that at the rate of from £30 to £40 a month had been sold and disposed of in and from the said public-house, to wit, to the amount of about £10 in spirits per month, as the said defendant, at the time of his making his said false and deceitful representation well knew; and the said plaintiff further saith, that the said defendant, by means of the premises, on the day and year aforesaid, at, &c. (*venue*) aforesaid, falsely and fraudulently deceived the said plaintiff on the said sale, and thereby the said lease, trades and businesses have become, and are of no use or value to the said plaintiff; and the said plaintiff hath sustained great trouble, expense and loss, to wit, an expense and loss of £600, in and about the carrying on the said trades and businesses, in the said house and premises, and endeavoring to dispose of the said lease, trades and businesses, to wit, at, &c. (*venue*) aforesaid.— And whereas also, before and at the time of the committing of the grievances hereinafter next mentioned, the said defendant proposed and offered to the said plaintiff, to sell and dispose of to the said plaintiff, a certain other public house and premises, with the appurtenances, for the residue of a certain term of years therein, together with the good-will and trade of a licensed victualler to the same house, and certain goods and chattels in and about the same premises, to wit, at, &c. (*venue*) aforesaid. And thereupon, heretofore, to wit, on the said, &c. (*day of misrepresentations, or about it,*) at, &c. (*venue*) aforesaid, the said defendant wrongfully and unjustly contriving and intending to deceive and defraud the said plaintiff in that behalf, then and there falsely and deceitfully pretended to the said plaintiff that a much greater and more advantageous business was then and there carried on in the said last-mentioned house than there really was, to wit, that from seven to eight butts of beer were sold per month in the same house, and that about £30 or £40 worth of spirits were sold each month in the same dwelling-house; and the said defendant then and there, by means of the same false pretences, then and there prevailed upon and induced the said plaintiff to bargain and agree to buy the said interest in the said term, and the said good-will and trade, at, and for a large sum of money, to wit, the sum of £300, which he the said plaintiff then and there paid to the said defendant for the same; whereas in truth and in fact, before and at the time of the making of the said last-mentioned false pretences of the said defendant, much less than from seven to eight butts of beer were sold per month in the said house, and much less than £30 worth of spirits per month were sold in the same house; and by reason thereof, the said good-will became and was of no use or value to the said plaintiff; and so the said plaintiff saith, that the said defendant falsely and fraudulently deceived him the said plaintiff, on the sale of the said last-mentioned house and good-will, to wit, at, &c. (*venue*) aforesaid.— And whereas also heretofore, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff, at the request of the said defendant, bargained with the said defendant, to buy of the said defendant, his the said defendant's interest in a certain other unexpired lease of a certain other public-house and premises, with certain other leasehold, furniture, fixtures, utensils of trade, and effects, together with the good-will of the said defendant's trade and business of a publican therein, at and for certain other prices or sums of money, amounting in the whole to a large sum of money, to wit the sum of £525, and the said defendant by then

FOR
DECAT.

Second
count
more gen-
eral.

Third
count.

FOR
DEBIT.

Fourth
count.

and there falsely, fraudulently, and deceitfully pretending and representing to the said plaintiff, that the said last-mentioned public-house was doing between seven and eight butts of beer a month, to the amount of about £30 or £40 per month in spirits, and was doing a great deal in ale, and a great deal in wine, and also that the parish dinners were provided and given at and in the said last-mentioned public-house, and the said house was a house of call for firemen, then and there sold the said last-mentioned lease, furniture, utensils, and effects, together with the good-will last aforesaid, at and for the said sum of money, so amounting to such large sums of money, to wit, the sum of £525, to the said plaintiff, who afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) paid the said defendant for the same; whereas in truth and in fact the trade and business of the said last-mentioned public-house had not been, nor were, between seven and eight butts of beer a month, but had been and were much less, to wit, one butt a month, and whereas in truth and in fact neither the said defendant, nor any other occupier of the said last-mentioned public-house, had sold or disposed of spirits to the amount of about £30 or £40, but had sold much less, to wit, to the amount of £10 in spirits; and whereas in truth and in fact the said last-mentioned public-house had not been, nor was doing a great deal in ale, and a great deal in wine, but had been and was doing very little in ale, and very little in wine; and whereas in truth and in fact the parish dinners were not provided and given at and in the said last-mentioned public-house, nor was the said last-mentioned public-house a house of call for firemen, as the said defendant at the time of making his said last-mentioned false and deceitful representation well knew. And the said plaintiff further saith, that the said defendant, by means of the last-mentioned premises, on the day and year aforesaid, at, &c. (*venue*) aforesaid, falsely and fraudulently deceived the said plaintiff in the said sale, and thereby the said lease, trade, and business last aforesaid, have become and are of no use or value to the said plaintiff, and the said plaintiff hath sustained great trouble and expense, to wit, an expense of £600 in and about the carrying on of the said trade and business last aforesaid, in the said last-mentioned messuage and premises, and endeavoring to dispose of the said lease, trades, and businesses last aforesaid, at, &c. (*venue*) aforesaid.—And whereas also afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff bargained with the said defendant to buy of the said defendant the said defendant's interest in a certain other unexpired lease of a certain other public-house and premises, with certain other trades of a publican and victualler, and dealer in wines and spirits, together with certain other household furniture, utensils, goods and chattels and also the good-will of the said last-mentioned trades and businesses, and the said defendant, by then and there falsely, fraudulently, and deceitfully pretending and representing to the said plaintiff, that the trades and businesses of the said last-mentioned public houses were of great extent and amount, to wit, to the extent and amount of between seven and eight butts of porter sold and delivered per month, and to the extent and amount of so much spirits, sold and delivered, as produced about the sum of from £30 to £40 per month, and to the extent and amount of a great deal of ale, and also that the parish dinners were supplied and taken by and in the said last-mentioned public-house, and that the said last-

FOR
DEBIT.

mentioned public-house was a house of call for firemen, from all which the said premises aforesaid great gains and profits, amounting in the whole to a large sum, to wit, the sum of £100 per month, accrued to and were received by him the said defendant, so carrying on the said trades and businesses as aforesaid, then and there sold the said last-mentioned lease, furniture, utensils, goods and chattels, together with the good-will last aforesaid, to the said plaintiff, at and for certain other sums of money, amounting in the whole to a large sum of money, to wit, the sum of £525, and the said plaintiff afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, paid the said defendant for the same; whereas in truth and in fact the said last-mentioned trades and businesses were not of great extent and amount, but on the contrary thereof, had been and were of small extent and amount, to wit, of the extent and amount of between two and three butts of porter sold and delivered per month, and to the extent and amount of so much spirits, sold and delivered, as produced about the sum of from £5 to £10 per month, and to the extent and amount of a small quantity of ale, to wit, to the extent and amount of one barrel per month; and whereas in truth and in fact the said parish dinners were not, nor ever had been supplied and taken by and in the said last-mentioned public-house; and whereas in truth and in fact the said last-mentioned public-house was not a house of call for firemen; and whereas in truth and in fact, from the said premises as aforesaid, great gains and profits did not accrue, and were not received by the said defendant so carrying on the said trades and businesses as aforesaid, but on the contrary thereof, the gains and profits which accrued to and were received by the said defendant, so carrying on the said trades and businesses as aforesaid, amounting to a small sum, to wit, the sum of £1 per month, whereby the same became and were of little use or value to the said plaintiff; and so the said plaintiff saith, that the said defendant falsely and fraudulently deceived the said plaintiff on the sale of his said last-mentioned interest in the said lease of the said last-mentioned public-house and premises, and the said last-mentioned good-will of the said trades and businesses, together with the last-mentioned furniture, utensils, goods and chattels aforesaid, to wit, at, &c. (*venue*) aforesaid.—[*Add another count, merely stating, as generally as practicable, that defendant represented the businesses, &c. greater and of more value than they really were.*]

For that whereas, before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, the said defendant kept a circulating library, and carried on the trades of a bookseller, stationer, jeweller, toyman, and hardwareman, at a certain messuage and premises, in Mare Street, Hackney, in the county of Middlesex, and was possessed of a certain lease of the said messuage and premises, to wit, for the term of — years, commencing from the — day of — in the year of our Lord — to wit, at, &c. (*venue*) aforesaid. And thereupon heretofore, to wit, on, &c. at, &c. (*venue*) the said plaintiff, at the special instance and request of the said defendant, *bargained with the said defendant to buy of the said defendant the said defendant's

For mis-
represent-
ing the
value of a
trade and
business,
sold by
plaintiff to
defendant
(l).

[*689]

(l) See the note to the preceding form.

FOR
DECEIT.

[*692]

Second
count.

[*693]

goods and merchandizes for the said I. K. to be by the said plaintiff, as such wharfinger as aforesaid, taken care of in and upon the said wharf, and from thence forwarded for the said G. H. and I. K. respectively, for wharfage and reward to the said plaintiff in that behalf, and which said packages the said plaintiff was then there ready and willing to accept and receive and take care of, at and upon his said wharf, and forward *as aforesaid. And thereupon, just before the committing of the grievance in this count hereinafter mentioned, the said E. F. was about to cause to be delivered the said packages to the said plaintiff, yet the said defendant, &c. well knowing the premises, but contriving and intending wrongfully and unjustly to injure and damnify the said plaintiff, so being such wharfinger as aforesaid, in the said business and employment, and to deprive him of the hire and reward he would otherwise have received and derived from the wharfage and care of the said packages, did heretofore, to wit, on, &c. at, &c. falsely, fraudulently, deceitfully, and maliciously represent and pretend to a certain person, then being the mate of the said ship or vessel, that the said defendant was authorized by the said G. H. and I. K. to receive the said packages; and the said mate being then and there deceived by the said false representation of the said defendant, did then and there suffer and permit the said defendant to take and receive the said parcels and packages, and the said defendant did then and there take away the said packages, and the said packages were never delivered by the said E. F. at the said wharf of the said plaintiff; by means of which said several premises, the said plaintiff then and there was put to great trouble and expense, in sending a lighter to the said ship or vessel for the said packages, and lost and was deprived of the hire and reward, profits, benefit, and advantage, which he otherwise would have derived and acquired from the wharfage, stowage, and keeping, and forwarding such packages as aforesaid, to wit, at, &c. aforesaid.—And whereas also, before and at the time of the committing of the grievances hereinafter next mentioned, divers packages of goods and merchandizes had been and were shipped on board a certain other ship or vessel, with directions that the same should be delivered at the said wharf of the said plaintiff, that is to say, 47 packages of goods and merchandizes for the said G. H. and 19 packages of goods and merchandizes for the said I. K. to be by the said plaintiff, as such wharfinger as aforesaid, taken care of in and upon his said wharf, and forwarded for the said G. H. and I. K. respectively, for wharfage and reward to the said plaintiff in that behalf, and which said, last-mentioned packages the said plaintiff was then and there ready and willing to accept and receive and take care of, at and upon his said wharf, and forward as aforesaid; and thereupon, just before the committing of the grievance in this count *hereinafter next-mentioned, the said last-mentioned packages were about to be delivered to the said plaintiff, as such wharfinger as aforesaid, yet the said defendant, well knowing the premises, but contriving and intending wrongfully and unjustly to injure and damnify the said plaintiff, so being such wharfinger, as aforesaid, in his said business and employment, and to deprive him of his hire and reward which he otherwise would have received and derived from the wharfage of the said last-mentioned packages, heretofore to wit, on, &c. at, &c. (*venue*) did falsely, fraudulently, deceitfully, and maliciously represent and pretend to a certain person, then being aboard the said last-

FOR
DEBIT.Third
count.

[*694]

Fourth
count.

mentioned ship or vessel, that the said defendant was authorized to deliver to the said G. H. and I. K. the said last-mentioned packages; and the said person so then being on board the said ship or vessel, being then and there deceived by the said false representation of the said defendant, did then and there suffer and permit the said defendant to take and carry away the said last-mentioned packages, and the said defendant did then and there take away the same packages, and the said last-mentioned packages were never delivered at the said wharf of the said plaintiff; by means of which said several premises the said plaintiff then and there lost and was deprived of the hire and reward, profit, benefit, and advantage which he otherwise would have derived and acquired from the wharfage and keeping, and forwarding of such packages as aforesaid, to wit, at, &c. (*venue*) aforesaid.—And whereas also, just before and at the time of the committing of the grievance hereinafter next mentioned, divers, to wit, 47 packages of goods and merchandizes, to be delivered to the said E. F. and 19 packages of goods and merchandizes, to be delivered to the said G. H. were consigned to and about to be delivered, and would (had not the grievance hereinafter next mentioned been committed by the said defendant) have been delivered to the said plaintiff as such wharfinger as aforesaid, for wharfage and reward to the said plaintiff in that behalf, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, heretofore, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, well knowing the premises, but contriving and intending wrongfully and unjustly to injure and damnify the said plaintiff, so being such wharfinger as aforesaid, in his said business and employment, and to deprive him of the reward he otherwise would have received and derived from the wharfage of the said last-mentioned packages, did falsely, *fraudulently, and deceitfully represent and pretend to a certain person then having the care and custody of the said last-mentioned packages, that the said defendant was authorized, as such wharfinger, to receive and forward the said packages to the said E. F. and G. H.; and the said person being then and there deceived by the said false representations of the said defendant, did then and there suffer and permit the said defendant, to take and receive the said last-mentioned packages, and the said defendant did then and there take away the said several last-mentioned packages, by means of which said several premises the said plaintiff then and there lost and was deprived of the hire and reward, profits, benefits, and advantage which he otherwise would have derived and acquired from the wharfage and keeping and forwarding the said last-mentioned packages as aforesaid, to wit, at, &c. (*venue*) aforesaid.—And whereas also, before and at the time of the committing of the grievance hereinafter next mentioned, divers, to wit, 68 packages of other goods and chattels were about to be delivered to the said plaintiff, as such wharfinger as aforesaid, to be by him, as such wharfinger, taken care of, at and upon a certain wharf of him the said plaintiff, for wharfage and reward to the said plaintiff in that behalf, and which said packages he the said plaintiff was ready and willing to accept and receive, and take care of, at and upon his said last-mentioned wharf; yet the said defendant heretofore, to wit, on the said, &c. aforesaid, at, &c. (*venue*) aforesaid, well knowing the premises, but contriving and intending wrongfully and unjustly to injure and damnify the said plaintiff, so being such wharfinger as aforesaid, in his said business and employment, and to deprive him of the hire and

For
rewards.

reward he otherwise would have received and derived from the wharfage of the said packages, by false pretences did hinder and prevent the delivery of the said last-mentioned packages to the said plaintiff, as such wharfinger as aforesaid, and did obtain and get into his possession the same packages; by means of which said several premises, the said plaintiff then and there lost and was deprived of the hire and reward, profit, benefit, and advantage, which he otherwise would have derived and acquired from the wharfage, keeping, and forwarding such packages as aforesaid, to wit, at, &c. (*venue*) aforesaid.

For representing
that plaintiff's waggon
set out from defendant's inn.

[*695]

For that whereas the said plaintiff, before and at the respective times of the committing of the grievances by the said defendant hereinafter mentioned, was, and from thence hitherto hath been, and still is, a carrier, in and by a certain waggon of the said plaintiff, of goods, wares, and merchandizes, from a certain inn called the White Hart Inn, St. John Street, in the county of — to Bedford, in the county of Bedford, and for hire and reward, during all that time, used, exercised, and carried on, and still doth use, exercise, and carry on the business and occupation of such carrier as aforesaid, to wit, at, &c. (*venue*); and whereas also, just before and at the time of the committing of the grievances hereinafter next mentioned, a *certain servant of certain persons, trading under the name, style, and firm of Messrs. E. and Co. was directed and authorized by them to send divers, to wit, two parcels, by the said waggon of the said plaintiff, from, &c. aforesaid, to, &c. aforesaid, that is to say, one of the said parcels, to Mr. T. P. at, &c. aforesaid, and the other thereof to Mr. D. of the same place, and which said parcels he the said plaintiff was ready and willing to accept for the purpose aforesaid, and to carry and convey the same, in and by the said waggon, from, &c. aforesaid, to, &c. aforesaid; and thereupon, just before the committing of the grievance in this count after mentioned, the said servant inquired of the said defendant, at a certain inn in St. John Street aforesaid, called the Cross Keys, whether the Bedford waggon, (meaning, as the said defendant well knew, the said waggon of the said plaintiff,) then went from the said last mentioned inn to Bedford aforesaid; whereupon the said defendant then and there, that is to say, on, &c. at, &c. aforesaid, well knowing the premises, but contriving, and falsely and fraudulently intending to injure and damnify the said plaintiff, so being such common carrier as aforesaid, and to deprive him of the hire and reward he would otherwise have received and derived from the carriage of the said parcels in and by his said waggon, knowingly, falsely, fraudulently, deceitfully, and maliciously, then and there represented to the said servant that the Bedford waggon (then and there meaning the said waggon of the said plaintiff,) did then go from the said inn called the Cross Keys, whereas in truth and in fact, the said waggon of the said plaintiff did not then go from the said last-mentioned inn, as he the said defendant then and there well knew; by means, and in consequence of which false representation of the said defendant, the said servant was then and there induced to and did then and there deliver the said parcels to the said defendant, who, further contriving and intending as aforesaid, afterwards, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, sent the same to Bedford aforesaid, by another and different waggon than the said waggon of the said plaintiff, and the said parcels were never

delivered to the said defendant, or carried or conveyed by his said waggon to Bedford aforesaid, or elsewhere; by means, and in consequence of which said several premises, the said plaintiff then and there lost and was deprived of the hire and reward, profit, benefit, and advantage, which might and would otherwise have been paid and arisen, and accrued to him from the carriage of such parcels in and by his said waggon as aforesaid, to wit, at, &c. (*venue*) aforesaid.— And whereas also, before and at the time of the committing of the grievance hereinafter next mentioned, the said Messrs. E. and *Co. at the request of the said defendant, had caused to be delivered to him the said defendant, divers, to wit, two other parcels, to be by him delivered to the said plaintiff, and to be carried and conveyed by the said plaintiff as such common carrier as aforesaid, in and by his said waggon, from, &c. aforesaid, to, &c. aforesaid, for certain hire and reward to him the said plaintiff in that behalf; nevertheless, the said defendant, well knowing the said last-mentioned premises, but contriving and intending to injure and damnify the said plaintiff, did not nor would deliver the said last-mentioned parcels to the said plaintiff, but, on the contrary thereof, afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, wrongfully, knowingly, and willingly caused the same to be sent from, &c. aforesaid, to, &c. aforesaid, by a certain other carrier, whereby the said plaintiff then and there lost and was deprived of the profit, benefit, and advantage, which might and would otherwise have arisen and accrued to him from the carriage of the said last-mentioned parcels in and by his said waggon as last aforesaid, to wit, at, &c. (*venue*) aforesaid.—And whereas also, before and at the time of the committing of the grievance hereinafter next mentioned, the said defendant had accepted and received from certain persons, trading under the style and firm of Messrs. J. and Co. a certain box or parcel to be by him delivered to the driver of the said waggon of the said plaintiff, in order that the same might be carried and conveyed by him, as such common carrier as aforesaid, in and by his said waggon, from, &c. aforesaid, to, &c. aforesaid, for a certain hire and reward to the said plaintiff in that behalf; yet the said defendant, well knowing the said last-mentioned premises, but contriving, and falsely and fraudulently intending to deprive the said plaintiff of the hire and reward he would have acquired and received in case he had the carriage and conveyance of the said last-mentioned box or parcel as aforesaid, and otherwise to injure and damnify the said plaintiff, afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, wrongfully and maliciously, instead of delivering the said last-mentioned box or parcel to the driver of the said waggon of the said plaintiff afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, caused the same to be sent from, &c. aforesaid, to, &c. aforesaid, by a certain other carrier, whereby the said plaintiff then and there lost and was deprived of all the benefit, profit, and advantage which might and would otherwise have arisen and accrued to him from the carriage of the last-mentioned box or parcel in and by his said waggon as aforesaid, and was thereby then and there otherwise much injured and damnified, to wit, at, &c. (*venue*) aforesaid.—[*Fourth count nearly similar to the third, *inserting half a hogshead of vinegar instead of a box or parcel.*]

FOR
DECEIT.

Second
count.
[*696]

Third
count

[*697]

For that whereas the said plaintiff for divers, to wit, two years and upwards now last past, hath been, and still is, a [fishmonger,] and for and

By one
fishmon

FOR
DECKET.
—
ed for
costs of
judgment
against
him (e).

[*700]

the said plaintiff in this suit had been served with a copy of the declaration in the said action of ejectment, and the said plaintiff had then no valid or sufficient defense to the same action; yet the said defendant contriving, and wrongfully and unjustly intending to injure the said plaintiff, and to subject him to the payment of the costs of the said action, heretofore, to wit, in — Term, in the — year of, &c. that is to say, on, &c. to wit, at, &c. (*venue*) aforesaid, wrongfully and injuriously, and without the leave or license, and against the will of the said plaintiff, caused and procured an appearance to be entered in the same court in the said action, for and on behalf of the said plaintiff, and then and there also, without the leave or license, and against the will of the said plaintiff, caused and procured a certain plea to be pleaded therein, to wit, that he the said plaintiff was not guilty of the trespass and ejectment complained of in the said action; and such proceedings were thereupon had without the license or consent or knowledge of the said plaintiff, that afterwards, to wit, in — Term, in and concerning the said action, it was *considered in and by the said court that the said J. D. should recover against the said plaintiff, his term then to come of and in the said tenements, with the appurtenances, and his damages of —*l.* by the jury in the said action assessed, and also —*l.* for his costs and charges, by the said court of our said lord the king adjudged to the said J. D. of increase, and with his assent, as by the record and proceedings thereof in the said court of our said lord the king, before the king himself more fully appears: And the said plaintiff further saith, that afterwards, to wit, on, &c. a certain writ of our said lord the king was duly issued upon the said judgment, out of the said court of our said lord the king, before the king himself, directed to the sheriff of — whereby our said lord the king commanded the said sheriff that he should take the said plaintiff, if he should be found in his bailiwick, and him safely keep, so that he the said sheriff should have the body of the said plaintiff before our said lord the king, on, &c. wheresoever our said lord the king should then be in England, to satisfy the said J. D. the said sum of —*l.* which by the said court of our said lord the king, before the king himself, at Westminster aforesaid, were adjudged to the said J. D. for his damages which he had sustained, as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was also convicted as aforesaid, as appeared to our said lord the king of record, and that the said sheriff should then have there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff of — to be executed as hereinafter mentioned, was duly indorsed, with a direction to the said sheriff, requiring him to levy —*l.* besides poundage, officers' fees, and all other incidental expenses: which said writ, so indorsed as aforesaid, afterwards, and before the said return thereof, to wit, on, &c. at, &c. was delivered to E. F. and G. H. then being sheriffs of the said county of — to be executed in due form of law, by virtue of which said writ the said E. F. and G. H. so being sheriffs as aforesaid, afterwards, and before the said return of the said writ, to wit, on, &c. and within the bailiwick of the said sheriff, took and arrested the said plaintiff by his body and then

(e) This cause was tried, and plaintiff obtained a verdict for 50*l.* damages.

and there, by virtue of the said writ, had and detained him in his custody, in execution for the said sum of —*l.* and the said plaintiff was kept and detained in execution upon the said judgment for a long space of time, to wit, for *the space of — days; by means of which said several premises he the said plaintiff, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed in his credit and circumstances, and was hindered and prevented from performing and transacting his necessary affairs and business, but was forced and obliged to, and did necessarily pay, lay out, and expend, a large sum of money, to wit, the sum of —*l.* in and about supporting himself whilst he was so imprisoned as aforesaid, and also in and about the obtaining his release from the said arrest and imprisonment, and in and about other the premises, and hath been, and is, by means of the premises, otherwise greatly injured, to wit, at, &c. (*venue*) aforesaid.—And whereas also, before and at the time of the committing of the grievances herein-after next mentioned, the said plaintiff was in the possession of a certain other messuage, &c. situate, &c. and a certain action of ejectment had been commenced on the part and behalf of the said F. S. and then was depending, for the recovery of the possession of the said last-mentioned tenements, with the appurtenances, in the court of our said lord the king, before the king himself; yet the said defendant contriving, and wrongfully and unjustly intending to injure the said plaintiff in this behalf, heretofore, to wit, in — Term, in the year of, &c. that is to say, on, &c. at, &c. (*venue*) aforesaid, wrongfully and injuriously, and without the authority, leave, or license of the said plaintiff, caused and procured a defense to the said last-mentioned action, to be conducted and carried on in the name of him the said plaintiff, and a certain plea to be pleaded therein, to wit, that he the said plaintiff was not guilty of the trespass and ejectment complained of in the said last-mentioned action, and suffered and permitted such proceedings to be thereupon had, without the authority, license, or consent of the said plaintiff; that afterwards, to wit, in — Term, to wit, on, &c. it was considered and adjudged by the said court that the said J. D. should recover against the said plaintiff his term to come of and in the said last-mentioned premises, with the appurtenances and his damages to —*l.* by the jury in the said action assessed, and also —*l.* for his costs and expenses, by the court of our said lord the king, before the king himself, adjudged of increase to the said J. D. and with his consent, as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, more *fully appears: and the said plaintiff further saith, that afterwards to wit, on, &c. a certain writ of our said lord the king was issued out of the court of our said lord the king, before the king himself, directed to the sheriff of — upon the said last-mentioned judgment, whereby our said lord the king commanded the said sheriff, &c. [*nearly similar to the last count.*]

FOR
DECEIT.

[*701]

Second
count.

[*702]

[*Commencement as ante*, 596.]—For that whereas the said plaintiff, before and at the time of the committing of the grievance by the said de-

For falsely representing a third person fit to be trusted

(p) By the late act, 9 Geo. 4. c. 14, s. 6, in writing signed by him. 'As to when an action of this nature may be supported, see Selw. N. P. 650.—3 Chit. Com. Law, 338, (p).

FOR
DECEIT.

[*703]

defendant, as hereinafter next mentioned, was and from thence hitherto hath been and still is a —, and the trade and business of a — hath for and during all that time, used, exercised, and carried on, and still doth use, exercise, and carry on, to wit, at, &c. (*venue*). And whereas also the said plaintiff, so being a —, and so using, exercising, and carrying on, the said trade and business as aforesaid, one E. F. before the committing of the grievance by the said defendant, as hereinafter next mentioned, to wit, on, &c. at, &c. (*venue*) aforesaid, applied to the said plaintiff, and then and there requested the said plaintiff to sell goods on credit to the said E. F. in the way of the said plaintiff's said trade and business of a —. And the said *plaintiff being then and there unacquainted with the character and circumstances of the said E. F. was then and there referred by him to the said defendant for information respecting the same, whereof the said defendant afterwards, and before the sale of any goods by the said plaintiff to the said E. F. to wit, on, &c. at, &c. (*venue*) aforesaid, had notice from one G. H. the servant of the said plaintiff, and the said defendant was then and there interrogated by the said G. H. on the part of the said plaintiff respecting the character and circumstances of the said E. F. Nevertheless the said defendant well knowing the premises, and that the said E. F. was then and there in bad and insolvent circumstances, and unfit to be trusted with goods on credit, but contriving, and fraudulently intending, craftily and subtly, to deceive and injure the said plaintiff in this behalf, on the day and year aforesaid, at, &c. aforesaid, falsely, fraudulently, and deceitfully (*q*), in writing (*r*), signed by the said defendant, in answer to certain questions then and there put to the said defendant by the said G. H. on the part of the said plaintiff, respecting the character and circumstances of the said E. F. represented and affirmed that [*here set forth the misrepresentations as they appear from the defendant's writing, as thus,*] the said defendant knew the said E. F. and had done a deal of business with him, and taken a deal of his (the said E. F.'s) money, and that the said defendant then did business with the said E. F. and that upon the whole the said defendant believed the said E. F. to be a good man, (thereby then and there meaning that the said defendant believed the said E. F. to be a man in good circum-

and cases there collected.—2 East, 107.—3 B. & P. 367.—2 New Rep. 241.—1 Taunt. 558. From 2 Moore, 713, 8 Taunt. 637, S. C., it should seem that to support this action there must have been some *fraud or intention on the part of the defendant to deceive*. In a later case, in 6 Bing. 396, it was held, that where a party recommends an agent by making statements, which he knows to be false, he is responsible in damages for the misconduct of the agent, although it be not shown that the representation was given from malice, or with a view to the pecuniary interest of the party recommending; and see the form of declaration in that case, post, 705.—See the precedents in 3 T. R. 51.—1 East, 318.—2 Id. 92.—3 B. & P. 367, where also the principles upon which this action is founded are stated. As to declarations for deceit in general, see the notes to the precedents, ante, "*False Warranties, &c.*" and 8 Wentw. Ind. 28,

29.—Com. Dig. Action for Deceit, F. 2.—Bac. Ab. Action on Case, E.—Deceit on a sale, 12 East, 632.—See also 7 Price, 544. The third person represented to be fit to be trusted, will be a competent witness for the plaintiff, 1 Campb. 277.—2 Id. 47.—See also as to evidence, 3 Esp. Rep. 194.

(*q*) As the improper motive is the gist of the action, the allegation of the *scienter* is in this case material, though we have seen in the case of warranty it is otherwise, ante, 680, *in nota*; and Com. Dig. Action on Case for Deceit, F. 2.—6 Bing. 396. The term "falsely," or "fraudulently," would, however, be sufficient, *Id.*—1 Saund. 242 a, note 2.—1 East, 563.

(*r*) Though the 9 Geo. 4. c. 14. s. 6, requires the representation to be in writing, signed by the defendant, yet it should seem this averment is unnecessary, 1 Saund. 276, note 1.—6 Bing. 529.

FOR
DECEIT.

[*704]

stances, and fit to be trusted with goods on credit.)] By means and in consequence (s) of which representation and affirmation so made and given by the said defendant to the said G. H. as aforesaid, the said plaintiff not knowing to the contrary, but believing therefrom that the said E. F. was a man in good circumstances, and fit to be trusted as *aforesaid, afterwards, to wit, on the day and year aforesaid, and on divers other days and times between that day and the — day of — then next following, at, &c. (venue) aforesaid, was induced to give credit to the said E. F. and did then sell and deliver to him divers goods on credit to a large amount, to wit, to the amount of £— to wit, at, &c. (venue) aforesaid; whereas in truth and in fact [*here negative the truth of defendant's representations, thus, mutatis mutandis*, the said E. F. at the time of the said defendant so making and giving the said representation and affirmation to the said G. H. as aforesaid, was in bad and insolvent circumstances, and not fit to be trusted with goods on credit; and whereas in truth and in fact the said defendant did not at that time do business with the said E. F.; and whereas in truth and in fact the said defendant did not believe the said E. F. to be a good man, but on the contrary thereof at that time well knew the said E. F. then was in bad and insolvent circumstances, and not fit to be trusted with goods on credit.] And the said plaintiff further says, that the said several sums of money are still wholly due and unpaid to the said plaintiff, and he is likely wholly to lose the same, to wit, at, &c. (venue) aforesaid.

Second
count
more gen-
eral.

[*705]

And whereas also the said plaintiff, before and at the time of the committing of the grievance by the said defendant, as hereafter next mentioned, carried on the trade and business of a —, and the said E. F. was desirous to deal with, and to be trusted by the said plaintiff for divers goods, wares, and merchandizes, on credit, in the way of the said trade and business; and thereupon the said defendant, heretofore, to wit, on, &c. at, &c. (venue) aforesaid, again contriving and intending to deceive and defraud the said plaintiff, and wrongfully, deceitfully, and fraudulently to induce, persuade, and encourage the said plaintiff to deal with the said E. F. in the way of his trade and business, and to sell and deliver to the said E. F. divers other goods, wares, and merchandizes, upon trust and credit, the said defendant falsely, fraudulently, and deceitfully, then and there *asserted and represented* to the said plaintiff in substance, that [the said plaintiff might safely trust and give credit to the said E. F. in that behalf, and that the said plaintiff might safely sell and deliver to the said E. F. divers other goods, wares and merchandizes, upon trust and credit.] By means of which said last mentioned false, fraudulent, and *deceitful assertion and representation, the said defendant did then and there fraudulently and deceitfully induce, persuade, and encourage, the said plaintiff to deal with the said E. F. in the way of his said trade and business, and to trust and give credit to him in that behalf, and to sell and deliver to the said E. F. divers goods, wares, and merchandizes, upon trust and credit. And the said plaintiff in fact says, that he, confiding in, and giving credit to, the said last-mentioned assertion and representation of the said defendant, and believing the same to be true, and not knowing the contrary

(s) Some loss or damage must be averred and proved, 2 Marsh. 219.

FOR
DEBIT.

thereof, did afterwards, to wit, on the day and year last aforesaid, and for a long time, to wit, until the — day of — deal with the said E. F. in the way of his trade and business, and did trust and give credit to him in that behalf, and did sell and deliver to him divers other goods, wares, and merchandizes, to a large amount, to wit, to the amount of £— upon trust and credit, to wit, at, &c. (*venue*) aforesaid; whereas in truth and in fact, at the time of the said defendant's making his said last-mentioned assertion and representation, the said plaintiff could not safely trust and give credit to the said E. F. nor could the said plaintiff safely sell and deliver to the said E. F. any goods, wares, and merchandizes, upon trust and credit, and the said defendant, when he so made his said last-mentioned assertion and representation, well knew the same, to wit, at, &c. (*venue*) aforesaid. And the said plaintiff further says, that the said E. F. hath not nor hath any other person on his behalf, paid to the said plaintiff the said last-mentioned sum of money so due to him for the said last-mentioned goods, wares, and merchandizes, or any part thereof, but on the contrary thereof he the said E. F. then was, and still is, wholly unable to pay the same, or any part thereof, to the said plaintiff, to-wit, at, &c. (*venue*) aforesaid, and the said plaintiff is likely to lose the same, to wit, at, &c. (*venue*) aforesaid.—[*Conclude as ante*, 596.]

For misre-
present-
ing the
character
of a per-
son whom
plaintiff in
conse-
quence
employed
as his
agent (t).
[*706]

For that whereas the said plaintiffs, before and at the time of the committing of the grievances hereinafter mentioned, carried on, and from thenceforth hitherto have carried on trade and business as dealers in tea and other goods, to *wit, at London; wherefore the said defendant, heretofore, to wit, on the 10th day of December, A. D. 1824, to wit, at London, contriving, and fraudulently intending craftily and subtly to deceive and injure the said plaintiffs, and to induce them to employ a certain person, to wit, one J. J. as their agent in the said business, at Manchester, in the county of Lancaster, to obtain and receive orders for goods to be supplied by them, and to receive and collect money on their account, in the way of their said business, for commission and reward to him, payable in that behalf, falsely, fraudulently, and deceitfully represented and asserted to the said plaintiffs, that the said J. J. had then an excellent connection in that line at Manchester and the neighborhood, and that the house for which he had done business there was no longer able to execute his extensive orders. By means and in consequence of which representation, the said plaintiffs, not knowing to the contrary, but believing therefrom that the said J. J. had, at the time of such representation, an excellent connection in the line of such agency as aforesaid, at Manchester aforesaid, and had obtained extensive orders there for some house, were induced to hire and engage, and did afterwards, to wit, on, &c. at London aforesaid, hire and engage the said J. J. as such agent in their said business at Manchester aforesaid, for commission and reward to him payable in that behalf, and did instruct and authorize him, in that capacity, to obtain and take orders for the sale and supply of goods by the said plaintiffs in the said business, and to collect and receive money for and on account of the said plaintiffs in the way of their said business. And the said J.

(t) This was the form adopted in 6 Bing. 396.—7 Bing. 105, S. C., and in which ac- tion the plaintiff succeeded; see the note, ante, 702.

FOR
DEBIT.

J. under and by virtue of that employment, did afterwards, to wit, on the day and year aforesaid, at, &c. obtain and take orders for the sale and supply of goods by the said plaintiffs in the said business, to divers persons, to a large amount and value, and to collect and receive for and on account of the said plaintiffs, in the way of the said business, from divers persons, divers sums of money; whereas in truth and in fact, at the time the defendant so represented and asserted as aforesaid, the said J. J. had not an excellent or any connection in the line of such agency, at Manchester aforesaid, or its neighborhood, as the said defendant then well knew, to wit, at London aforesaid. And whereas in truth and in fact, at the time last aforesaid, the said J. J. had not obtained extensive orders, or any orders, at Manchester aforesaid, for any *house whatsoever, as the said defendant then and there well knew. And the said plaintiffs in fact say, that the said J. J. for want of a good and sufficient connection in the line of such agency, at Manchester aforesaid and its neighborhood, did, under and by virtue of his said employment, obtain orders for the sale and supply of goods on credit by the said plaintiffs in the said business, to divers customers of worse and less respectable characters and circumstances than he otherwise would have done, and did thereby induce the said plaintiffs, who were ignorant of the character and circumstances of such customers, to sell to them on credit, and supply them with goods pursuant to such orders, such goods being in the whole of large value, to wit, of the value of £2000, of lawful money of Great Britain; and although the prices for which those goods were so sold ought long since to have been paid and satisfied to the said plaintiffs, yet those customers, by reason of such their characters and circumstances, have hitherto refused and neglected to pay for the same, and the said last-mentioned goods were wholly lost to the said plaintiffs, to wit, at London aforesaid. And the said plaintiffs further say, that the said J. J. contrary to his duty as such agent, has made away with and converted to his own use, and has not paid or accounted for to the said plaintiffs, divers large sums of money, collected and received by him as such agent as aforesaid, amounting in the whole to a large sum, to wit, £2000, of like lawful money, which was thereby wholly lost to the said plaintiffs, to wit, at London aforesaid. And the said plaintiffs further say, that the said J. J. contrary to his duty as such agent, has neglected and refused to render due and sufficient accounts to the said plaintiffs, of divers large quantities of their goods sold by him, and of the prices of other of their goods which came to his possession as such agent as aforesaid, the value thereof amounting in the whole to a large sum, to wit, £2000, of like lawful money, which goods were thereby wholly lost to the said plaintiffs, to wit, at London aforesaid.—[The second and third counts differed from the first in stating, more generally, the representation made by the defendant to the plaintiffs, and their consequent employment of J. J. The gravamen in the fourth count was, that the defendant, at the time he recommended J. J. as a desirable agent, knew that he had £800 to pay without any means of doing so, and that J. J. being employed by the plaintiffs, failed to account to them. The *fifth count stated that defendant requested plaintiffs to employ J. J. as an agent; it then set forth in detail certain embarrassments which J. J. was laboring under at the time, of which it was material they should have been informed, and which the defendant, although it was his duty to inform them, wrong-

[*707]

[*708]

FOR
DECEIT.

fully, deceitfully, wilfully, and fraudulently withheld from and concealed from them, per quod they employed and were injured by J. J. (nearly as in the first count.) There were four other counts, alleging this concealment in various ways.]

FOR NEG-
LIGENCE
IN DRIV-
ING CAR-
RIAGES.

Against
the owner
of a coach
for the
negli-
gence of
his ser-
vant in
driving
the same
against
plaintiff's
chaise (u).

[*710]

[Commencement as ante, 596.]—For that whereas the said plaintiff heretofore, to wit, on, &c. at, &c. (venue) was lawfully *possessed (w) of a certain carriage, to wit, [a chaise] of great value, to wit, of the value of £— and of a certain horse, [or, divers, to wit, — horses,] then and there drawing the same, and in which said carriage the said plaintiff was then riding in and along a certain public and common highway; and the said defendant was also then and there possessed of a certain other carriage, and of a certain other horse, [or divers, to wit, — horses,] drawing the same, and which said carriage and horses of the said defendant were then and there under the care, government, and direction of a certain then servant of the said defendant, who was then and there driving the same, in and along the said highway, to wit, at, &c. aforesaid. Nevertheless the said defendant then and there by his said servant so carelessly and improperly drove, governed, and directed his said carriage and horses, that by and through the carelessness, negligence, and improper conduct of the said defendant by his said servant in that behalf, [one of the hind wheels of] the said carriage of the said defendant, then and there ran and struck with great force and violence upon and against the said carriage of the said plaintiff, and thereby then and there crushed, broke to pieces,

(u) See forms, 8 Wentw. Index, 47.—2 New Rep. 117, 446; and see the forms, ante, 647, of declarations against coach proprietors, for overloading and improper driving. As to the law, see Selw. N. P. tit. Consequential Damage. The law or usage of the road is not the criterion of negligence; therefore, where the defendant's carriage was on the wrong side of the road, and in attempting to pass on the near instead of the off side, plaintiff sustained damage, it was held a question for the jury, to decide whether there was negligence, without regard to the law of the road, 2 D. & R. 255.—5 Esp. 273, 35, 44. But though the rule of the road is not to be adhered to, if by departing from it an injury can be avoided, yet in cases where parties meet on a sudden, and an injury result, the party on the wrong side should be held answerable, unless it appear clearly that the party on the right side had ample means and opportunity to avoid it, 3 C. & P. 544. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason, crossed over to the side on which the defendant was driving, and on endeavoring to pass his horse was killed, Lord Kenyon, C. J. held, that it was putting himself voluntarily into danger, and that the injury was of his own seeking; but the jury found a verdict for the plaintiff, which the court of King's Bench refused to disturb, 2 Esp. Rep. 686. As to the rule, where ships

meet, see 3 C. & P. 538. The plaintiff cannot recover if he was in fault, the injury should entirely arise from the defendant's fault, 2 Taunt. 315.—M. & M. C. N. P. 169. When the action is against the party himself, who either wilfully or negligently drove the carriage, and thereby occasioned the injury complained of, the remedy may and should be *trespass*, 3 East, 593, 600, 601. 1 East, 109. But when the action is against the master for the negligent driving of his servant, the action should be *case*, 1 East, 106, 109, 110.—2 Hen. Bla. 442.—4 B. & A. 590. The declaration against the master for the act of his servant, should not state it to have been committed wilfully or forcibly, or furiously, but should show that it was committed negligently; see 1 East, 106; and 3 Id. 593. 6 T. R. 126.—5 T. R. 648.—4 B. & A. 590. See the form, 2 H. Bl. 442.—6 T. R. 659. The negligence may be stated to be that of the master, without noticing the servant, but the above form is most correct, 6 T. R. 659.—1 East, 110. The defendant's servant who drove the carriage is not a competent witness to disprove the negligence, without a release, 4 T. R. 589.—Holt, C. N. P. 139.—4 Campb. 80; and if the plaintiff's carriage was driven by a servant, the plaintiff cannot call such servant without releasing him, 1 Campb. 251.—8 Taunt. 455.

(w) This is sufficient, though the plaintiff only hired the carriage, and furnished the horses, 4 B. & A. 590.

damaged and destroyed the same, [and one of the wheels, and the splinter bar, and the shafts thereof,] and the said carriage of the said plaintiff, thereby then and there became and was rendered of no use or value to the said plaintiff, and thereby *the said plaintiff was then and there cast out and thrown with great force and violence from and off his said carriage to and upon the ground there, and by means of the several premises aforesaid, the said plaintiff was then and there greatly bruised, hurt, and wounded, and became and was sick, sore, lame, *and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time the said plaintiff suffered great pain, and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be done and transacted; and also by means of the premises, was forced and obliged to pay, lay out, and expend, and hath necessarily paid, laid out, and expended, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of [£10,] in and about the endeavoring to be healed and cured of his said wounds, hurt, and bruises, occasioned as aforesaid; and also by means of the premises the said plaintiff hath paid, laid out, and expended, divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £— in and about the repairing of the said chaise so damaged as aforesaid, to wit, at, &c. aforesaid.—And whereas also the said plaintiff, heretofore, to wit, on, &c. at, &c. (*venue*) was lawfully possessed of a certain other carriage, to wit, a chaise of great value, to wit, of the value of £— and of a certain other horse, [or “of divers others, to wit, — horses,”] then and there harnessed to the same, and in which said carriage the said plaintiff was then riding in and along a certain public and common highway; and the said defendant was also then and there possessed of a certain other carriage, and of a certain other horse, [or “divers, to wit, — other horses,”] drawing the same, and which said last-mentioned carriage and horse, [or “horses,”] the said defendant was then and there driving in and along the said highway, to wit, at, &c. (*venue*) aforesaid. Nevertheless the said defendant then and there so carelessly and improperly drove, governed, and directed his said carriage and horses, that by and through the carelessness, negligence, and improper conduct of the said defendant, the said carriage of the said defendant then and there crushed, broke to pieces, damaged, and destroyed the said carriage of the said plaintiff, and the said carriage of the said plaintiff thereby then and there became and was rendered of no use or value to the said plaintiff, and thereby, &c. [*Conclude as in the first count from the asterisk.*]

FOR NEGLIGENCE
IN DRIVING CAR-
RIAGES.

[*711]

Second
count.

*[*Commencement as ante*, 596.]—For what whereas the said plaintiff, before and at the time of the committing of the grievance by the said defendant as hereinafter next mentioned, was lawfully possessed of a certain [barge or vessel] of great value, to wit, of the value of £— then lawfully being in the River [Thames,] to wit, at, &c. (*venue*), and the said defendant was also then possessed of a certain other [barge or vessel] in the river aforesaid, to wit, at, &c. (*venue*) aforesaid, and then and

[*712]
FOR NEGLIGENCE
IN NAVI-
GATING
SHIPS.
Against
the owner

FOR NEGLIGENCE
IN NAVI-
GATING
SHIPS.

of a ship
for negli-
gence in
the navi-
gation of
it, where-
by plain-
tiff's barge
was dam-
aged (x).
[*713]

Second
count.

there had the care, direction, and management of the same; yet the said defendant not regarding his duty in that behalf, whilst the said barge or vessel of the said plaintiff so was in the said river, to wit, on &c. at, &c. (*venue*) aforesaid, took so little and such bad care of his said [barge or vessel] in the direction and management of the same, that the same, by and through the carelessness, misdirection, and mismanagement of the said defendant, [*or if he were not on board*, "by his servants in that behalf,"] then and there, with great force and violence, ran foul of and struck against the said [barge or vessel] of the said plaintiff, and thereby then and there greatly broke, damaged, and injured the same, and thereby *divers goods and chattels, to wit, &c. [*specify them, either according to the exact description or as in trover*,] of the said plaintiff of great value, to wit, of the value of £— then being on board of the *said [barge or vessel] of the said plaintiff then and there became and were greatly wetted, damaged, and spoiled; and also by reason of the premises, the said plaintiff hath been forced and obliged to pay, lay out, and expend, and hath necessarily paid, laid out, and expended, a large sum of money, to wit, the sum of £— in and about the repairing the said damage so done to the said [barge or vessel] as aforesaid, and also by means of the premises, the said plaintiff lost and was deprived of the use of the said [barge or vessel] of the said plaintiff for a long space of time, to wit, for the space of — and thereby lost and was deprived of all the profits and advantages which during that time he might, and also otherwise would have derived and acquired from the use of the said [barge or vessel,] to wit, at, &c. (*venue*) aforesaid.—And whereas also the said plaintiff, before and at the time of the committing of the grievance by the said defendant as hereinafter next mentioned was lawfully possessed of a certain other [vessel] of great value, to wit, of the value of £— to wit, at, &c. (*venue*); and the said defendant was also then possessed of a certain other [vessel,] to wit, at, &c. (*venue*) aforesaid, and then and there had the care, direction, and management of the same; yet the said defendant not regarding his duty in that behalf, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, took so little and such bad care of his said [vessel] in the direction and management of the same, that the same, by and through the carelessness, misdirection, and mismanagement of the said defendant in that behalf, then and there greatly broke, damaged, and injured the said [vessel] of the said plaintiff, and

(x) See the forms, 8 Wentw. Index, 46, 47—5 T. R. 649—2 New Rep. 446,—1 B. & P. 472.—8 T. R. 188.—Morg. 432, 434.—1 Rich. C. P. 478—Lil. Ent. 38, 180. In an action against the party himself, who has occasioned an injury by improperly driving a carriage, the remedy is *trespass*, ante, 710; but *case* may be supported for the consequences of negligence in the navigation of a ship; *Leame v. Bray*, 3 East, 599, 601.—8 T. R. 188—1 B. & P. 472; but see 1 Camp. 497.—2 Id. 465. The injury may be stated to have been occasioned by the negligence of the defendant himself, though in fact he were not present. This action will not in general lie against the owners or master, if a pilot was on board who had the management of the vessel, see

6 Geo. 4. c. 125. s. 63.—3. Stark. 12.—7 Taunt. 258.—1 Moore, 4—Holt, C. N. P. 359, S. C.; and see the late cases in 6 B. & C. 657.—5 B. & C. 156.—2 Bing. 214, and those collected in 2 Chit. Com. Law, 59. As to the evidence of such management, see 7 Taunt. 258, 309. A pilot steering a vessel is liable for an injury occasioned by his own misconduct, though a superior officer be on board, *Peake's Rep.* 107.—15 East, 384. What owner is liable, 2 New Rep. 182.—1 East, 110.—6 T. R. 659. What remedy in Court of Admiralty, 5 Rob. Rep. 345. See the rule as to the mode of navigation where ships meet, 4 C. & P. 523. The captain and crew may be rendered competent witnesses for defendant by one release, 4 Camp. 80.

thereby, &c.—[Conclude as in the first count from the asterisk. Add other counts if the case suggest any, varying the statement of the injury, according to the circumstances of the case as they may be probably established in evidence, and conclude as ante, 596.]

FOR NEGLIGENCE
IN NAVI-
GATING
SHIPS.

Middlesex, to wit. Be it remembered, that Sir William Garrow, Knt. attorney-general of our present sovereign lord the king, who prosecutes for our lord the king in this behalf, *comes in his own proper person, before the barons of this Exchequer, at Westminster, on the — day of — in this same term, and for our said lord the king, gives the court to understand and be informed, that our said lord the king, before and at the time of the committing of the grievance hereinafter next mentioned, to wit, on, &c. to wit, at, &c. was lawfully possessed of a certain ship or vessel called the *Semiramis*, and of the tackle, apparel, and furniture thereof, of great value, to wit, of the value of £—, of lawful money of Great Britain, as of his own proper ship, goods, and chattels, which said ship or vessel, then and at the time of the committing of the grievance hereinafter next mentioned, was navigating and sailing on the high seas, near to the island of St. Helena, to wit, at, &c. (*venue*) aforesaid; and the said attorney-general of our said lord the king, for our said lord the king, further gives the court here to understand and be informed, that at the time of committing the grievance hereinafter next mentioned one J. M., and R. M., and one H. R., were the owners of a certain ship or vessel called the *Vansittart*, which said last-mentioned ship or vessel, a little before and at the time of committing the grievance hereinafter next mentioned, was also navigating and sailing on the high seas aforesaid, near to the said ship or vessel of our said lord the king, called the *Semiramis*, and was then and there under the care, direction, and management of the said H. R. and of certain servants of them the said J. M., R. M. and H. R., to wit, at, &c. (*venue*) aforesaid; and the said attorney-general of our said lord the king, for our said lord the king, further gives the court here to understand and be informed, that the said J. M., R. M., and H. R. then and there by the said H. R. and their said servants, so incautiously, negligently, unskilfully, and carelessly managed, conducted, navigated, steered, and directed their said ship or vessel, and took such bad care in the management, conducting, navigating, steering, and directing thereof, that the said ship or vessel of them the said J. M., R. M., and H. R. so navigating and sailing as aforesaid, then and there, by and through the mere default, and by the negligence, carelessness, and unskilfulness of the said H. R. and the said servants of them the said J. M., R. M., and H. R., did then and there, with great force and violence, run foul of, upon, and against the said ship or vessel, of and belonging to our said lord the king, and struck against the same, by means whereof the said ship or vessel, of and belonging to our *said lord the king, was then and there broken, split, fractured, and very much damaged and spoiled in the hull, rigging, and other parts thereof, and in great danger of sinking; and the said attorney-general of our said lord the king, for our

Information by the
attorney-general
against
the owners of a
ship, for
running foul of one
of the king's
ships (y).
[*714]

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(y) See form and note, ante, 712. 8 Wentw. 425, 428.—15 East, 384. This information is against the proprietor, who is in general liable for the acts of those whom

he employs, except, as we have before seen, in the case where there is a pilot on board, ante, 712, note.

FOR NEG-
LIGENCE
IN NAVI-
GATING
SHIPS.

Second
count.

said lord the king, further gives the court here to understand and be informed, that by reason of the premises aforesaid, our said lord the king was forced and obliged to lay out and expend, and actually did lay out and expend, a large sum of money, to wit, the sum of £—, of like lawful money, in and about the repairing and amending the said ship or vessel, of and belonging to our said lord the king, to wit, at, &c. (*venue*) aforesaid.—And the said attorney-general of our said lord the king, for our said lord the king, further gives the court here to understand and be informed, that our said lord the king, before and at the time of the committing of the grievance hereinafter next mentioned, to wit, on, &c. at, &c. (*venue*) was lawfully possessed of a certain other ship or vessel called, &c. and of the tackle, apparel, and furniture thereof, of great value, to wit, of the value of —l. of like lawful money, as of his own proper ship, goods, and chattels, which said last-mentioned ship or vessel then and at the time of committing the grievance hereinafter next mentioned, was navigating and sailing on the high seas near to the island of St. Helena, to wit, at, &c. (*venue*) aforesaid.—And the said attorney-general of our said lord the king, for our said lord the king, further gives the court here to understand, &c. [*stating the injury to have been occasioned by the defendants themselves.*—Third count, *stating the injury to have been occasioned by the defendants' servants, and whilst the vessel was in their custody. The information concludes as follows :*—To the damage of our said lord the king of £—, wherefore the said attorney-general of our said lord the king, prays the advice of the court here in the premises, and due process of law to be made against the said J. M., R. M., and H. R. in this behalf, to answer our said lord the king of and in the premises aforesaid.

W. GARROW.

ILLEGAL
DIS-
TRESSES.

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At common law, though a distress for rent or damage feasant were legal in its inception, yet if there were any subsequent irregularity, the parties became trespassers ab initio, *Bac. Ab. Trespass, B.* — 8 Co. 146. And in the case of a *distress for damage feasant, this is still the law; but the 11 Geo. 2. c. 19. s. 19, alters the common law with respect to distress for RENT, and enacts, that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distressing, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass, or on the case, at the election of the plaintiff or plaintiffs: Provided always, That where the plaintiff or plaintiffs shall recover in such action, he, she, or they, shall be paid his, her, or their full costs of suit, and have all the like remedies for the same, as in other cases of costs." Therefore since this act, trover will not lie where the distress has been merely irregularly sold; 1 Hen. Bla. 13; nor trespass, unless for some act which of itself might be the subject-matter of that form of action, 2 Campb. 115. If however, the distress were illegal in its inception, or if the person making the distress turned the tenant out of possession, or continued an unreasonable time more than five days in possession, or distrained af-

ter a tender of rent, trespass may be supported: 1 *East*, 139.—11 *East*, 396.—2 *Campb.* 115, *S. C.*—4 *B. & A.* 208.—3 *Stark.* 171; but the tenant may waive the trespass and declare in case, 4 *B. & A.* 208.—2 *D. & R.* 356.—1 *B. & C.* 145.—3 *Stark.* 171, *S. C.*—A tenant whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action on the case under the 2 *W. & M. sess.* 1. c. 5. against the landlord or his bailiffs for selling the same before five days had elapsed after the seizure, as such sale was altogether void, 3 *B. & A.* 470. The sale of goods under a distress, after service of an irregular notice of replevy, without removing the goods off the premises, is not a sufficient conversion to enable the tenant to maintain trover, 2 *M. & R.* 313. A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whose he occupies, 2 *C. & P.* 374. A right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction for the wrong done; therefore in the case of an excessive distress, *for rent, a tenant does not waive his right of action, though he afterwards enters into a written agreement with his landlord concerning the sale of the effects seized, 4 *D. & R.* 539.—2 *B. & C.* 821, *S. C.*; and see 1 *Bing.* 405. In declaring specially for any irregularity, it is not necessary to state a demise, or that the goods were distrained for rent in arrear, and it is sufficient to allege that the goods were taken nomine districtionis; 4 *Mod.* 231. By section 20 of the above act, no tenant shall recover in the action on the case if tender of amends have been made before action brought. If the judge certify under 43 *Eliz.* c. 6, it will deprive plaintiff of costs. 5 *B. & A.* 796.

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[Commencement as ante, 596.]—For that whereas the said plaintiff, after the making of a certain act of parliament, intituled “An act for enabling the sale of goods distrained for rent, in case the rent be not paid in a reasonable time,” and before and at the time of the committing of the grievance by the said defendant as hereinafter next-mentioned, held and enjoyed certain premises, with the appurtenances (a), as tenant thereof to the said defendant [or *E. F. (b)*] at and under a certain rent, therefore payable by the said plaintiff, to wit, the rent or sum of —*l.* per annum; yet the said defendant not regarding the Statute in such case made and provided, but contriving, and wrongfully and injuriously intending to harass, oppress, and injure the said plaintiff in this behalf, heretofore, to wit, on, &c. (the day of distress or about it), at, &c. (venue) wrongfully and injuriously seized, took, and distrained, in and upon the said premises, with the appurtenances, divers goods and chattels, to wit, &c. [here specify the goods as in trover. If they have been already set forth *in a prior count,

1. On 2 *W. & M. sess.* 1. c. 5. s. 5. for double value of goods distrained and sold, where no rent was due (z).

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(z) When no rent is due, the owner of the goods distrained may, in an action of trespass, or case, recover double the value of the goods, and full costs. 2 *W. & M. sess.* 1. c. 5. s. — See the form, 8 *Wentw.* 420. — 9 *Id.* 84, & *id.* Index viii. but the terms of the tenancy appear to be there stated more fully than is necessary, *Bristow v. Wright*, Dougl. 665. — 5 *T. R.* 497. — 5 *Esp. Rep.* 33. — See *Salter v. Brunsden*, 4 *Mod.* 231, in which the declaration was

more concise than that above, and it was held unnecessary to state a demise in form, and sufficient to say, that the goods were taken “*nomine districtionis*.” *Com. Dig. Distress*, D. 9.

(a) There is no occasion to state the situation of the premises, and if stated a variance in the description would be fatal. 2 *Moore*, 587.

(b) If the tenancy is disputed, omit these words, “as tenant, &c.”

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then say "goods and chattels of the like number, quantity, quality, description, and value, as those in the said — count mentioned," and omit the statement of value afterwards] of the said plaintiff, of great value, to wit, of the value of —*l.* and afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, sold (*c*) the said goods and chattels as such distress as aforesaid, by color of the said act, for certain rent to wit, the sum of —*l.* then and there pretended by the said defendant to be in arrear and due to the said defendant [or *E. F.*] for the said demised premises, with the appurtenances; whereas in truth and in fact, at the time of the making of the said distress, and the said sale, as aforesaid, no rent was in arrear or due to the said defendant [or *E. F.*] for or in respect of the said premises, with the appurtenances, contrary to the form of the Statute in that case made and provided.—[If the above count be framed in case, add a count in trover, and if in trespass, add a count de bonis asportatis, and conclude, if in case, as ante, 596.]

2. On what
Marl. 51
H 3. c. 4,
for dis-
training
beasts of
the
plough,
and sheep,
there be-
ing other
goods suf-
ficient to
distrain
(d).

[Commencement as ante, 596.]—For that whereas the said defendant, on, &c. at, &c. (*venue*) took and distrained the beasts of the plough, and sheep of the said plaintiff, to wit, &c. [here specify them as in trover,] of great value, to wit, of the value of —*l.* then being in and upon certain land and premises, with the appurtenances, of the said plaintiff (*c*); and whereby and wherewith he the said plaintiff then tilled his said land, not for damage feasant, but for certain rent, to wit, the sum of —*l.* then alleged to be due and owing from the said plaintiff to the said defendant [or *E. F.*] for and in respect of the said land and premises, with the appurtenances, although there were then and there other (*f*) goods and chattels of the said plaintiff, in and upon the said land and premises, with the appurtenances, not being beasts of the plough, or sheep, sufficient for a reasonable distress for the rent aforesaid, and the said defendant afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, sold the said beasts of the plough, and the said sheep, and converted and disposed of the money arising from the sale thereof, to the use of the said defendant, contrary to the form of the Statute in such case made and provided.—[Add a count in trover, and conclude as ante, 595.]

3. For dis-
training
tools of
trade,
when suf-
ficient
other
goods on
premises
to be an-
swerable
(g).

For that whereas, before and at the time of committing of the grievances by the defendant as hereinafter mentioned, the said plaintiff was a [working carpenter,] and the trade and business of such [working carpenter,] then exercised and carried on in and upon certain premises, with the appurtenances, to wit, at, &c. (*venue*) and which the said plaintiff then

(c) From the statute 2 W. & M. sess. 1. c. 5. s. 5. it should seem a *sale* would be necessary in order to support an action on the case.

(d) See form, 8 Wentw. 430, 443, 4, and Bradby, 262. The first was in trespass, and both the forms conclude against the peace. As to the law, see Com. Dig. Trespass, C. 4. — 4 T. R. 565, 569. — 2 Moore, 491. — 3 Id. 96. — 8 Taunt 431, 742 — 1 Bott, 244. — Gilb. — Dist. by Hunt, 36, &c — Co. Lit. 47 a, n. 117 — 1 Burn, J. 26th ed. 978. The tenant cannot support this action if

there was reasonable ground for supposing that there was not a sufficient quantity to distrain without taking beasts, &c. 6 Price, 3. — 2 Chit. Rep. 167, and the distrainor would not in such case be bound to sell other goods first. 6 Price, 3. The declaration need not show that there was a sufficient distress of other goods. Dyer, 312. — Sid. 348.

(e) See the preceding page, n. (a).

(f) This is not necessary, see Dyer, 312. — Sid. 346

(g) See the notes to the preceding form.

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held as tenant thereof to the said defendant [or E. F. (h)] at and under a certain rent, whereof, at the time of the committing the grievance hereinafter mentioned, a small sum, viz. the sum of £— alleged to be due and in arrear to the said defendant [or E. F.]; and whereas also before and at the time of the committing of the said grievance hereinafter next mentioned, the said plaintiff was lawfully possessed of a certain [carpenter's] tools and utensils in the way of his trade and business, duly and from time to time to be used by the said plaintiff in the way of his said trade and business, viz. 500 carpenter's tools, 10 work benches [*here enumerate the tools and utensils, according to the exact description, or as in trover*] of great value, to wit, of the value of £— and which said tools and utensils were, at the time of the committing of the said grievance hereinafter next mentioned, in and upon the said premises, with the appurtenances; and whereas also, at the time of committing the grievance hereinafter next mentioned, there were divers other goods and chattels of the said plaintiff upon the said last-mentioned premises, with the appurtenances, of great value, to wit, of the value of £— and sufficient for a reasonable distress for the said rent, and to *pay and satisfy the same and all the costs and charges of such a distress, and expense incidental thereto, and which the said defendant at the time of the committing of the said grievance hereinafter next mentioned, could and might have taken as a distress for such last-mentioned arrears of rent, to wit, at, &c. (*venue*) aforesaid. Yet the said defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure the said plaintiff in the way of his said trade and business heretofore, to wit, on, &c. (*day of distress or about it*) at, &c. (*venue*) aforesaid, wrongfully and unjustly took and distrained the said tools and utensils of the said plaintiff, in the way of his said trade and business, as a distress for the said arrears of rent aforesaid, and afterwards, to wit, on the day and year aforesaid, to wit, at, &c. (*venue*) aforesaid, sold and disposed of the said tools and utensils for a much less sum of money than the same were reasonably worth, by means whereof the said plaintiff wholly lost and was deprived of the use of the said tools and utensils in the way of his said trade and business, and sustained great loss and inconvenience from the want of the same, to wit, at, &c. (*venue*) aforesaid.—[*Add a count in trover.*]

[*719]

[*Commencement as ante*, 596.]—For that whereas the said plaintiff, before and at the time of the committing the grievance hereinafter next

4. For distraining for more rent than was due (i).

(h) See ante, 718, n.

(i) This action is at common law, and is not founded upon the statute 52 Hen. 3. c. 4, for an excessive distress, as in the next form, nor on the statute 2 W. & M. c. 5 s. 5.—Sira. 851. See the notes to the next form. In a late case, where a tenant, shortly after he had paid half a year's rent to his landlord, due at Lady-day preceding, was called upon by the agent of the ground-landlord for ground-rent due previously to Lady-day, and which the landlord had refused to pay: it was held, that the payment for such ground-rent by the tenant, was not a voluntary payment, although the agent of the ground-landlord gave him time for that purpose, as the tenant was liable to be

distrained on for such rent: Held also, that the tenant was entitled to deduct such payment from the next rent accruing due to his landlord, although it was not actually due at the time the ground-rent was paid; and the tenant having tendered the balance remaining due, after deducting such payment, together with another sum paid for land-tax previously due, which the landlord refused to accept, but distrained for the whole rent then in arrear: Held, that the tenant was entitled to recover in an action on the case for a wrongful distress: and that a count stating that the landlord had distrained for the whole rent, when only the sum tendered was due, was sufficient. 2 M. & P. 732.—5 Bing. 406, S. C.

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DIS-
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mentioned, held and occupied certain premises, with the appurtenances (*k*) as tenant thereof to the said defendant [*or E. F. (l)*] at and under a certain rent therefore payable by the said plaintiff, for and in respect of the same, to wit, at, &c. (*venue*). Yet the said defendant contriving and maliciously intending wrongfully and unjustly to injure the said plaintiff in this behalf, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, falsely and maliciously pretending that a certain large sum of money, to wit, the sum of —*l.* (*m*), of lawful money of Great Britain, was then due and in arrear from the said plaintiff to the said defendant [*or E. F.*] for rent of the said premises, with the appurtenances, wrongfully and unjustly seized and took certain goods and chattels, to wit, &c. [*here specify them as in trover. If they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description and value as those in the said — count mentioned," and omit the statement of value afterwards.*] of the said plaintiff, then found and being in and upon the said premises, with the appurtenances, of great value, to wit, of the value of —*l.* of like lawful money, as a distress for the said sum of money so pretended to be due and in arrear as aforesaid, and under that pretence, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, sold and disposed of the said goods and chattels for and towards paying and satisfying the said alleged arrears of rent, and the costs and charges of the said distress, [*or if the goods were not sold, but the plaintiff paid money to redeem them, then say, "kept and retained the said goods and chattels of the said plaintiff, from the said plaintiff, for a long space of time, to wit, for the space of — days then next following, and until the said plaintiff, in order to regain the possession of his said goods and chattels, was forced and obliged to pay, and did then and there pay to the said defendant the said pretended arrears of rent, and a large sum of money, to wit, the sum of —*l.* for the costs and charges of the said distress, and expenses incidental thereto"*] Whereas in truth and in fact, at the time of the making of the said distress as aforesaid, and during all the time aforesaid, a small part only, to wit, the sum of —*l.* (*n*), of the said sum of money so pretended to be due and in arrear as aforesaid, *was due and in arrear from the said plaintiff to the said defendant for the rent of the said premises, with the appurtenances, to wit, at, &c. (*venue*) aforesaid.—[*Add a count for an excessive distress for the rent really due, as in the next form, and a count in trover, and conclude as ante, 596.*]

[*720]

5. For taking an excessive distress for rent, on stat. Marl. b. 58 Hen. 3. c. 4. (n).

[*Commencement as ante, 596.*—For that whereas the said plaintiff be-

(*k*) Ante, 718, note.

(*l*) If the plaintiff dispute the tenancy, omit the words, "to the said defendant, [*or E. F.*]"

(*m*) The plaintiff need not prove the precise sum stated, see 1 Bing. 401.

(*n*) See also 51 Hen. 3. c. 4.—Gilb. Dist. by Hunt, 63 to 68, the remedy must be on the above statute, 2 Stra. 851.—3 Lev. 48.—2 Ken. 204, and not by trespass or trover, id. ibid.: but see the exceptions, 1 Burr. 582.—1 Hen. Bla. 13. 9 East, 298. Case is maintainable, even though the tenant had tendered the rent due to his landlord

before the distress was levied, 2 D. & R. 256.—1 B. & C. 145.—3 Stark. 171, S. C. In such an action express malice need not be proved, but the excess taken must be considerable, 6 Esp. 71. It is no bar to this action, that between distress and sale of the goods distrained, the parties came to an arrangement respecting the sale, 1 Bing. 401.—4 D. & R. 539.—2 B. & C. 821, S. C. A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whom he occupies, 2 C. & P. 374.

fore and at the time of the committing of the grievance hereinafter next mentioned, held and enjoyed certain premises, with the appurtenances (o) as tenant thereof to the said defendant [or E. F. (p)] at and under a certain rent therefore payable by the said plaintiff to the said defendant for the same, of which said rent, at the time of the committing of the grievance hereinafter next mentioned, a certain small sum of money, to wit, the sum of £— (q), and no more, was due and in arrear from the said plaintiff. Yet the said defendant, not regarding the Statute in such case made and provided, but wrongfully and maliciously contriving and intending to injure and oppress the said plaintiff in this behalf, heretofore, to wit, on, &c. at, &c. (venue) aforesaid, wrongfully and maliciously took and distrained for the said arrears of rent, certain goods and chattels, to wit, &c. [here specify the goods as in trover. If they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, and description, as those in the said — count mentioned,"] of the said plaintiff, of much greater value than the amount of the said arrears of rent, to wit, of the value of £— and thereby took a great and unreasonable distress for the said arrears of rent, when, at the time of the taking of the said distress as aforesaid, a certain part of the said goods and chattels so distrained as aforesaid, to wit, [one-half] thereof then was of sufficient value to have satisfied the said arrears of rent, and the charges of the said distress, and of the appraisement and sale thereof, to wit, at, &c. (venue) aforesaid, contrary to the form of the Statute in such case made and provided.—[Add a count in trover and conclude as ante, 596.]

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For that whereas, before the committing of the grievances hereinafter next mentioned, to wit, on, &c. (day of distress or about it) at, &c. (venue) the said defendant took and distrained certain goods and chattels of the said plaintiff, to wit, &c. [here set them out as in trover, or if already set forth in a prior count, say, "goods and chattels of the like number, quantity, quality, description, and value, as the said goods and chattels in the said — count mentioned,"] under color, and as and for and in the name of a distress for certain rent, then alleged to be due and payable to the said defendant [or E. F.] for and in respect of certain premises in the possession of the said plaintiff; and which said [last-mentioned] goods and chattels then and afterwards were of more than sufficient value to have satisfied the said alleged rent, and the costs and charges of and attending such distress, and the sale of the said [last-mentioned] goods and chattels under such distress, and incidental thereto, to wit, at, &c. (venue) aforesaid; and whereas also the said defendant having so taken and distrained the said [last-mentioned] goods and chattels as aforesaid, then and there had and retained possession of the same under such distress for

6. For distraining a second time on the same goods for same rent (r).

(o) Ante, 718, note.

(p) If the plaintiff dispute the tenancy, omit the words, "to the said defendant."

(q) The plaintiff need not allege or prove the precise sum due, 1 Bing. 401.

(r) It should seem that this cause of action might be supported under a count in trover. That a party cannot, in general, distrain twice for the same rent, see Bradbey on Distr. 130.—1 Burn. J. 26th edit.

988.—17 Car. 2. c. 7. s. 4. But in *Wilton v. Bird*, K. B. Easter Term, 1830, for a fresh arrear or rent, the same goods previously replevied may be distrained. And he may again distrain the same goods for rent subsequently accrued, previously to his executing his *retorno habendo*, without waiving his action against the sureties in the bond, *Hefford v. Alger*, 1 Taunt. 219.

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a long space of time, to wit, the space of [four] days then following and afterwards, and at the expiration of the said space of time, to wit, on, &c. (*day of quitting possession, or about it*) to wit, at, &c. (*venue*) aforesaid, the said defendant quitted and abandoned the possession of the said [last-mentioned] goods *and chattels, and the said distress thereupon; and although the said defendant under the said distress, and by virtue thereof, would and might have satisfied the said alleged arrears of rent, and all reasonable and lawful charges in that behalf. Nevertheless the said defendant well knowing the premises, but contriving, and wrongfully intending to injure the said plaintiff, afterwards, to wit, on, &c. (*day of second distress, or about it*) at, &c. (*venue*) aforesaid, wrongfully, injuriously, and vexatiously made a second and another distress upon the said [last-mentioned] goods and chattels of the said plaintiff, for the same identical alleged arrears of rent, for and in respect whereof the said distress in this count first mentioned was made as aforesaid, and then and there again took and distrained the said [last-mentioned] goods and chattels, as and for the same rent so pretended to have been due and payable as aforesaid, and not for any more or other or different rent or cause whatever, and then and there wrongfully and injuriously refused to return the same goods and chattels to, and withheld them from the said plaintiff, under the said second distress in this count mentioned for a long time, to wit, for the space of [seven] days then next following, and then and there wrongfully converted and disposed thereof to his own use, although the said plaintiff then and there requested the said defendant to deliver the said [last-mentioned] goods and chattels to him the said plaintiff, to wit, at, &c. (*venue*). —[*Add a count in trover.*]

[*722]
7. For im-
pounding
goods dis-
trained,
off the
premises,
and not
giving the
tenant
notice (s).

*[*Commencement as ante, 596.*]—For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. (*venue*) seized and took divers goods and chattels, to wit, &c. [*here specify the goods as in trover; if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description, and value, as those in the — count mentioned," and omit the statement of value afterwards*] of the said plaintiff, of great value, to wit, of the value of —l. there then found and being in certain premises, with the appurtenances (t), as and for and in the name of a distress for certain supposed arrears of rent, to wit, for the sum of —l. pretended to be due and in arrear from the said plaintiff, for and in respect of the said premises, with the appurtenances, and then and there carried away and removed the said goods and chattels, and impounded the same off the said premises, with the appurtenances. Nevertheless the said defendant contriving, and wrongfully and unjustly intending to injure the said plaintiff, and not regarding the Statute in such case made and provided, did not nor would give due and proper notice (u) of the said distress, and of the cause of the taking *the

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(s) 2 W. & M. c. 5. s. 2.—11 Geo. 2. c. 19. s. 10. As to what notice is necessary, and how to be given, see *Moss v. Gallimore*, Dougl. 279.—Lord Raym. 54. 1 Hen. Bla. 13. *Gilbert's Distr.* by Hunt, 76. 9 East, 298. Query if not in all cases necessary that some notice of the distress should be given, whether there be a sale or removal or not, Com. Dig. Distress, D. 7.

By the 2 W. & M. c. 5, it must be given before a sale.

(t) *Ante*, 718, note.

(u) Where the distress is in growing corn, &c. as allowed by the 11 Geo. 2. c. 19. s. 8, the tenant must, in pursuance of the 9th section of that act, have notice of the place where the corn, &c. is lodged within a week after such lodging.

same, or of the place to which the said goods and chattels were removed, to the said plaintiff, or leave the same at the said premises, with the appurtenances, but wholly neglected so to do, and therein failed and made default, contrary to the form of the Statute in such case made and provided ; and to the damage, &c.

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TRESS.

[*Commencement as ante*, 596.]—For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. (*venue*) had taken and distrained divers goods and chattels, to wit, [*here specify the goods as in trover ; if they have been already specified in a former count, then say* “goods and chattels of the like number, quantity, quality, description, and value as those in the — count mentioned,” *and omit the statement of value afterwards*] of the said plaintiff, of great value, to wit, of the value of —*l.* there then found and being, as and for and in the name of a distress for certain rent, to wit, the sum of —*l.* then due and in arrear from the said plaintiff to the said defendant, for and in respect of certain premises, with the appurtenances, before *then held and occupied by the said plaintiff as tenant thereof to the said defendant [*or E. F.*] ; and thereupon afterwards, and whilst the said defendant was in possession of the said goods and chattels under such distress as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff tendered and offered to the said defendant, in satisfaction and discharge of the said arrears of rent, and the costs and charges of the said distress, a certain large sum of money, to wit, the sum of £—, the same being then and there a sufficient sum to satisfy and discharge the said arrears of rent, together with all the costs and charges of the said distress, and then and there requested the said defendant to re-deliver and restore the said goods and chattels to the said plaintiff, and although the said defendant then and there ought to have accepted and received the said sum of money from the said plaintiff in discharge of such arrears of rent, and the costs and charges of the said distress, and to have re-delivered and restored the said goods and chattels to the said plaintiff ; yet the said defendant contriving, and wrongfully and unjustly intending to harass, oppress, and aggrieve the said plaintiff in this behalf, did not nor would, when he was so requested as aforesaid, or at any other time, accept or receive the said sum of money from the said plaintiff, in satisfaction and discharge of the said arrears of rent, and

8. For refusing to restore goods distrained for rent, on tender of the rent and costs. (w).

[*724]

(w) See the precedent, 8 Wentw. 440 ; and the like in the case of a distress damage feasant, *id.* 392 ; but this latter is not sustainable, see 1 Camp. 285 — 1 Taunt. 261. — 1 B. & P. 382. According to these cases, and to 8 Rep. 147 a. Gilb. Distr. by Hunt. 76, &c. — 8 Moore, 334. — 1 Bing. 341, S. C., tender upon the land before the distress makes the distress tortious ; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful ; tender after the impounding makes neither the one nor the other wrongful ; for then it comes too late, because the case is put to the trial of the law, to be there determined. But in the case of a distress for rent, upon the equity of the statute 2 W. & M. c. 5, a sale of the distress, after tender of the rent and costs, would

be illegal ; and trespass in such case is the proper remedy ; but if there was also an excessive distress, plaintiff may declare in case for that injury, 3 Stark. 171. — 4 D. & R. 539. — 2 B. & C. 821, S. C. By the 11 G. 2. c. 19, s. 10. if after distress taken of corn, &c. growing, the rent and costs of distress be paid and tendered, the distress shall cease, and the corn be restored. Case does not lie for detaining cattle distrained damage feasant, where tender of sufficient amends was made after the cattle had been impounded, 1 Bing. 341. Query if *replevin* would not in such case lie, see Doct. & Stud. 193. From the cases in note, post, vol. iii. 1119, it would seem it would not. As to what is not an impounding, see 4 Bing. 230.

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the costs and charges of the said distress, or re-deliver or restore the said goods and chattels, or any part thereof, to the said plaintiff, but then and there wholly neglected and refused so to do, and hath hitherto wrongfully and injuriously kept and withheld the said goods and chattels from the said plaintiff, and hath converted and disposed thereof to his own use, to wit, at, &c. (*venue*) aforesaid.—[*Add a count in trover.*]

9. For sell-
ing a dis-
tress with-
in five
days, on
the equity
of 2 W. &
M c 5. s.
2. (z).

For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. (*venue*) seized and took divers goods and chattels, to wit, &c. [*here specify the goods as in trover, if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description, and value as those in the — count mentioned," and omit the statement of value afterwards,*] of the said plaintiff, of great value, to wit, of the value of £— then found and being in and upon certain premises (y) in the name of a distress for certain arrears of rent, pretended to be due and payable for the same, to the said defendant, and then and there gave notice thereof to the said plaintiff (z); yet the said defendant, not regarding the Statute in such case made and provided, and contriving, and wrongfully and unjustly intending to injure the said plaintiff in this behalf, and to deprive him of his said goods and chattels, and of the use, benefit, and advantage thereof, and to prevent him from replevying the same, afterwards, and before the expiration of five days next after such distress so taken and made, and such notice thereof so given as aforesaid, to wit, within the space of five days then next following, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, wrongfully, unlawfully, and unjustly did sell and dispose of the said goods and chattels, without the leave or license, and against the will of the said plaintiff, whereby the said plaintiff was not only hindered and prevented from replevying the said goods and chattels so distrained as aforesaid, but was also deprived of such reasonable and sufficient time as in that respect is allowed by law, for the raising, obtaining, and procuring money to pay and discharge the rent so pretended to be due and in arrear as aforesaid, and the costs of the said distress; and the said plaintiff hath also thereby wholly lost and been deprived of the said goods and chattels, and of the use, benefit, and advantage thereof, to wit, at, &c. (*venue*) aforesaid.

10. For
not remov-
ing goods
distrained
within a
reasona-
ble time
after the
lapse of
the five
days (a).
[*725]

[*Commencement as ante*, 596.]—For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. (*venue*) *seized and took divers goods and chattels, to wit, &c. [*here specify the goods as in trover, or if they have been already specified in a former count, then say, "goods and chat-*

(z) What a violation of this section, see 4 B. & A. 208—1 H. n. Bla. 13—1 Burn, J. 26th ed. 994. This count will not support a claim in respect of the defendant having sold corn before it was ripe, &c. see 3 B. & A. 470.

(y) Ante, 718, note.

(z) When this is not necessary, see Lutw. 214.

(a) This count, founded on the equity of the 2 W. & M. c. 5. s. 2, and 11 Geo. 2. c. 19. s. 10, has frequently been adopted, but trespass is the proper form of action, where the party distraining continues too long in

possession, Stra. 717.—1 Hen. Bla. 15.—Gilb. 77.—11 East, 395.—2 Campb. 115. As to the time allowed for the removal, see 1 Burn, J. 26th ed. 991. A reasonable time after the five days is allowed, 4 B. & A. 208. Where the defendant wrongfully seized the plaintiff's goods, and placed a man in possession of them for some days, it was held the owner might recover damages, although he had the use of the goods all the time, 7 Bing. 153. A party may waive the trespass, and declare in case, 1 B. & C. 145.—2 D. & R. 256, S. C.

tels of the like number, quantity, quality, description, and value as those in the — count mentioned," *and admit the statement of value afterwards*] of the said plaintiff, of great value, to wit, of the value of —*l.* then found and being in and upon certain premises of the said plaintiff (*b*), in the name of a distress for certain arrears of rent pretended to be due and payable for the same to the said defendant [*or E. F.*] and then and there gave notice thereof to the said plaintiff; yet the said defendant not regarding the Statute in such case made and provided, but contriving and wrongfully and unjustly intending to injure the said plaintiff in this behalf, did not nor would remove the said goods and chattels from the said premises, within a reasonable time after the expiration of five days next after the making of the said distress, and giving the said notice thereof as aforesaid, but wholly neglected and refused so to do, and wrongfully and unjustly, without the license or consent, and against the will of the said plaintiff kept and detained the said goods and chattels in and upon the said premises for a great and unreasonable space of time after the expiration of the said five days as aforesaid, to wit, for the space of — then next following, contrary to the form of the Statute in such case made and provided, to wit, at, &c. (*venue*) aforesaid.

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For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, the said defendant seized and distrained certain goods and chattels, to wit, &c. [*here specify them as in trover, or if the goods have been already set out in a prior count, say, "goods and chattels of the like number, quantity, quality, description, and value as those in the said — count mentioned," and omit the averment as to the value of the said plaintiff, of great value, to wit, of the value of —*l.* of lawful money of Great Britain, then found and being in and upon certain other premises, with the appurtenances, of the said plaintiff, as for and in the name of a distress for certain arrears of rent alleged to be due to the said defendant [*or E. F.*] for the use and occupation of the said premises, with the appurtenances. Yet the said defendant, not regarding the Statute in such case made and provided, but contriving, and fraudulently intending to injure the said plaintiff in that behalf, did not nor would cause the said goods and chattels so distrained as aforesaid, to be appraised by two sworn appraisers, according to the Statute in that case made and provided, previously to a sale of the said goods and chattels, but on the contrary thereof, the said defendant, afterwards, and before the said goods and chattels had been appraised by two sworn appraisers, according to the form of the Statute in such case made and provided, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, wrongfully sold the said goods and chattels without having had the same previously appraised by two sworn appraisers, contrary to the form of the Statute in such case made and provided, to wit, at, &c. (*venue*) aforesaid.*

11. For selling under a distress, without having the goods appraised by two sworn appraisers (*c*).

(*b*) Ante, 718, note.

(*c*) The 2 W. & M. sess. 1. c. 5. s. 1, requires such an appraisal previous to the sale, see 1 Chit. Col. St. 662.—1 Burn, J. 26th edit. 991. The person distraining must not be one of the appraisers Bul. N. P. 81.—1 Stark. 172.—2 Bing. 337. The appraiser must not be sworn before the con-

stable of another parish. 1 Moody & Malin, C. N. P. 172.—1 Hen. Bla. 13. Where the premises lay partly in the hundred of A. and partly in the hundred of K. the constable of K. was held the proper officer to administer the oath for the appraisal of the distress. 1 Ld. Raym. 53.

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TRESSERS.
12. For
selling a
growing
crop, (un-
der a dis-
tress) be-
fore the
same had
been gath-
ered and
appraised,
contrary
to the 11
Geo. 2. c.
19. s. 8.
(d).

For that whereas heretofore, to wit, on, &c. (*day of seizure or about it*) at, &c. (*venue*) the said defendant seized and distrained a certain crop of [potatoes] of the said plaintiff of great value, to wit, of the value of £100, then growing on and upon certain land situate in the county of S. before then demised, as for and in the name of a distress for certain arrears of rent alleged to be due to the said defendant [or E. F.] for the use and occupation of the said land; nevertheless the said defendant, not regarding the Statute in such case made and provided, nor his duty in selling and disposing of the said distress, but contriving, and wrongfully and injuriously intending to injure the said plaintiff in that behalf, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) wrongfully and injuriously sold and disposed of the said crop before the same had been gathered and appraised, according to the form of the Statute in such case made and provided, by means whereof the said crop of potatoes were then and there sold for much less than the best price, that is to say, for the sum of £50 less than the best price which might have been gotten and received for the same, had the same been gathered, appraised and sold in a due and proper manner, according to the Statute in such case made and provided, and contrary to the said Statute, to wit, at, &c. (*venue*).

13. For
not selling
for the
best price,
on the
equity of
stat. 2 W.
& M. c. 5.
s. 2. (e).

[*Commencement as ante*, 596.]—For that whereas heretofore, to wit, on, &c. at, &c. (*venue*) the said defendant seized and distrained divers goods and chattels, to wit, &c. [*here specify the goods as in trover, or if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description, and value as those in the said — count mentioned," and omit the statement of value afterwards*] of the said plaintiff of great value, to wit, of the value of—*l.* of lawful money of Great Britain, then found and being in and upon certain premises, with the appurtenances (*f*), as and for and in the name of a distress for certain arrears of rent alleged to be due to the said defendant [or E. F.] for the use and occupation of the said premises, with the appurtenances. And whereas also the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, sold the said goods and chattels for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress. Yet the said defendant not regarding his duty in making and selling the said distress, nor the Statute in such case made and provided, but contriving, and fraudulently intending craftily and subtly to injure the said plaintiff in that behalf, did not nor would sell the said goods and chattels under the said distress, for the best price that could and might have been gotten for the same, but on the contrary thereof, the said defendant then and there, to wit, on the day and year aforesaid, wrongfully and injuriously sold the said goods and chattels for much less than the best price, (that is to say) for —*l.* less than the best price that could and might have been gotten and received for the same, had the same been sold in a due and proper manner by the said defendant, to wit, at, &c. (*venue*) aforesaid.—[*Add a count in trover and conclude as ante*, 596.]

(d) See this enactment and the decisions thereon, 1 Chit. Col. Stat. 671.

(e) The price at which the goods were appraised will be presumed to be the best

that could be obtained till the contrary be proved. 4 Mod. 390. Com. Distress, D. 8. See 1 Burn, J. 26th edit. 594.

(f) Ante, 718, note.

*And whereas also, heretofore, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, the said defendant pretended that the said plaintiff held and enjoyed certain other premises as tenant thereof, at and under a certain rent payable by the said plaintiff, and the said defendant had then and there distrained divers other goods and chattels of the said plaintiff, to wit, goods and chattels of the like number, quantity, quality, description, and value as those in the said [first] count mentioned, for certain alleged arrears of rent, to wit, the sum of [£—] alleged to be due from the said plaintiff, for the use and occupation of the said premises; and whereas also the said defendant, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, sold a part of the said goods and chattels for divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of £— being more than was sufficient to pay and satisfy the said supposed arrears of rent, and all costs and charges incident thereto, whereof the said defendant then and there had notice. Yet the said defendant, not regarding his duty in this behalf, but contriving and intending to injure the said plaintiff, afterwards, to wit, on the day and year aforesaid, wrongfully proceeded to sell, and did sell the rest and remainder of the said goods and chattels when it was wholly unnecessary so to do, to wit, at, &c. (*venue*) aforesaid.—[*Add count for an excessive distress, as ante, 720, and a count in trover.*]

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14. For selling more goods than necessary, under a distress for rent.

And whereas also the said defendant, heretofore, and after the passing of a certain act of parliament, passed in the 57th year of the reign of his late Majesty King George the third, intituled, "An act to regulate the costs of distresses levied for payment of small rents;" and before the committing of the grievances hereinafter next-mentioned, to wit, on, &c. (*day of distress, or about it.*) at, &c. (*venue*) aforesaid, had made and levied a distress upon divers goods and chattels of the said plaintiff, of great value, to wit, of the value of £— for certain rent, alleged to be in arrear and due and owing from the said plaintiff; and although the said defendant was then and there requested by the said plaintiff so to do, yet the said defendant, not regarding his duty in that behalf, nor the Statute in such case made and provided, but contriving, and fraudulently intending to injure the said plaintiff in this behalf, did not nor would, when he was so requested as aforesaid, or at any other time, according to the form of the Statute in such case made and provided, give a copy of his charges, and of all the costs and charges of the said distress, signed by him the said plaintiff, but wholly neglected and refused so to do, contrary to the form of the Statute in such case made and provided, to wit, at, &c. (*venue*) aforesaid.

15 Against a broker, on the 57 Geo. 3 c. 93. for not giving a copy of the charges of a distress (g).

[*Commencement as ante, 596.*]—For that whereas, heretofore, to wit, on, &c. at, &c. (*venue*) the said defendant seized and distrained divers goods and chattels, to wit, &c. [*here specify the goods as in trover; or if they have been specified in a former count, then say,* "goods and chattels of the like number, quantity, quality, description, and value as those in the said — count mentioned," and omit the statement of value after-

16. On equity of stat. 2 W. & M c. 5. s. 1, for not leaving the overplus

(g) It should seem from the act that this action can only be supported against the broker; also that it will not lie unless the

goods have been levied under the distress, see 5 Bing. 39.

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the costs and charges of the said distress, or re-deliver or restore the said goods and chattels, or any part thereof, to the said plaintiff, but then and there wholly neglected and refused so to do, and hath hitherto wrongfully and injuriously kept and withheld the said goods and chattels from the said plaintiff, and hath converted and disposed thereof to his own use, to wit, at, &c. (*venue*) aforesaid.—[*Add a count in trover.*]

9. For selling a distress within five days, on the equity of 2 W. & M. c. 5. s. 2. (z).

For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. (*venue*) seized and took divers goods and chattels, to wit, &c. [*here specify the goods as in trover, if they have been already specified in a former count, then say, "goods and chattels of the like number, quantity, quality, description, and value as those in the — count mentioned," and omit the statement of value afterwards,*] of the said plaintiff, of great value, to wit, of the value of £— then found and being in and upon certain premises (y) in the name of a distress for certain arrears of rent, pretended to be due and payable for the same, to the said defendant, and then and there gave notice thereof to the said plaintiff (z); yet the said defendant, not regarding the Statute in such case made and provided, and contriving, and wrongfully and unjustly intending to injure the said plaintiff in this behalf, and to deprive him of his said goods and chattels, and of the use, benefit, and advantage thereof, and to prevent him from replevying the same, afterwards, and before the expiration of five days next after such distress so taken and made, and such notice thereof so given as aforesaid, to wit, within the space of five days then next following, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, wrongfully, unlawfully, and unjustly did sell and dispose of the said goods and chattels, without the leave or license, and against the will of the said plaintiff, whereby the said plaintiff was not only hindered and prevented from replevying the said goods and chattels so distrained as aforesaid, but was also deprived of such reasonable and sufficient time as in that respect is allowed by law, for the raising, obtaining, and procuring money to pay and discharge the rent so pretended to be due and in arrear as aforesaid, and the costs of the said distress; and the said plaintiff hath also thereby wholly lost and been deprived of the said goods and chattels, and of the use, benefit, and advantage thereof, to wit, at, &c. (*venue*) aforesaid.

10. For not removing goods distrained within a reasonable time after the lapse of the five days (a).
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[*Commencement as ante*, 596.]—For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. (*venue*) *seized and took divers goods and chattels, to wit, &c. [*here specify the goods as in trover, or if they have been already specified in a former count, then say, "goods and chat-*

(z) What a violation of this section, see 4 B. & A. 208—1 Hen. Bla. 13—1 Burn, J. 26th ed. 994. This count will not support a claim in respect of the defendant having sold corn before it was ripe, &c. see 3 B. & A. 470.

(y) *Ante*, 718, note.

(z) When this is not necessary, see Lutw. 214.

(a) This count, founded on the equity of the 2 W. & M. c. 5. s. 2, and 11 Geo. 2. c. 19. s. 10, has frequently been adopted, but trespass is the proper form of action, where the party distraining continues too long in

possession, Stra. 717.—1 Hen. Bla. 15.—Gilb. 77—11 East, 395.—2 Campb. 115. As to the time allowed for the removal, see 1 Burn, J. 26th ed. 991. A reasonable time after the five days is allowed, 4 B. & A. 208. Where the defendant wrongfully seized the plaintiff's goods, and placed a man in possession of them for some days, it was held the owner might recover damages, although he had the use of the goods all the time, 7 Bing. 153. A party may waive the trespass, and declare in case, 1 B. & C. 145.—2 D. & R. 256, S. C.

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TRESS.

tels of the like number, quantity, quality, description, and value as those in the — count mentioned," and admit the statement of value afterwards] of the said plaintiff, of great value, to wit, of the value of —l. then found and being in and upon certain premises of the said plaintiff (b), in the name of a distress for certain arrears of rent pretended to be due and payable for the same to the said defendant [or E. F.] and then and there gave notice thereof to the said plaintiff; yet the said defendant not regarding the Statute in such case made and provided, but contriving and wrongfully and unjustly intending to injure the said plaintiff in this behalf, did not nor would remove the said goods and chattels from the said premises, within a reasonable time after the expiration of five days next after the making of the said distress, and giving the said notice thereof as aforesaid, but wholly neglected and refused so to do, and wrongfully and unjustly, without the license or consent, and against the will of the said plaintiff kept and detained the said goods and chattels in and upon the said premises for a great and unreasonable space of time after the expiration of the said five days as aforesaid, to wit, for the space of — then next following, contrary to the form of the Statute in such case made and provided, to wit, at, &c. (venue) aforesaid.

For that whereas heretofore, to wit, on, &c. at, &c. (venue) aforesaid, the said defendant seized and distrained certain goods and chattels, to wit, &c. [here specify them as in trover, or if the goods have been already set out in a prior count, say, "goods and chattels of the like number, quantity, quality, description, and value as those in the said — count mentioned," and omit the averment as to the value of the said plaintiff, of great value, to wit, of the value of —l. of lawful money of Great Britain, then found and being in and upon certain other premises, with the appurtenances, of the said plaintiff, as for and in the name of a distress for certain arrears of rent alleged to be due to the said defendant [or E. F.] for the use and occupation of the said premises, with the appurtenances. Yet the said defendant, not regarding the Statute in such case made and provided, but contriving, and fraudulently intending to injure the said plaintiff in that behalf, did not nor would cause the said goods and chattels so distrained as aforesaid, to be appraised by two sworn appraisers, according to the Statute in that case made and provided, previously to a sale of the said goods and chattels, but on the contrary thereof, the said defendant, afterwards, and before the said goods and chattels had been appraised by two sworn appraisers, according to the form of the Statute in such case made and provided, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, wrongfully sold the said goods and chattels without having had the same previously appraised by two sworn appraisers, contrary to the form of the Statute in such case made and provided, to wit, at, &c. (venue) aforesaid.

11. For selling under a distress, without having the goods appraised by two sworn appraisers (c).

(b) Ante, 718, note.

(c) The 2 W. & M. sess. 1. c. 5. s. 1, requires such an appraisement previous to the sale, see 1 Chit. Col. St. 662.—1 Burn, J. 26th edit. 991. The person distraining must not be one of the appraisers Bul. N. P. 81.—1 Stark. 172.—2 Bing. 337. The appraiser must not be sworn before the con-

stable of another parish. 1 Moody & Malkin, C. N. P. 172.—1 Hen. Bla. 13. Where the premises lay partly in the hundred of A. and partly in the hundred of K. the constable of K. was held the proper officer to administer the oath for the appraisement of the distress. 1 Ld. Raym. 53.

ILLEGAL
DIS-
TRESS.

arising
from the
sale of a
distress,
with the
sheriff,
&c.

wards] of the said plaintiff of great value, to wit, of the value of £— of lawful money of Great Britain, there then found and being in and upon certain premises, with the appurtenances, as and for and in the name of a distress for certain arrears of rent alleged to be due to the said defendant, [*or E. F.*] for and in respect of the said premises. And whereas also, the said defendant having caused the said goods and chattels to be appraised afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, sold the said goods and chattels so by him seized and distrained as aforesaid, for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress, appraisement and sale, for divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £— of lawful money of Great Britain, being a much larger sum of money than was sufficient to satisfy and discharge all the rent then due for the said premises, with the appurtenances, and all the charges of the said distress, appraisement, and sale. And the said plaintiff further saith, that although the said defendant afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) out of, and with a part of the produce of the said goods and chattels so by him sold as aforesaid, *satisfied the said rent, for which the said goods and chattels were so distrained as aforesaid, and the charges of the said distress, appraisement, and sale, leaving a great and considerable overplus of the money produced by the said sale; yet the said defendant, not regarding his duty in that behalf, nor the Statute in such case made and provided, but contriving, and fraudulently intending to deceive and defraud the said plaintiff in this behalf, did not, after satisfaction of the rent for which the said goods and chattels were so distrained as aforesaid, and of the charges of the said distress, appraisement, and sale, out of the produce of the said goods and chattels so sold as aforesaid, leave the overplus thereof in the hands of the sheriff, or under sheriff, of the said county of — or either of them, or of the constable of the parish, hundred, or place, where the said distress was so taken as aforesaid, for the use of the said plaintiff, so being the owner of the said goods and chattels as aforesaid, although a reasonable time for that purpose hath long since elapsed, but the said defendant hath hitherto wholly neglected and refused so to do, and therein wholly failed and made default, and the said plaintiff hath not yet received nor been in any way satisfied for such overplus as aforesaid, and the said defendant hath converted and disposed thereof to his own use, contrary to the form of the Statute in such case made and provided, to wit, at, &c. (*venue*) aforesaid.

[*727]

17 Against
plaintiff's
landlord,
for not in-
demnify-
ing him
against a
distress
made on
his goods
by the
ground
landlord
(i).

For that whereas, before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, the said defendant held and enjoyed certain premises situate in the county of M. as tenant thereof of one J. H., to wit, at, &c. (*venue*).—And whereas also, whilst the said defendant was such tenant to the said J. H. and before and at the time of the committing of the grievances hereafter next mentioned, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, the said plaintiff, at the special instance and request of the said defendant, had become

(h) See the enactment, 1 Chit. Col. Stat. 663.

(i) See the form and notes, ante, 313.

ILLEGAL
DIS-
TRESS.

and was tenant to the said defendant of the said premises with the appurtenances, at and under a certain yearly rent, to wit, the yearly rent of [£250] payable to the said defendant quarterly, on, &c. [*stating the days of payment in every year.*] And thereupon it then and there became and was the duty of the said defendant, so long as the said defendant continued such tenant to the said J. H. and so long as the said plaintiff continued such tenant to the said defendant, to pay the said first-mentioned rent to the said J. H. and to indemnify and save harmless the said plaintiff from and against the payment of any of the said rent so payable to the said J. H. over and beyond the amount of the said rent so payable to the said defendant as aforesaid, which might be due and in arrear from the said plaintiff to the said defendant, and from and against any distress or costs, charges, damages, or expenses which should or might be made, arise, or happen to the said plaintiff for or by reason of the non-payment thereof; and although the said tenancy of the said defendant to the said J. H. and the said tenancy of the said plaintiff to the said defendant was and continued for a long time, until and after the committing of the grievances hereinafter next mentioned, and although a small sum of money only, to wit, the sum of [£84. 17s.] of the rent aforesaid, was due and in arrear from the said plaintiff to the said defendant at the time of the committing of the grievances hereinafter mentioned; yet the said defendant not regarding his duty aforesaid, but contriving and fraudulently intending to injure and defraud the said plaintiff, did not nor would, during the continuance of the said tenancies, pay the said first-mentioned rent to the said plaintiff, or save harmless or indemnify the said plaintiff according to his said duty, but wholly neglected so to do, and by reason thereof, during the continuance of the said tenancies, to wit, on the said — day of, &c. to wit, at, &c. (*venue*) aforesaid, a certain distress was made by and on the behalf of the said J. H. on divers goods and chattels of the said plaintiff, to wit, &c. [*state them as in trover*] of great value, to wit, of the value of [£400] then in and upon the said premises, for a certain sum of money, being in the amount much over and beyond the amount of the said rent so due and in arrear from the said plaintiff to the said defendant, to wit, the sum of [£125] then due and in arrear from the said defendant to the said J. H. for and in respect of the said rent so payable to him as aforesaid.—And the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, sold the said goods and chattels as such distress as aforesaid, for and towards payment and satisfaction of the said rent so due and owing to him from the said defendant, and of the costs and charges, of the said distress and incidental thereto, and the said plaintiff has been and is much prejudiced, injured and damaged, by means of the premises, to wit, at, &c. (*venue*) aforesaid.—And whereas also before and at the time of the committing of the grievances by the said defendant as hereafter next mentioned, the said defendant held and enjoyed certain other premises with the appurtenances, as tenant thereof to the said J. H. at and under a yearly rent, to wit, the yearly rent of [£—] payable by the said defendant to the said J. H., to wit, at, &c. (*venue*) aforesaid.—And whereas also whilst the said defendant was such tenant to the said J. H. and before and at the time of the committing of the grievances hereafter next mentioned, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, the said plaintiff, at the special instance and

Second
count.

SECOND
SERIES
&c.

Second
count for
issuing a
fieri facias
when no-
thing was
due.

tiff, in order to obtain possession of his said goods and chattels, was forced and obliged to pay (e) a large sum of money, to wit, the sum of £— and the said plaintiff hath been and is, by means of the premises, greatly injured and damaged in his credit and circumstances, and otherwise, to wit, at, &c. (*venue*) aforesaid.—And whereas also, before and at the time of the committing of the grievances by the said defendant hereinafter next mentioned, the said defendant had signed a judgment in the said court of [King's Bench,] against the said plaintiff, for a certain sum of money, to wit, the sum of £— debt, and — costs; and although at the time of the committing of the grievances hereinafter next mentioned, a certain sum of money, to wit, the sum of — remained unpaid: yet the same was not payable until a long time, to wit, — days after the committing of the said grievances, at, &c. (*venue*) aforesaid, and there was no sum of money due or payable upon the said judgment, for which the goods and chattels of the said plaintiff were liable to be taken in execution, as hereinafter next mentioned, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, well knowing the said last-mentioned premises, but contriving, and wrongfully and unjustly intending to injure and aggrieve the said plaintiff in this behalf, heretofore, to wit, on, &c. wrongfully and unjustly caused and procured a certain writ, of *fieri facias* to be issued out of the said court of our said lord the king of the bench, founded on the said judgment, and whereby the sheriff of the county aforesaid was directed to levy of the goods and chattels of the said plaintiff a certain sum of £— debt, and 80s. costs, and that the said sheriff should have those monies before his majesty's justices at Westminster, on — (*return day*); and wrongfully and unjustly caused and procured the said last-mentioned writ of *fieri facias* to be indorsed, with a direction to the said sheriff to levy £— as due upon the said last-mentioned judgment, besides sheriff's poundage, officer's fees and other incidental expenses; and afterwards, to wit, on, &c. wrongfully and unjustly caused and procured the said last-mentioned writ, so indorsed as aforesaid, to be delivered to the then sheriff of the said county, and then and there caused and procured *certain goods and chattels of him the said plaintiff, in the bailiwick of the said sheriff, to be seized and taken in execution, under color and pretence of the said writ, for the said sum of £— besides sheriff's poundage, officer's fees, and other incidental expenses, so directed to be levied as aforesaid, and caused and procured the said last-mentioned goods and chattels to be kept and detained in execution under the said writ for a long time, to wit, until the — day of — in the year aforesaid, when he the said plaintiff, in order to obtain possession of the said last-mentioned goods, was forced and obliged to pay, and did pay (p), a large sum of money, to wit, the sum £—, and the said plaintiff hath been and is, by means of the premises, otherwise greatly injured in his credit and circumstances, to wit, at, &c. (*venue*) aforesaid.—And whereas also, before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, the said defendant had obtained judgment against the said plaintiff, in the said court of [the bench] at Westminster aforesaid, for a certain sum of money, to wit, the sum of £— debt, and £— costs, and

Third
count for
procuring
a *fieri facias*
to be
issued for
a larger
sum than

(e) If the goods were actually sold, then state that fact accordingly.

(p) If the goods were sold, then state that fact accordingly.

[*729]

at the time of the committing of the grievances hereinafter mentioned, there was due and owing upon the said last-mentioned judgment only a small sum of money, to wit, the sum of —*l.* to wit, at, &c. (*venue*) aforesaid; yet the said defendant, well knowing the premises, but contriving, and fraudulently and unjustly intending to injure and aggrieve the said plaintiff in that behalf, heretofore, to wit, on, &c. aforesaid, wrongfully and unjustly caused and procured a certain other writ of *fieri facias* to be issued out of the court of our said lord the king, [of the bench,] founded on the said last-mentioned supposed judgment, and whereby the sheriff of the county aforesaid was directed to levy of the goods and chattels of the said plaintiff a certain debt and cost therein mentioned, and wrongfully and unjustly caused and procured the said last-mentioned writ of *fieri facias* to be indorsed, with a direction to the said sheriff to levy —*l.* as due upon the said last-mentioned judgment; and afterwards, to wit, on, &c. wrongfully and unjustly caused and procured the said last-mentioned writ, so indorsed as aforesaid, to be delivered to the sheriff of the said county, and then and there caused and procured certain other goods and chattels of him the said plaintiff, in the bailiwick of the said sheriff, to be seized and taken in execution, under color and pretence of the said last-mentioned writ, for the said sum of £—and other incidental expenses, and then and there caused and procured the said last-mentioned goods and chattels to be kept and detained in execution under the said last-mentioned writ, for a long time, to wit, until the — day of — in the year aforesaid, when the said plaintiff, in order to obtain possession of his said last-mentioned goods and chattels, was forced and obliged to pay, and did pay, a large sum of money, to wit, the sum of —*l.* and the said plaintiff hath been and is, by means of the premises, otherwise greatly injured in his credit and circumstances, to wit, at, &c. (*venue*) aforesaid.—[*Fourth count in trover.*]

RELEVANT
REVISED,
&c.

judgment
had been
obtained
for.

[*730]

For that whereas, before the committing of the grievances hereinafter next mentioned, to wit, on, &c. a certain writ of our lord the king, called a *fieri facias*, was issued out of the court of our said lord the king, [before the king himself,] at Westminster, in the county of Middlesex, directed to the sheriff of the county of — by which said writ our said lord the king commanded the said sheriff (*r*), that he should cause to be levied of the goods and chattels of the said plaintiff, as well a certain debt of —*l.* before then recovered by one E. F. against the said plaintiff, in the said court of our said lord the king, before the king himself, at Westminster aforesaid, as also, &c. (*r*) which had been adjudged to the said E. F. and with his assent, and that the said sheriff should have that money before [our said lord the king,] at Westminster aforesaid, on, &c. (*return day*), to render unto the said E. F. for his debt and damages aforesaid, whereof the said plaintiff was convicted, as appeared to our said lord the king of

Against a
sheriff for
levying on
a *fieri fa-
cias* more
than suffi-
cient to
satisfy
debt and
costs, for
disposing
of them
for less
than their
value,
and con-
verting
the same
to his own
use (*g*).

(*g*) See form, 9 East, 298.—An action on the case lies against the sheriff for wilfully and without any reasonable or probable cause delaying to sell goods of the plaintiff which the sheriff seized by virtue of a writ of *levari facias*; and see a form of such action, 3 Stark. 163.

The sheriff having taken goods under an

execution, is not justified in selling them to the highest bidder much under their value; he should return that they remain unsold for want of buyers, 3 Campb. 591. Tidd, 9th edit. 1013; but see 1 Stark. 43. —3 Id. 163.

(*r*) Examine carefully with the writ.

ILLEGAL
LEVIES,
&c.

[*731]

record, and that the said sheriff should have there then that writ, which said writ afterwards, and before the delivery thereof to the said sheriff of — *to be executed as hereinafter mentioned, was indorsed (*s*), with a direction for the said sheriff to levy — *l.* besides sheriff's poundage, and all other expenses attending the said levy; and which said writ, so indorsed, afterwards, and before the return thereof, to wit, on, &c. at, &c. was delivered to the said defendant, who then and from thence until and at and after the return of the said writ, was sheriff of the said county of — to be executed in due form of law (*t*); by virtue of which said writ the said defendant, so being sheriff of the said county of — as aforesaid, afterwards, and before the said return of the said writ, to wit, on the day and year last aforesaid, within his bailiwick, as such sheriff as aforesaid, to wit, at, &c. (*venue*) aforesaid, seized and took in execution divers goods and chattels of the said plaintiff, of much greater value than sufficient to pay and satisfy the said sum of £— besides sheriff's poundage, and the other expenses attending the said levy, so indorsed, to be levied as aforesaid, to wit, of the value of £—; and although the said defendant, so being sheriff as aforesaid, then and there well knew that the money arising from the sale of a part of the said goods and chattels so seized and taken in execution as aforesaid, would be sufficient to satisfy and pay the said sum of £— so indorsed, to be levied as aforesaid, besides sheriff's poundage, and the other expenses attending the said levy; yet the said defendant, so being sheriff of the said county of — as aforesaid, contriving, and wrongfully and unjustly intending to injure, oppress, impoverish and wholly ruin the said plaintiff, afterwards, to wit, on the day and year last aforesaid, at &c. (*venue*) aforesaid under color and pretence of the said writ, wrongfully and injuriously did sell and dispose of much more of such goods and chattels than was necessary and sufficient to pay and satisfy the said sum of £— so indorsed, to be levied as aforesaid, besides sheriff's poundage, and other expenses attending the said levy, to wit, the whole of the said goods and chattels so levied as aforesaid, and thereout levied a much greater sum than was sufficient to pay and satisfy the said sum of £— besides sheriff's poundage, and other expenses attending the said levy, to wit, the sum of £—; and also then and there wrongfully and injuriously sold and disposed of the same goods and chattels for a much *less sum of money, to wit, the sum of £— less than the same were really worth, and for which the said defendant could and might and ought to have sold the same, and converted and disposed of the monies arising from the said sale to his own use: by means whereof the said plaintiff was then and there wholly deprived of the use of the said goods and chattels and of the produce thereof, and hath been and is by means of the premises otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.

FOR RES-
CUE AND
POUND
BREACH.

[*734]

For rescu-
ing cattle
taken da-
mage fea-
sant (*u*).

*[*Commencement, as ante, 596.*]—For that whereas, heretofore, to wit, on, &c. at, &c. (*venue*) the said plaintiff [by E. F. his bailiff in that be-

(*s*) See the indorsement, and let this correspond.

(*t*) See 9 East, 299.

(*u*) See Com. Dig. Distress, D. 2, 3, and

half,] had taken in a certain close of the said plaintiff, situate in the parish of —, in the county of —, certain cattle, to wit, &c. [*here specify the cattle taken*] doing damage to the said plaintiff there, and was then and there [by his the said bailiff in that behalf,] about *to impound the said cattle for the cause aforesaid; yet the said defendant, well knowing the premises, but wrongfully and injuriously contriving and intending to injure the said plaintiff, and to deprive him of the benefit of the said distress, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, unlawfully, and against the will of the said plaintiff, with force and arms rescued the said cattle, and took the same from the said plaintiff [or E. F.] and thereby prevented the said plaintiff [or E. F.] from impounding the same, as he otherwise lawfully might and would have done, to wit, at, &c. (*venue*) aforesaid; by means of which said premises, the said plaintiff hath been and is greatly injured, and deprived of the said means of obtaining compensation for the damage so done and doing by the said cattle as aforesaid, to wit, at, &c. (*venue*) aforesaid.— [*If the declaration be framed in case, a count in trover may be added, and if in trespass a common count for the damage to the land should be joined, and a count for taking away cattle.*]

FOR RES-
CUE AND
POUND
BREACH.
[*735]

[*Commencement as ante*, 596.]—For that whereas, heretofore, to wit on, &c. at, &c. (*venue*) when the said plaintiff had then and there taken and distrained certain cattle, to wit, — in a certain close of the said plaintiff, situate in the parish of —, in the county of —, &c. treading down, trampling upon, spoiling, and consuming the grass growing in his said close, and doing damage therein to the said plaintiff, and had impounded the said cattle in a certain common and open pound, in the parish and county aforesaid, as a distress for the said damage, according to the law and custom of England, the said defendant, with force and arms, &c. afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, broke and entered the said common and open pound, and rescued and took away from out of the said pound the said cattle so impounded as aforesaid. Whereby, &c.—[*State the damage as in the preceding form, and add other counts as there directed.*]

For a
pound-
breach of
cattle tak-
en damage
feasant
(w).

*[*Proceed as in the declaration for an escape, post*, 737, to the end of

For a res-
cue of a
person ar-
rested on
mesne pro-
cess (x).
[*736]

the precedents, 8 Wentw. Index, xxiv.—Lutw. 1259. Rescue and pound breach may be joined, Lord Raym. 83. As to the *venue*, F. N. B. 101, E. n. c. Bul. N. P. 63. The remedy for the rescue of a distress damage feasant is, at common law, either by writs of rescous, (Com. Dig. Rescous, D. 1,) or by action on the case for the consequential damage which is laid, nevertheless, *vi et armis*, and may be joined with any other demand either in case or trespass, Lutw. 1259.—Lord Raym. 83, 104.—Tidd's Prac. 9th ed. 98. In an action for a rescue, as well as for pound breach, it is usual to show the cause of the distress; but in the latter case, as the distress is but inducement to the action, and the breach of the pound is the gist of it, it is not necessary to show the cause of the distress. Lord Raym. 105.

—Rast. Ent. 444.

(w) See the notes to the above form, 8 Wentw. Index, xxiv. Lutw. 1259—l.d. Raym. 104. It is most usual to join this count with a count in trespass for damage feasant, when the action is against the owner of the cattle.

(x) See forms, 8 Went. Index, xxiv.—8 T. R. 127.—Com. Dig. Rescous, D. 2 Bac. Ab. Rescue. If it be doubtful whether an actual arrest can be proved, a count should be added for obstructing the sheriff in making the arrest, F. N. B. 102, F.—Com. Dig. Rescous, B. If the rescue be upon final process, the declaration should state the judgment, the *ca. ss.* and the delivery thereof to the sheriff, as *ante*, 416 to 418, and then the warrant, the arrest, and the rescue may be stated nearly as in the above

FOR RES-
CUE AND
POUND
BREAD.

*the statement of the delivery of the writ to the sheriff, and then state the sheriff's warrant and arrest and rescue as follows :—*And thereupon the said G. H. so being such sheriff as aforesaid, afterwards and before the return of the said writ, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, made his certain warrant in writing, under his seal (*y*) of office of sheriff of the said county of — as aforesaid, directed to the keeper of the jail of the said county, and to J. K. and L. M. the said sheriff's bailiffs; and thereby commanded (*z*) them jointly and severally, that they should take the said E. F. if he should be found in his the said sheriff's bailiwick, and safely keep him, so that the said sheriff might have the body of the said E. F. before our said lord the king at Westminster aforesaid, on, &c. (*return day*) to answer the said plaintiff in a plea, and to the said bill in the said last-mentioned writ mentioned; which said last-mentioned warrant, afterwards and before the return of the said writ, to wit, on the said — day of — in the year aforesaid, at, &c. (*venue*) aforesaid, was delivered to the said J. K. and L. M. to be executed according to due form of law. By virtue of which writ and warrant the said J. K. and L. M. before the time appointed for the return of the said writ, to wit, on the day and year last aforesaid, and within the bailiwick of the said sheriff, to wit, at, &c. [*some place in the sheriff's bailiwick,*] took and arrested the said E. F. by his body, and had him in their custody for the cause in the said writ and warrant *mentioned. Nevertheless the said defendant, well knowing the premises, but contriving to injure the said plaintiff, and to deprive him of the means of recovering his said debt, afterwards, and whilst the said E. F. was so in custody of the said J. K. and L. M. as aforesaid, and before the return of the said writ, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, rescued the said E. F. from and out of the custody of the said J. K. and L. M. and caused the said E. F. to escape and go at large, and the said E. F. did thereby then and there escape and go at large out of the custody of the said J. K. and L. M. wheresoever he would, the said plaintiff not then nor yet being paid or satisfied his said debt, and by means of the premises, the said sheriff could not have the body of the said E. F. before our lord the king, at Westminster, at the return of the said writ, nor did the said E. F. appear in the said court at the return of the said writ, according to the exigency thereof, but therein wholly failed and made default (*a*), whereby the said plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same; and thereby also the said plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out, and expended, in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid, amounting together to a large sum of money, to wit, the sum of —*l.* to wit, at, &c. (*venue*) aforesaid.

[*737]

form. See the forms on final process, 8 Wentw. Index, xxiv. It does not seem necessary in a declaration for rescue either on mesne or final process, to state the warrant to the bailiff; it may be stated that the sheriff arrested the party, and that the rescue was from his custody, and this seems preferable; Cro. Jac. 242, 435.—Com. Dig. Rescous, D. 2.

(*y*) It is not necessary to state that the warrant was under seal; Cro. Eliz. 53.—Palm. 357.—2 Saund. 305 b.

(*z*) Examine and let this correspond with the warrant.

(*a*) This allegation of the non-appearance of the defendant does not appear to be necessary, 8 T. R. 127.—Post, 740, note (*a*).

[*Commencement as ante*, 596.]—For that whereas one *E. F. heretofore, to wit, on, &c. (c) at, &c. (*venue*) (d) was indebted to the said plaintiff in a large sum of money, exceeding £20 (e), to wit, the sum of £— of lawful money of Great Britain, upon and in respect of (f) certain causes of action *before then accrued to the said plaintiff against the said E. F.; and the said E. F. being so indebted, the said plaintiff, for the recovery of his said debt, afterwards, to wit, on the day and year aforesaid, sued and prosecuted out of the court of our said lord the king,

FOR ESCAPE, &c.
For an escape on *meane process* (b).
[*739]

(b) See forms, 8 Wentw. Index, xxxiii.—2 Saund. 150.—Bac. Ab. Escape, F. G.—Morgan's Prec. 368, 382, 5.—Lil. Ent. 60, 87. When the escape is on *meane process*, or where there has been no caption on final process, *case* is the only remedy, and the jury may give merely nominal damages, 1 Saund. 37, 38, note 2.—Ante, 416. note.—Bac. Ab. Escape, F., where see the form in *debt*; and 2 Saund. 150, and ante, 416.—5 East, 440. If it be doubtful whether there was an actual capture, it is usual to have three counts; first, for an escape; secondly, for not taking the defendant when he had an opportunity; and thirdly, for not assigning the bail bond, as post, 739; see 5 Taunt. 325. As to what this action lies, see Tidd's Prac. 9th edit. Index, Escape. As to where sheriff liable for the arrest in a liberty, see 3 B. & A. 502. An attachment for non-payment of money, is in the nature of *meane process*, and debt does not lie for an escape on it, 2 B. & A. 56.—See, as to an action for an escape, where the defendant was in custody on an attachment for non-payment of money awarded to plaintiff, 8 B. & C. 124.—2 M. & R. 88, S. C.—The sheriff is not liable, provided he have defendant at the return of writ, 2 T. R. 172.—2 B. & P. 35; and see 2 Saund. 61, c. 4.—2 B. & A. 56. It does not suffice, as an answer to this action, for sheriff to have defendant in custody the day after the return of the writ, though the plaintiff sustain no damage, 2 Bing. 317.

If a bail bond has been taken, this action does not lie, 5 Taunt. 325. In this action it is enough, without producing the warrant or giving direct evidence of the arrest or escape, to prove the sheriff's return of the *cepi corpus*, and to show that the party did not put in bail, and was not in the sheriff's custody at the return of the writ.—3 Campb. 397.—2 Y. & J. 399. Tidd, 9th ed. 236. And for the evidence necessary to charge the defendant with the act of his bailiff, see the cases cited in Tidd, 9th edit. 236. note.—Roscoe on Evid. 406.—7 B. & C. 535.

(c) In order to avoid an unnecessary statement of different days, it is advisable here to insert the tests of the writ, or the day it issued, and the former preferable: ante, 446, note.

(d) The *venue* is transitory, 1 Wils. 336.—Flood. 25.—Dyer, 226 b.—Bac. Abr. Escape, F.

(e) The sum for which a party may be arrested on *meane process*. As to this averment, see 10 B. & C. 215.

(f) It must be stated and proved, that the plaintiff had cause of action against the party arrested, 4 T. R. 611.—2 Lev. 85.—2 Saund. 151, n. 1.—1 Saund. 38.—2 Campb. 188. Proof of the affidavit of debt would perhaps suffice; see 2 Moore, 60. As to when the declarations of the debtor are evidence, see 7 B. & C. 86.—2 Stark. 42. It has been usual to state the subject-matter of the debt, and the promise to pay it; (see a form, where the original debt was on bond, 2 Saund. 150); and if the debt be stated, it must be proved as stated, 2 Esp. Rep. 476, in notes; though indeed the precise sum stated need not be proved, Bul. N. P. 66.—5 Esp. Rep. 102. According to Lutw. 110.—Com. Dig. Pleader, 2 F. 1, and E. 18, this statement of the subject-matter of the debt is unnecessary, and see the form, 8 T. R. 127.—1 Wils. 255. Ante, 253, note; and as this latter mode gives the plaintiff more latitude in evidence, it is preferable in most cases. But it is not so if it is expected that the sheriff will suffer judgment by default; in which case, by stating the debt fully, some proof may be saved. In an inferior court it should be stated that the debt accrued within the jurisdiction, though the omission will be aided after verdict, 8 T. R. 127.—2 Saund. 109, n. 2.—1 Saund. 74, n. 1.—Bac. Abr. Escape, A. 1. The old method of describing the debt and promise was as follows:—“was indebted to the said plaintiff in a large sum of money, to wit, the sum of —l. of lawful, &c. for so much money by the said E. F. before that time had and received to and for the use of the said plaintiff; and being so indebted, the said E. F. in consideration thereof, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook and faithfully promised the said plaintiff to pay him the said sum of —l. when the said E. F. should be thereunto afterwards requested; but the said sum of —l. being wholly unpaid to the said plaintiff, and the said promise and undertaking of the said E. F. being wholly unperformed, the said plaintiff, for the recovery of his damages by him sustained on occasion of the not performing of the said promise and undertaking of the said E. F. afterwards, to wit, on, &c. sued and prosecuted, &c.”

FOR ES-
CAPES,
&c.

&c.—[here state that latitat or bill of Middlesex (g), and the indorsement for bail (h), the delivery to the sheriff,* and the arrest, precisely as ante, 446, observing the note. If the process were by the original, special capias, testatum, &c. or by capias in the Common Pleas, or quo minus, observe the forms, ante, 450 to 452, and after stating the arrest, proceed as follows :]—Yet the said defendant, so being sheriff of the said county of — as aforesaid, not regarding the duty of his office as such sheriff, but wrongfully, and unjustly contriving and intending to injure the said plaintiff, and to delay and hinder him in and from the recovery of his said debt, afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, without the leave or license and against the will of the said plaintiff, voluntarily (i) suffered and permitted the said E. F. to escape and go at large wheresoever he would, out of the custody of the said defendant, so being such sheriff as aforesaid, the said debts for which the said E. F. was so arrested as aforesaid, and every part thereof, then and still being wholly unpaid to the said plaintiff.* And the said plaintiff in fact saith, that the said E. F. did not appear (k) in the said court of our said lord the king, before the king himself, at the return of the said writ (or “precept,”) according to the exigency thereof, but therein wholly failed and made default, whereby the said plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same, and thereby also the said plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out, and expended, in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid, amounting together to a large sum of money, to wit, the sum of £— to wit, at, &c. (venue) aforesaid.

[*740]
Second
count for
not arrest-
ing the
debtor
when the
defendant
had an op-
portunity
(4).

*[Proceed as in the first count, to the end of the statement of the delivery of the writ to the sheriff, and then proceed as follows:]—And the said plaintiff in fact saith, that the said E. F. at the time of the delivery of the said last-mentioned writ (or “precept,”) to the said defendant, so being sheriff of the said county of — as aforesaid, and from thence until the return of the said last-mentioned writ (or “precept,”) was within the said sheriff’s bailiwick, and the said sheriff, at any time during that period, might have taken and arrested the said E. F. by virtue of the said last-mentioned writ (or “precept,”) at the suit of the said plaintiff if he would so have done, whereof the said defendant, so being she-

(g) Stating the words, “to the damages of the said plaintiff of 30l.” to have been in the writ, when they were not so, held no variance, Ry. & Moo. C. N. P. 291.

(h) It is sufficient to allege that the writ was “duly indorsed for bail,” without adding “by virtue of an affidavit made and filed of record,” 10 B. & C. 202, in error.—4 Bing. 510—1 M. & P. 279, S. C.

(i) Under this allegation, a negligent escape may be given in evidence, 2 T. R. 126.—5 Burr. 2814.—1 Saund. 35, n. 1 The party escaping may be called to prove a voluntary escape, Bul. N. P. 67; for though the whole debt may be recovered against the sheriff, yet in an action against

the original debtor for the debt, he can neither plead in bar, nor give in evidence in reduction of damages, the judgment obtained in the action against the sheriff, per Abbott, C. J. 4 B. & A. 210.

(k) As to this allegation, Vin. Abr. Escape, K. pl. 4.—Noy. 72.—Cro. Eliz. 269.—8 T. R. 130; it is not necessary, 2 B. & P. 561.

(l) See forms, 8 Wentw. 487, 501. It is advisable to add this count whenever there is any doubt of the proof of an actual arrest; see Loft’s Rep. 63.—8 Wentw. 487, note b.—It is no defense to this action that the debtor was arrested the day after the return of the writ, 2 Bing. 317.

riff as aforesaid, during all that time had notice (m); yet the said defendant so being sheriff of — as aforesaid, not regarding the duty of his said office, but contriving and intending, wrongfully and unjustly to injure the said plaintiff, and to delay and hinder him in and from the recovery of his debt last aforesaid, did not nor would, at any time before the return of the said last-mentioned writ (or "precept,") (although often requested so to do) take or cause to be taken, the said E. F. as by the said last-mentioned writ, (or "precept,") he was commanded, but therein wholly failed and made default, and the said E. F. did not appear (n) in the said court of our said lord the king, before the king himself, at the return of the said writ (or "precept,") according to the exigency thereof, but therein wholly failed and made default, whereby the said plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same, and thereby also, the said plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out, and expended, in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid, amounting together to a large sum of money, to wit, the sum of —l. to wit, at, &c. (venue) aforesaid.—[Add a count, post, 755, for not assigning a supposed bail bond, if it be apprehended that one was taken, see 5 Taunt. 325.]

FOR ESCAPE, &c.

[Same as the first count, ante, 737, to the end of the statement of the escape, as far as the asterisk, 739, and then proceed as follows;]—And the said defendant so being sheriff of — as aforesaid, afterwards, to wit, on, &c. (the return day) being the return of the said writ, to wit, at, &c. (venue) aforesaid, falsely and deceitfully returned upon the said writ to the court of our said lord the king, before the king himself, here, to wit, at Westminster aforesaid, that the said E. F. was not found in the bailiwick of the said defendant, so being such sheriff as aforesaid, to wit, at, &c. (venue) aforesaid, and the said E. F. did not appear (p) in the said court of our said lord the king, before the king himself, at the *return of the said writ, (or "precept,") according to the exigency thereof, but therein wholly failed and made default, whereby the said plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same, and thereby also the said plaintiff hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out, and expended, in and about his said suit so commenced and prosecuted against the said E. F. as aforesaid, amounting together to a large sum of money, to wit, the sum of £— to wit, at, &c. (venue) aforesaid.

The like and for false return on mesne process of non est inventus (o).

[*741]

When it is certain that the caption of the original defendant under a ca. sa. can be proved, it is most advisable to declare for the escape in debt,

Against the sheriff

(m) This averment is not requisite, and the omission would not be bad on special demurrer, 5 D. & R. 95. What is not sufficient evidence of notice to sheriff, 2 Campb. 189.—2 Esp. Rep. 475.—Roscoe, 413.

(n) See note (k) in the preceding page.

(o) See the form, post, 745.—2 Saund. 150, 5, and other forms, 1 Rich. C. F. 474.

—Morg. 368.—Pleader's Assist. 207. Lil. Ent. 40. The statement of the false return may be introduced, as well in the count for an escape, as in the count for not taking; but it seems unnecessary in either case, as the gist of the action is the escape, 2 Saund 155, n. 3.

(p) See supra, note (q).

FOR RE-
CAPTURE,
&c.

for an es-
cape on
final pro-
cess.

because the jury must then give the entire debt; 2 T. R. 129.—1 Saund. 38, note 2.—2 Chit. Rep. 454; but if it be doubtful whether a caption can be proved, it is advisable to declare in case, stating the escape in one count, as in form, ante, 416, and adding a count for not taking the original defendant when the sheriff had an opportunity, as ante, 740; see 1 Saund. 38, note 2.—Bac. Ab. Escape, E.

Against
the mar-
shal, for
the escape
of one tak-
en on
mesne
process
and remo-
ved to
King's
Bench by
*habeas cor-
pus* (g).

[*742]

[State the debt and delivery of the process to the sheriff as ante, 737.]
—By virtue of which said writ (or "precept,") the said defendant afterwards, and before the return of the said writ (or "precept,") to wit, on, &c. at, &c. (*venue*) aforesaid, was taken and arrested by the said sheriff, and kept and detained by the said sheriff in custody, according to the exigency of the said writ (or "precept,") and by virtue thereof for want of bail; and the said C. D. being and remaining in the custody of the said E. F. so being sheriff of the *county of — as aforesaid, for the cause aforesaid, afterwards, to wit, on, &c. was brought before [Sir G. H. knt.] then and now one of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, at his chambers in Serjeant's Inn, Chancery-lane, London, in his own person, in the custody of the said E. F. so being sheriff of the county of — as aforesaid, by virtue of a certain writ of our said lord the king of *habeas corpus*, issuing out of the court of our said lord the king, before the king himself, and directed to the sheriff of the said county of —; and the said C. D. was thereupon committed by the said [Sir G. H. knt.] so being such justice of our said lord the king as aforesaid, to the custody of the marshal of the Marshalea of our said lord the king, before the king himself, at the suit of the said plaintiff in the plea aforesaid, and for the cause aforesaid there to remain until, &c. By which said commitment the said defendant being then, and continually from thenceforth, hitherto marshal of the Marshalea of our said lord the king before the king himself, took the said C. D. into his custody, and had and detained him in his custody in the prison of our said lord the king, called the King's Bench prison, in the borough of Southwark, in the county of Surrey, for the cause aforesaid; and the said C. D. being so in the custody of the said defendant, for the cause aforesaid, and the said defendant not regarding the duty of his office of marshal of the Marshalea of our said lord the king, before the king himself, but contriving, and wrongfully intending to hurt and injure the said plaintiff, and to deprive him of his remedy for the recovery of the said sum of money so due and owing from the said C. D. to the said plaintiff as aforesaid, whilst the said defendant had the said C. D. in his custody for the cause aforesaid, and ought to have kept and detained him in such his custody as such marshal as aforesaid, to wit, on, &c. (*day of escape, or about it*) to wit, at, &c. (*venue*)

(g) See other forms, 5 East, 340, and ante, 737, and notes. See also the form in debt, ante, 419, and form against the marshal in vacation, ante, 30. See a form against the marshal for an escape of a debtor sued in an inferior court and removed to the King's Bench by *habeas corpus* 7 B. & C. 86. See a form against the marshal for an escape of a person against whom an attachment had issued for non-perform-

ance of an award, who was by *habeas corpus* committed to the custody of the warden and afterwards committed by *habeas corpus* to the custody of the marshal, 8 B. & C. 124.—2 M. & R. 88, S. C. In that case it was made a question whether the commitment by a judge at chambers was legal. As to the necessity of filing the bill when the prisoner is out of the Rules, see 2 T. R. 129.

aforesaid, without the license and consent, and against the will of the said plaintiff, and without any legal cause, warrant, or authority whatsoever voluntarily permitted and suffered the said C. D. to escape out of his custody, and out of the said prison, and to go at large; and the said C. D. did escape and go at large wherever he would, contrary to the duty of his said office of marshal of the Marshalsea aforesaid, the said sum of money so due and owing from the said C. D. being and remaining wholly unpaid to the said plaintiff, to wit, at, &c. (*venue*) aforesaid, by means of which said several premises, the said plaintiff hath been and is greatly injured and delayed in the means of recovering the said sum of money so due and owing to him from the said C. D. as aforesaid, and is likely wholly to lose the same, together with the costs, and charges, and expenses of commencing and prosecuting the said action against the said C. D. amounting to a large sum of money, to wit, the sum of —*l.* of lawful money of Great Britain, to wit, at, &c. (*venue*) aforesaid. To the damage of the said plaintiff of —*l.* and therefore he brings his suit, &c.

FOR RE-
CAPTURE,
&c.

For that whereas one G. S. heretofore, to wit, on, &c. [*day of issuing writ,*] at, &c. (*venue*) was indebted to the said plaintiff in a large sum of money, exceeding the sum of £20, to wit, the sum of —*l.* of lawful money of Great Britain, upon and in respect of certain causes of action before then accrued to the said plaintiff against the said G. S.: and the said G. S. being so indebted, the said plaintiff, for the recovery of the said debt, afterwards, to wit, on the day and year aforesaid, sued and prosecuted out of the court of our lord the now king, before Sir. R. D. knight, and his companions, then his majesty's justices of the Bench at Westminster, in the county of Middlesex, a certain writ of our said lord the king, called a *capias ad respondendum*, against the said G. S. directed to the sheriff of —, by which said writ our said lord the king commanded (*s*) the said sheriff, that he should take the said G. S. if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before the justices of our said lord the king at Westminster, on — to answer to the said plaintiff in a plea, wherefore, with force and arms, the close of the said plaintiff at Westminster he broke, and other wrongs to him did, to the great damage of the said plaintiff, and against the peace of our said lord the king; and also that the said G. S. might answer to the said plaintiff, according to the custom of his said Majesty's court of the bench, of a plea of [*trespass on the case, upon promises to the damage of the said plaintiff of £90,*] and that the said sheriff should have there that writ, which said writ afterwards, and before the delivery thereof to the said sheriff, to be executed as hereinafter next mentioned, to wit, on the day and year first aforesaid, to wit, at, &c. (*venue*) aforesaid, was duly marked and indorsed for bail for —*l.* and which

Against
marshal
for escape
where
original
action was
in Com-
mon Pleas
and defend-
ant there-
in was sur-
rendered
to the war-
den of the
Fleet in
discharge
of bail, and
thence by
*habeas cor-
pus* com-
mitted to
the custo-
dy of the
marshal.
(*r*).

(*r*) See the notes to the preceding forms, where the declaration against the marshal for an escape alleged that one S. I. was arrested and gave bail; that afterwards, bail above was put in before a judge at chambers, "as appears by the record of the recognizance," that S. I. surrendered in discharge of the bail, and afterwards escaped: held, that the plaintiff was bound to prove that bail above was put in as alleged, and

that the averment was not made out by the production of the filacer's book, the entry therein importing that the recognizance was taken before a single judge, an examined copy of the entry of the recognizance of bail, stating that the recognizance was taken before the court at Westminster, having also been given in evidence, 4 B. & C. 403.—6 D. & R. 483, S. C.

(*s*) Examine with the writ.

FOR RE-
CAPES,
&c.

said writ so indorsed, afterwards, and before the said return thereof, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, was delivered to W. V. esq. who then and from thence until, and at the arrest of the said G. S. and the return of the said writ, was sheriff of — aforesaid, in due form of law to be executed. By virtue of which said writ, the said sheriff, afterwards, and before the return of the said writ, to wit, on the day and year aforesaid, and within his bailiwick, as such sheriff, to wit, at, &c. [*some place in the sheriff's bailiwick,*] took and arrested the said G. S. by his body, and then and there had and detained him in his custody as such sheriff, at the suit of the said plaintiff, for the cause aforesaid. And hereupon he the said sheriff of — then and there took bail for the appearance of the said G. S. at the return of the said writ, according to the exigency of the said writ. And the said plaintiff further saith, that afterwards, and whilst the said plea in the said court of our lord the king of the Bench, to wit, at the return of the said writ in the same — Term, in the — year of the reign of our said lord the king before Sir J. R. knight, then and still being one of the justices (*t*) of the said court of our said lord the king, of the Common Pleas, at his chambers in — came J. K. and H. P. in their proper persons, and then and there, by the names of J. K. and H. P. acknowledged themselves, and each of them did acknowledge himself to owe to the said plaintiff the sum of — which said sum of — the said J. K. and H. P. for themselves and their heirs consented and granted, and each of them, for himself and his heirs, covenanted and granted (*u*) should be made of theirs, and each of their lands and chattels, and to the use and behoof of the said plaintiff, be levied upon the condition, that if judgment should happen in the said court of the Bench, in the said plea to be given for the said plaintiff against the said G. S. then the said G. S. should satisfy all such damages which should be adjudged to the said plaintiff against the said G. S. in the said court of the Bench, in the plea aforesaid, or should render his body on that occasion to the prison of the Fleet; as by the record of the said recognizance, now remaining in the said court of our said lord the king, of the Common Pleas aforesaid, more fully appears. And the said plaintiff further says, that afterwards, to wit, on, &c. in the said — year of the reign of our said lord the king, the said G. S. surrendered himself to the custody of the then warden of the prison of the Fleet, in discharge of his said bail in the said plea, at the suit of the said plaintiff, as by the said surrender now remaining in the said court of Common Pleas more fully appears. And the said G. S. being and remaining in the custody of the said warden as aforesaid, for the cause aforesaid, afterwards, to wit, on, &c. aforesaid, was brought before Sir G. S. H. knight, then and now being one of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king himself, at his chambers in —, in his own person, in the custody of the said warden, by virtue of a certain writ of our said lord the king, of *habeas corpus* issuing out of the court of our said lord the king, before the king himself, and directed to the said warden; and the said G. S. was

(*t*) This would be correct in C. P. but in K. B. the recognizance always appears from the entry to have been taken before the

court, see 4 B. & C. 403.—Ante. 472.
(*u*) Examine with the recognizance.

FOR ES-
CAPES,
&c.

thereupon committed by the said Sir G. S. H. knight, so being such justice of our said lord the king as aforesaid, to the custody of the marshal of the marshalsea of our said lord the king, before the king himself, at the suit of the said plaintiff, in the plea aforesaid, and for the cause aforesaid, there to remain until, &c. and by virtue of which commitment the said defendant, being then and continually from thenceforth hitherto marshal of the said marshalsea, took and received the said J. S. into his custody, and had and detained him in his custody in the prison of our said lord the king, called the King's Bench, at the suit of the said plaintiff, for the cause aforesaid; and the said J. S. being so in the custody of the said defendant, as such marshal as aforesaid, for the cause aforesaid, and the said defendant, not regarding the duty of his said office of marshal, but contriving and wrongfully intending to hurt and injure the said plaintiff, and to deprive him of his remedy for the recovery of the said money, so due and owing to him as aforesaid, whilst the said defendant had the said G. S. in his custody as such marshal as aforesaid, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, without the license or warrant, and against the will of the said plaintiff, and without any legal cause warrant, or authority whatever, voluntarily permitted and suffered the said G. S. to escape out of his custody, and out of the said prison, and to go at large; and the said G. S. did escape and then and there go at large wherever he would, contrary to the duty of the said defendant's said office of marshal; the said money so due and owing from the said G. S. so being and remaining wholly due and unpaid to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. By reason of which said premises the said plaintiff hath been and is greatly injured and delayed in the means of recovering the said sum of money so due and owing to him from the said G. S. as aforesaid, and the costs of the said action, and is likely wholly to lose the same, to wit, at, &c. (*venue*) aforesaid.—And also for that whereas the said G. S. heretofore, to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid was indebted to the said plaintiff in a large sum of money, to wit, the sum of — of like lawful money, upon and in respect of certain causes of action before then accrued to the said plaintiff, against the said G. S. and the said G. S. being so indebted to the said plaintiff, for the recovery of the said last-mentioned sum of money, afterwards, to wit, on the day and year first aforesaid, sued and prosecuted out of the court of our said lord the king, before Sir R. D. knight, and his companions, at Westminster, in the county of Middlesex, a certain other writ of our lord the king, called a *capias ad respondendum*, against the said G. S. directed to the sheriff of — to the like purport and effect as the said writ of *capias ad respondendum*, in the said first count mentioned. By virtue of which said last-mentioned writ, the then sheriff of — afterwards, and before the return thereof, to wit, on the day and year first aforesaid, and within the bailiwick of the sheriff, to wit, at, &c. [some place in the sheriff's bailiwick] did take and arrest the said G. S. by his body, and then and there had and detained him in custody at the suit of the said plaintiff. And the said plaintiff in fact says, that such proceedings were thereupon had in the said suit, that afterwards, to wit, in — term, in the — year of the reign of our lord the now king, the said G. S. was by virtue of a writ of *habeas corpus*, brought before the said Sir G. S. H. knight, then and now being one of the justices of our said lord the king, assigned

Second
count, set-
ting out
the writ
and pro-
ceedings,
more con-
cisely.

FOR RE-
CAPES,
&c.

to hold pleas in the court of our said lord the king, before the king himself, in his own person, and was thereupon committed by the said justice to the custody of the marshal of the Marshalsea of our lord the king, before the king himself, at the suit of the said plaintiff, for the cause aforesaid, there to remain until, &c. by virtue of which said last-mentioned commitment, the said now defendant, being then and there and continually from henceforth hitherto marshal of the Marshalsea of our said lord the king, before the king himself, had and received the said G. S. into his custody, and had and detained him in custody in the prison of our said lord the king, called the King's Bench, for the cause aforesaid. Yet the said defendant, so being marshal as aforesaid, and so having the said G. S. in his custody, at the suit of the said plaintiff, and not regarding the duty of his said office of marshal of the Marshalsea of our said lord the king, before the king himself as aforesaid, but contriving, and wrongfully intending to injure the said plaintiff, and wholly to deprive the said plaintiff of his remedy for the recovery of the said last-mentioned sum of money so due and owing to him as aforesaid, whilst the said now defendant had the said G. S. in his custody, as such marshal as aforesaid, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, without the license or warrant, and against the will of the said plaintiff, and without any legal warrant or other things, voluntarily permitted and suffered the said G. S. to escape out of his custody, and out of the said prison, and to go at large, and the said G. S. did then and there escape and go at large wherever he would, contrary to the duty of the said defendant, and of his said office of marshal of the Marshalsea as aforesaid, the sum of money so due and owing from the said G. S. being and remaining wholly unpaid to the said plaintiff, to wit, at, &c. (*venue*) aforesaid. By reason and by means of which said several premises, the said plaintiff hath been and is greatly injured and delayed in the means of recovering the said sum of money, so due and owing to him from the said G. S. as aforesaid, and the costs of the said action, and is likely wholly to lose the same, to wit, at, &c. (*venue*) aforesaid.

[*743]
A general
count
against
marshal,
for escape,
where de-
fendant in
custody,
on a sur-
render in
discharge
of bail.

*And whereas also the said M. W. before and at the time of the escape hereinafter mentioned, was in custody of the said defendant as marshal of the Marshalsea of our said lord the king, before the king himself, under a surrender of the said M. W. before then made, into the custody of the said defendant, as such marshal as aforesaid, whilst he was such marshal, in discharge of the said G. H. and I. J. who before then had become bail for the said M. W. in a certain action before then brought, and there pending in the court of our said lord the king, before the king himself, wherein the said P. was plaintiff, and the said M. W. defendant, for the recovery of certain damages, to wit, damages to the amount of £—, which the said plaintiff had before then sustained by reason of the non-performance by the said defendant of certain promises and undertakings by him made to the said plaintiff for securing the payment and satisfaction to the said plaintiff of the said damages and the costs and charges in the said action, which should be adjudged to the said plaintiff, and in discharge of the said G. H. and I. J. as such bail; and the said M. W. so being in the custody of the said defendant, as such marshal as aforesaid, under and by virtue of the said last-mentioned surrender, he the said de-

fendant, not regarding the duty of his said office of marshal of the Marshalsea aforesaid, but contriving and wrongfully intending, &c.—[*Here state the escape, and conclude as usual, as in the preceding form.*]

FOR RECAPTURE, &c.

[*After stating the plaintiff's debt, as ante, 737, proceed as follows:*]
—And the said plaintiff further saith, that the said sum of money being and remaining wholly unpaid and unsatisfied, and the said W. W. then being a prisoner for debt in the actual custody of the marshal of the Marshalsea of our said lord the king, before the king himself, the said plaintiff, for the recovery thereof, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, according to the course and practice of the said court of our said lord the king before the king himself, duly made an affidavit before [the Right Honorable Charles Lord Tenterden,] his said majesty's chief justice of the said court of our said lord the king, before the king himself (x), and by the said affidavit *swore, that the said W. W. then was unjustly and truly indebted unto the said plaintiff in the sum of £—, &c.—[*Here state the affidavit of debt.*]—And the said plaintiff afterwards, to wit, on, &c. to wit, at [Symond's-Inn, Chancery-Lane,] to wit, at, &c. (*venue*) aforesaid, according to the course and practice of the said court, caused the said affidavit to be duly filed with the clerk of the rules of the said court, according to the custom and practice of the same court, in such cases used and approved, as by the said affidavit affiled of record in the said court (reference being thereunto had) will more fully appear; and the said plaintiff further saith, that the said plaintiff thereupon afterwards, to wit, on the day and year last aforesaid, for the recovery of the said money so due to him as aforesaid, impleaded the said W. W. in the said court, upon and by virtue of the said affidavit in a certain plea of [trespass on the case upon promises,] for the said causes of action; that is to say, by then and there bringing into the office of the clerk of the declarations of the said court, according to the course and practice of the same court, his certain bill against the said W. W. so then being in the actual custody of the marshal of the Marshalsea as aforesaid, and filed the said bill as of — Term, in the — year of the reign of our said lord the king, and by his said bill the said plaintiff then and there complained against the said W. W. then and there being in the custody of the said defendant as marshal of the Marshalsea of our lord the now king, before the king himself, for and in respect of the said causes of action which the said plaintiff so had as aforesaid against the said W. W. and those contained in the said affidavit (y).—And the said plaintiff further saith, that after the making and filing of the said affidavit, and exhibiting and filing the said bill as aforesaid, to wit, on, &c. to wit, at Southwark, that is to say, at, &c. (*venue*) aforesaid, he the said plaintiff duly charged the said W. W. in the custody of the said defendant, then being marshal of the Marshalsea of our said lord the king, before the king himself, with a declaration in the said plea of [trespass on the case upon promises,] by then and

Against the marshal for an escape, where the prisoner was in custody under a detainer by a fresh plaintiff (w).

[*744]

(w) See other forms, 8. Wentw. 484. Morg. 373.

(x) Or if sworn before a commissioner, say, "before one J. E. gentleman, being then and there a commissioner, and duly authorized and empowered to take and receive affi-

davits touching and concerning matters and proceedings of and in the said court of our said lord the king before the king himself."

(y) It has been the practice to set out the whole declaration verbatim, but this is unnecessary and reprehensible.

FOR RE-
CAPES,
&c.

[*745]

there delivering the said declaration to the said W. W. [*or according to the fact,*] at the lodge of the prison of the Marshalsea, commonly called the King's Bench prison, being the prison of the said court, to C. M. *then and there being one of the turnkeys of the said prison, and the proper officer in that behalf,] and on which said declaration at the said time of the said delivery of the same as aforesaid, was duly and according to the course and practice of the said court, used in such cases, indorsed with a certain indorsement, to wit, with the said sum of £—, as the sum so sworn by the said plaintiff to be due to the said plaintiff as aforesaid, and for which the said suit was brought, whereby the said defendant then and still being marshal of the Marshalsea of our said lord the king, then and there had and detained the said W. W. in his custody in the said prison, at the suit of the said plaintiff in the plea aforesaid, charged as aforesaid, and kept and detained him in his the said defendant's said custody as aforesaid, from thence until the said defendant, so being marshal of the Marshalsea of our said lord the king as aforesaid, not regarding the duty of his said office of marshal of the Marshalsea, but contriving, and wrongfully and injuriously intending to deceive and defraud the said plaintiff, and to hinder and deprive him of the means of recovering his said debt, afterwards, to wit, on, &c. [*day of escape or about it,*] at, &c. (*venue*) aforesaid, without the license, and against the will of the said plaintiff, permitted and suffered the said W. W. to escape and go at large out of the custody of him the said defendant, so being marshal of the Marshalsea as aforesaid, and out of the said prison, wheresoever the said W. W. would; and the said plaintiff being then and yet wholly unsatisfied the money so due and owing to him the said plaintiff as aforesaid, by means of which said premises the said plaintiff is unjustly injured and damnified, and is greatly retarded and hindered in and from the recovering of his aforesaid debt, and is likely to lose the same, together with the costs, charges, and expenses of commencing and prosecuting the said action against the said W. W. amounting to a large sum of money, to wit, the sum of —l. of lawful money of Great Britain, to wit, at, &c. (*venue*) aforesaid.

Against
the war-
den of the
Fleet, for
the escape
of a pris-
oner who
had sur-
rendered
in dis-
charge of
his bail
(x).

[*State the debt, the issuing of the process, and indorsement for bail, as ante, 451, and then proceed as follows:*] And the said precept being so indorsed, afterwards, and before the said return thereof, to wit, on, &c. was delivered to the said G. and H. who then and from thenceforth, until and at and after the return of the said precept, were the sheriff of Middlesex, to be executed in due form of law; by virtue of which said precept they the said G. and H. then being sheriff of Middlesex as aforesaid, afterwards, and before the return of the said writ, to wit, on the day and year last aforesaid, and within the bailiwick of the said sheriff, to wit, at, &c. [*some place in their bailiwick*] did take and arrest the said E. F. by his body, and then and there had and detained him in his custody at the suit of the said plaintiff, and thereupon the said G. and H. so being sheriff of

(z) See other forms, ante, 421, 423.—8 Wentw. Ind.—Morg. 367. A bill may be filed against the warden in vacation, 59 Geo. 3. c. 64. *Vide* 2 Marsh. 49, in such case the form will be similar to that against

the marshal, ante, 30. What a variance in stating a recognizance taken before a judge at chambers, in K. B. see 4 B. & C. 403.—Ante, 472, n.

FOR RE-
CAPES,
&c.

Middlesex as aforesaid, upon that arrest took bail for the appearance of the said E. F. at the return of the said writ, according to the exigency of the said writ. And whereas afterwards and whilst the said plea was pending in the said court of the Bench, to wit, at the return of the said writ, in the same — Term, in the — year of the reign of our said lord the king, before Sir W. B. knt. then and still being one of the justices (a) of the said court of our said lord the king, of the Bench, at his chambers, situate in Sergeant's Inn, Chancery-lane, came J. and R. in their own proper persons, and then and there, by the names, of &c. acknowledged themselves, and each of them did acknowledge himself, &c. [*here set out the recognizance, see the form, ante, 742 b.*] as by the record of the said recognizance now remaining in the said court of our said lord the king of the Bench aforesaid, more fully appears; and the said plaintiff further says, that afterwards, to wit, on, &c. in the said — year of the reign of our said lord the king, the said E. F. surrendered himself to the custody of the said warden of the prison of the Fleet, in discharge of his said bail in the said plea, at the suit of the said plaintiff, as by the record (b) of the said surrender now remaining in the said court of the Bench aforesaid, more fully appears; by means whereof the said defendant, who then and there was, and ever since hath been, and still is, warden of the Fleet of our said lord the king, had the said E. F. in his custody at the suit of the said plaintiff, for the cause aforesaid, and kept him in such his custody for the cause aforesaid, at the suit of the *said plaintiff, from thence until the said defendant, not regarding the duty of his said office of warden of the prison of the Fleet, but contriving, and wrongfully intending to hurt, injure, and prejudice, the said plaintiff in this respect, and wholly to deprive and hinder the said plaintiff from his damages against the said E. F. after the surrender of the said E. F. to the custody of the said defendant, so being warden of the said prison of the Fleet as aforesaid, to wit, on, &c. the said E. F. so being a prisoner as aforesaid, and the said defendant, so being such warden as aforesaid, and so having the said E. F. in his custody for the cause aforesaid, at, &c. (*venue*) aforesaid, voluntarily and freely permitted and suffered the said E. F. to go and escape out of the said custody of the said defendant, so being warden of the said prison of the Fleet, at large and abroad, wheresoever he would and pleased, and without restraint, and without the license or consent, and against the will of the said plaintiff, the said plaintiff not then being, or at any time before or since, in the least satisfied of the damages aforesaid, or any part thereof; and the said defendant so then being warden of the said prison of the Fleet as aforesaid; by reason of which said several premises, the said plaintiff is greatly injured, prejudiced, delayed, and hindered of the due and just means of the recovery and obtaining his said damages, and is very likely wholly to lose the same, together with the costs, charges, and expenses of commencing and prosecuting the said action against the said E. F. amounting to a large sum of money, to wit, the sum of £— of lawful, &c. to wit, at, &c. (*venue*) aforesaid.— And whereas the said E. F. on, &c. aforesaid, at, &c. (*venue*) was indebted to the said plaintiff in another sum of £— of like lawful money, by virtue of several promises and undertakings before that time made by the said E. F.

[*746]

Second
count, less
circum-
stantial
than the
former.

(a) See 4 B. & C. 403.—Ante, 472.

(b) *Quare* if there be any such record.

FOR ES-
CAPES,
&c.

[*747]

to the said plaintiff. And the said last-mentioned sum of money being wholly unpaid, and the said last-mentioned promises being wholly unperformed, &c. [*here state the suing of the writ, the indorsement, and arrest and the sheriff's taking bail, as in the first count ;*] and the said plaintiff further says, that the said plaintiff, for the recovery of the damages by him sustained on occasion of the not performing of the said several promises and undertakings last aforesaid, afterwards, to wit, in the said — Term, in the said — year of the reign of our said lord the now king, in the said court of our said lord the king of the Bench, impleaded the said E. F. in a plea *of [trespass on the case upon promises] to the said plaintiff, his damage of £— for the non-performance of the said last-mentioned promises and undertakings, and by his said declaration duly filed and exhibited in the said court, complained against the said E. F. [*alleging and stating the said debt and causes of action.*]—And whereas and whilst the said plea was pending, &c. *here set out the recognizance of bail as above.*] and such further proceedings were thereupon had in the said court, that afterwards, to wit, in the same Term of — in the said — year of the reign of our said lord the king, before Sir W. D. G. knt. and his brethren, then justices of our said lord the king, of the Bench aforesaid, by the consideration of the same court, the said plaintiff did recover against the said E. F. £— for his damages by him sustained, as well by occasion of the not performing the promises and undertakings last-mentioned, as for his costs and charges ; whereof the said E. F. is convicted, as by the record and proceedings thereof, now remaining in the same court of the Bench at Westminster aforesaid, more fully appears. And afterwards, to wit, on, &c. aforesaid, the said E. F. surrendered himself to the custody of the said warden of the Fleet, in discharge of his bail in the said last-mentioned plea, at the suit of the said plaintiff ; as by the record (c) of the said surrender, now remaining in the said court of our said lord the king, of the Bench aforesaid, more fully appears ; yet the said defendant, so being warden as aforesaid, and so having the said E. F. in his custody, at the suit of the said plaintiff, not regarding the duty of his said office of warden of the said prison of the Fleet as aforesaid, but contriving, &c. &c. [*as in the first count*] and wholly to deprive the said plaintiff of his said last-mentioned damages against the said E. F. afterwards, and before the said judgment was in anywise satisfied, and before the said plaintiff had charged the said E. F. in execution of his damages aforesaid, to wit, on, &c. aforesaid, the said E. F. so being a prisoner as last aforesaid, and the said defendant so being such warden as aforesaid, and having the said E. F. in his custody as last aforesaid, for the cause last aforesaid, at, &c. (*venue*) aforesaid, voluntarily, &c. [*as in the first count.*]

FOR
FALSE RE-
TURN.

[*748]

For a false
return of

*[*Commencement as ante, 596.*]—For that whereas the said plaintiff heretofore, to wit, in — Term, in the — year of the reign of our

lord the now king, in the court of our said lord the king, before the king himself, [or if the judgment were in C. P. say, "in the court of our said lord the king, of the Bench at Westminster, before the Honorable Sir Nicholas Conyngham Tindal, knt. and his companions then his said majesty's justices of the Bench, at Westminster, in the county of Middlesex,"] by the consideration and judgment (e) of the same court, recovered against one E. F. a certain debt, [or if the judgment were in *assumpsit*, state it as ante, 420] of £—, and also — costs, which in and by the same court were adjudged to the same plaintiff, and with his assent for his damages, which he had sustained as well by occasion of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said E. F. was convicted, as by the record and proceedings thereof still remaining in the same court of our said lord the king, before the king himself, [or if in C. P. say "of the Bench aforesaid, (f),"] at Westminster aforesaid, will more fully appear. And the said plaintiff further saith, that the said judgment being in full force, and the said debt and damages [or if in *assumpsit*, "damages,"] remaining unpaid and unsatisfied, the said plaintiff, on, &c. (g) in the — year of the reign of our said lord the king, for the obtaining of satisfaction thereof sued and prosecuted out of the said court of our said lord the king, before the king himself, [or if in C. P. "of the Bench aforesaid,"] at Westminster aforesaid, a certain writ of our said lord the king, called a *fieri facias*, directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff (h) that of the goods and chattels of the said E. F. in his the said sheriff's bailiwick, he should cause to be levied the debt and damages [or if in *assumpsit*, "damages,"] aforesaid, and that he should have that money before our said lord the king [or if in C. P. "justices of the Bench,"] at Westminster aforesaid, on —,

FOR
FALSE RE-
TURN.
—
nulla bona
to a writ of
fieri facias
(d).

(d) See Bac. Ab. Sheriff.—Com. Dig. Return, F. 2. The precedents, 8 Went. 455, 485; and Id. Index, xxxiii. See the form, ante, 740, for false return of *non est inventus*. The venue in this action is transitory, 1 Wils. 336. As to when the sheriff is liable to an action for a false return, see Tidd, 9th edit. 309, 1005. The sheriff cannot go into circumstantial evidence to impeach the judgment, on the ground of collateral fraud, 2 Stark. 218. As to whether the plaintiff may do so where he disputes the judgment of another creditor under an execution, whereof the sheriff had the goods when plaintiff's writ was delivered, see 5 B. & C. 660. Where the sheriff returned *nulla bona* after satisfying the landlord's claim for rent, and the king's taxes, and the plaintiff assented to his quitting possession of the premises, and sued out a *ca. sa.* it was held, that he could not afterwards maintain an action for a false return to the *fi. fa.* however unfounded the claim for rent might turn out to be, R. & M. C. N. P. 300. The plaintiff waives his right of action for false return, by accepting money under the return, 1 C. & P. 154. In an action, for a false return of *non est inventus*, where it was proved the sheriff's officer had frequently an op-

portunity of arresting the defendant, who afterwards absconded, it was holden, the jury did right in assessing damages to the amount of the whole debt, 2 Ld. Raym. 1411.—1 Stra. 650, S. C.—Tidd, 9th edit. 886. An action does not lie against a sheriff who has not been ruled to return the writ, for neglecting to have the money in court according to the exigency of a *fi. fa.* 1 Stark. 388. When money had and received does not lie against the sheriff, see 16 East, 254—1 B. & B. 380. When sheriff may dispute his return made in plaintiff's favor, see 6 M. & S. 42.

(e) The judgment must be accurately described. As to what a variance, see the notes, ante, 417, n. (k). The case in 5 B. & C. 339.—3 D. & R. 98, S. C. there noticed, was an action for a false return. See also 11 East, 516.—9 East, 298.—2 Campb. 525.—4 Taunt. 13.

(f) There is no occasion to refer to the record of the judgment by a *prout patet per recordum*, 3 B. & C. 2.—4 D. & R. 624. S. C.

(g) The tests of the writ.

(h) Examine the statement with the writ of *fi. fa.* For the different descriptions of writs, see Tidd's Prac. Forms, Index, tit. *Fieri Facias*.

FOR
FALSE RE-
TURNS.

[*749]
The levy.

False re-
turn.

to render to the said plaintiff for his debt and damages [*or if in assumpsit*, "damages,"] aforesaid; and that the said sheriff should have there then that writ. Which said writ afterwards, and before the delivery thereof to the said sheriff, as hereinafter mentioned, to wit, on the said, &c. at, &c. (*venue*) aforesaid, was duly indorsed, with the direction for the said sheriff to levy £—, besides sheriff's poundage, officers' fees, and all other incidental expenses (i); and which said writ so indorsed, afterwards, and before the said return thereof, to wit, on the day and year last aforesaid, at, &c. (*venue*), was delivered to the said defendant, who then and from thence, until, and at and after the return of the said writ (k), was sheriff of the said county of —; to be executed (l) in due *form of law.* By virtue of which said writ, the said defendant so being sheriff of the said county of — as aforesaid, afterwards, and before the said return of the said writ, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, and within his bailiwick, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said E. F. (m) of great value, to wit, of the value of the monies so indorsed on the said writ, and directed to be levied as aforesaid, and then and there levied the same thereout. Yet the said defendant so being such sheriff of the said county of — as aforesaid, not regarding his duty as such sheriff, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in that behalf, and to deprive him of the said monies so indorsed on the said writ, and directed to be levied as aforesaid, and of the means of obtaining the same, had not the said monies so levied as aforesaid, or any part thereof, before our said lord the King, [*or if in C. P.* "before the justices of the Bench,"] at Westminster aforesaid, at the return of the said writ, according to the exigency thereof, and of the said indorsement so made thereon as aforesaid, but therein wholly failed and made default, nor hath he paid the said sum of £—, or any part thereof to the said plaintiff; and at the return of the said writ, to wit, on, &c. (*the return day*) aforesaid, the said defendant falsely and deceitfully returned to the said court of our said lord the king, upon the said writ, that (n) the said E. F. had not any goods or chattels in his bailiwick, whereof he could cause to be levied the debt and damages [*or if in assumpsit*, "damages,"] aforesaid, or any part thereof, as by the said writ and the return thereof remaining of the record in the said court of our said lord the king, before the king himself here, to wit, at Westminster aforesaid, more fully appears (o). By means of which said premises the said plaintiff hath been and is greatly injured and deprived of the means of obtaining the said monies so indorsed on the said writ, and directed to be levied as aforesaid, and which are still wholly unpaid as aforesaid, and is likely to lose the same, to wit, at, &c. (*venue*) aforesaid.

(i) What a variance, 2 Bing. 255.—9 Moore, 425, S. C.—5 Esp. Rep. 133.—Ry. & Moo. C. N. P. 291. Examine with the indorsement on the writ.

(k) This would be no variance, though defendant's shrievalty expired before the return of the writ, 3 D. & R. 483.

(l) See the effect and proof of this aver-

ment, 2 Bing. 479.—10 Moore, 210, S. C.

(m) If the *fi. fa* were against two, and it be alleged that the goods of both were taken, it will suffice to prove that the goods of one were taken, 4 M. & S. 349.

(n) Examine with the return.

(o) As to this reference, see Fortesc. 379.

*[*The same as the first count, ante, 748, to the asterisk, observing the notes, and then proceed as follows:*]—And although there were then, and afterwards, and before the return of the said last-mentioned writ, divers goods and chattels of the said E. F. within the bailiwick of the said defendant, as such sheriff as aforesaid, whereof the said defendant could and might, and ought to have levied the monies so indorsed on the said last-mentioned writ, and directed to be levied as last aforesaid, to wit, at, &c. (*venue*) aforesaid, whereof the said defendant so being sheriff as aforesaid, during all the time aforesaid, there had notice. Yet the said defendant so being sheriff of the said county of — as aforesaid, not regarding the duty of his office as such sheriff, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in this behalf, and to deprive him of the monies so indorsed on the said last-mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, did not nor would, at any time before the return of the said last-mentioned writ, levy the money last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein failed and made default, and at the return of the said last-mentioned writ, to wit, on, &c. aforesaid, falsely and deceitfully returned to the said court of our said lord the king, that the said E. F. had not any goods or chattels in his bailiwick, whereof he could cause to be levied the debt and damages [*or if in assumpsit, "damages,"*] last aforesaid, or any part thereof, as by the said last-mentioned writ, and the return thereof remaining, &c.—*Proceed as in the first count to the end. If the sheriff seized and improperly sold the goods, a count should be added, as in 9 East, 298.*]

FOR
FALSE RE-
TURNS.
Second
count, for
not levy-
ing, and
false re-
turn of
nulla bona
(p).

[*Commencement as ante, 596.*]—For that whereas the said plaintiff, heretofore, to wit, on, &c. in a certain close *and premises situate in the county of —, took and distrained divers goods and chattels, [*or large quantities of potatoes, (according to the fact) then planted and growing*] in the said close and premises, of great value, to wit, of the value of £— of lawful money of Great Britain, as a distress for certain arrears of rent to wit, for the sum of — of like lawful money, then due and owing from one E. F. to the said plaintiff for the rent of the said premises, with the appurtenances, by virtue of a certain demise thereof theretofore made, rendering rent for the same.—And the said plaintiff then and

NOT TAK-
ING A RE-
PLEVIN
BOND.
For not
taking a
replevin
bond, ac-
cording to
the 11
Geo. 2. c.
19. s. 23
(q).
[*751]

(p) See the use of this count, ante, 740, note.

(q) See the forms, Mod. Ent. 215.—2 Hen. Bla. 35, 547.—Lil. Ent. 37. As to what replevin bond ought to be taken, see Harr. Landlord & Ten. 736. An action is sustainable against the sheriff, either for not taking a replevin bond, (Cro. Car. 445.—Sir W. Jones, 378.—1 Saund. 195 b.—2 T. R. 617;) or for taking insufficient pledges, 1 Saund. 195 b.—2 Hen. Bla. 36, 547.—4 T. R. 433.—2 Sel. Prac. 2 edit. 175, 6, 7. The action must be brought in the name of the avowant, or in case there be no avow-

ant, of the person making consuance in the replevin suit, 1 B. & P. 378. The forms, ante, 456 to 463, and the notes thereto, will assist in framing declarations of this nature. What not a variance, see 3 M. & S. 169. The courts will not grant an attachment against the sheriff for neglecting to take a replevin bond, as the party injured might have his action, 2 T. R. 617. If the sheriff has lost the bond, he may, it seems, be sued for the negligence, and if there be reason to apprehend a bond was taken, it may be prudent to insert a count to meet such negligence, 5 B. & C. 284.

NOT TAK-
ING A RE-
PLEVIN
BOND.

The plaintiff
levied.

[*752]

Judgment
against
plaintiff in
replevin.

Reference
to pro-
ceedings.
Defend-
ant's neg-
lect to
take reple-
vin bond.

there detained the said goods and chattels, [or potatoes,] so taken and distrained for the cause aforesaid, according to the laws and customs of this realm, until the said defendant, then being sheriff of the said county of —; afterwards, to wit, on the day and year aforesaid, and within his bailiwick, as such sheriff, (that is to say) at, &c. (*venue*) on the complaint of the said E. F. made to the said defendant, so then being such sheriff as aforesaid, against the said plaintiff in that behalf, and under color of his office of such sheriff as aforesaid, caused the said goods and chattels [or potatoes] to be replevin and delivered to the said E. F. and then and there made deliverance of the said distress to the said E. F.—And the said plaintiff in fact further saith, that at the then next county court (*r*) of the said sheriff, to wit, at the county court of the said sheriff, holden at, &c. in and for the said county of — on, &c. before the then suitors of the said court, to wit, — and — (*s*), the said E. F. did appear, and then and there in the same court, without the writ of our said lord the king, levied his plaint against the said plaintiff for the taking and unjustly detaining of the said goods and chattels, [or potatoes] and afterwards, to *wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff did duly appear in and before the said court, to answer the said E. F. in the plea of his said plaint; and such proceedings were thereupon had in the said plea (*t*), that afterwards, to wit, at the next county court of the said defendant, as such sheriff as aforesaid, holden at, &c. aforesaid, in and for the said county of — on, &c. aforesaid, before the said then suitors of the said court, the said E. F. did not duly prosecute his suit, and it was then and there duly considered, in and by the said last-mentioned court (*u*), that the said E. F. should take nothing by his said plaint, but that he and his said pledges to prosecute should be in mercy, &c. and that the said plaintiff should have a return of the said goods and chattels [or potatoes]; as by the remembrance and proceedings thereof still remaining in the said court, more fully and at large appears.—And although it was the duty of the said defendant, as such sheriff as aforesaid, before his making deliverance of the said distress to the said E. F. as aforesaid, in pursuance of the Statute in such case made and provided, to take from the said E. F. and two (*w*) responsible persons as sureties, a bond in double the value of the said goods and chattels [or potatoes] so distrained as aforesaid, conditioned for the prosecuting the suit of replevin of the said E. F. for the taking of the said goods and chattels [or potatoes] with effect, and without delay, and for duly returning the goods and chattels [or potatoes] so distrained, in case a return should be awarded; nevertheless the said defendant, so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending to injure the said plaintiff, and to deprive him of the benefit of his

(*r*) If the plaint in replevin were removed into K. B. or C. P. by *re. fa. lo.* and there was a declaration and avowry and judgment in the court above, observe the form, ante, 459 to 463. It is not necessary, where pledges have been taken, to state any proceedings against them.

(*s*) A misdescription of the suitors under a videlicet is not a fatal variance, 3 D. & R. 226.—2 B. & C. 2 S. C.

(*t*) As to this *taliter processum*, see 1 Saund. 92, note 2.—Carth. 53.

(*u*) If the proceedings were removed into K. B. or C. P. see the form, ante, 456, &c.

(*w*) A bond with one surety seems sufficient to enable the sheriff to sue thereon, 2 Marsh. 352.—7 Taunt. 28, 327.—1 Moore, 68, S. C.

said distress, and of the means of obtaining satisfaction for the said arrears of rent so due and owing as aforesaid, did not nor would, before his making deliverance of the said distress to the said E. F. as aforesaid, take from the said E. F. and two responsible persons as sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously wholly omitted and neglected so to do, *to *wit, at, &c. (*venue*) aforesaid. And the said plaintiff in fact saith, that he hath not as yet obtained a return of the said goods and chattels [*or* potatoes] so distrained as aforesaid, or any or either of them, or any part thereof, and the said arrears of rent have not, nor hath any part thereof as yet been paid to the said plaintiff, nor hath the said E. F. hitherto answered to the said plaintiff for the value of the said goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof, and by reason of the premises the said plaintiff hath been and is wholly deprived of the said goods and chattels [*or* potatoes] so distrained as aforesaid, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and his costs and charges by him expended in and about the endeavoring to obtain satisfaction thereof, and a return of the said goods and chattels [*or* potatoes,] to wit, at, &c. (*venue*) aforesaid. And whereas also heretofore to wit, on the day and year first aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff took and distrained certain other goods and chattels of great value, to wit, of the value of £— for a certain sum of money, to wit, the sum of £— then due and owing to the said plaintiff for rent, and the said last-mentioned goods and chattels being so distrained as aforesaid, the said defendant then being sheriff of —, afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, at the prayer of the said E. F. replevied and made deliverance of the said last-mentioned goods and chattels to the said E. F. And afterwards, to wit, at the county court of the said defendant, as such sheriff as aforesaid, duly holden at, &c. aforesaid, on, &c. aforesaid, before certain then suitors of the same court, the said E. F. did not duly appear at the same court, and then and there prosecute with effect his suit by him before then commenced in the same county court against the said plaintiff for the taking of the said goods and chattels as last aforesaid; and it was thereupon then and there duly considered in and by the same court, that the said plaintiff should have a return of the said last-mentioned goods and chattels; as by the remembrance and proceedings thereof still remaining in the said court more fully appears. And the said plaintiff further saith, that the said defendant so being sheriff of the county of — at the time of the causing the said last-mentioned goods and chattels to be replevied and delivered to the said E. F. as aforesaid, not regarding his duty as such sheriff, nor the Statute in that *case made and provided, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in that behalf, and to deprive him of the benefit of the said last-mentioned distress, did not nor would, before the replevying and delivery of the said last-mentioned goods and chattels so distrained as last aforesaid, to the said E. F. take, in the name of the said defendant, so being sheriff as aforesaid, of the said E. F. and two responsible persons, a bond in double the value of the said last-mentioned goods and chattels so distrained as last aforesaid, such value being ascertained by the oath of one or more credible witness or witnesses not interested in the said last-mentioned goods

NOT TAK-
ING A RE-
PLEVIN
BOND.

[*753]

Second
count.

[*754]

NOT TAK-
ING A RE-
PLEVIN
BOND.

and chattels, or distress, and conditioned for the prosecuting the suit of replevin of the said E. F. with effect and without delay, and for duly returning the said last-mentioned goods and chattels, in case a return thereof should be awarded before the deliverance of the said last-mentioned distress was so caused to be made to the said E. F. as last aforesaid, as the said defendant, according to the form of the Statute ought to have done; but the said defendant, so being sheriff of the county of — aforesaid, then and there wholly neglected so to do, nor hath the said last-mentioned arrears of rent, or any part thereof, been paid or satisfied to the said plaintiff, nor hath the said E. F. hitherto answered to the said plaintiff for the value of the last-mentioned goods and chattels so distrained as last aforesaid, or any or either of them, or any part thereof. By means, &c.—[*Conclude as in the first count.*]

FOR TAK-
ING INSUF-
FICIENT
PLEDGES.
For tak-
ing insuf-
ficient
pledges
in replev-
in (z).

[*Proceed as in the form, ante, 750, to the asterisk, 752, and then as follows :*—And on the contrary thereof, the said defendant wrongfully and unjustly, before the replevying and delivery of the said [cattle,] goods, and chattels as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, did take, in the name of the said defendant, as such sheriff as aforesaid, of the said E. F. and other persons, to wit, G. H. and I. K. (y) a certain bond, conditioned (z) for the prosecuting the said suit of the said E. F. with effect, and for duly returning the said [cattle,] goods, and chattels, so distrained as aforesaid, in case a return thereof should be adjudged, as a bond taken in pursuance of the said Statute; nevertheless the said plaintiff in fact saith, that the said G. H. and I. K. so taken as sureties as aforesaid, at the time of their becoming pledges and sureties in that behalf as aforesaid, were not good, able, sufficient, or responsible sureties for prosecuting the said suit with effect, or for duly returning the said [cattle,] goods, and chattels so distrained as aforesaid, in case a return thereof should be adjudged; but the said G. H. and I. K. at the time of their becoming such sureties as aforesaid, were, and each of them was, and ever since hath been, and still are, wholly insufficient for that purpose, nor have the said [cattle,] goods, and chattels, or any or either of them, or any part thereof, as yet been returned, to the said plaintiff, nor have the said arrears of rent, or any part thereof, been as yet paid or satisfied to the said plaintiff, nor hath the said judgment been yet in any way satisfied, nor hath the said E. F. hitherto answered to the said plaintiff for the

(z) See other forms, 1 Mall. 215.—Mod. Ent. 215.—Lil. Ent. 37.—4 T. R. 433.—Gilb. Rep. 24.—3 Bing. 50; see the note, ante, 750, n. b, and 2 Hen. Bla. 36, 547. If the sureties were apparently responsible at the time they were taken, the sheriff is not liable, 5 Taunt. 225.—1 Marsh. 27.—8 Moore, 27. What is evidence of insufficiency, see 3 Stark. 168. As to this action, Cro. Car. 11, 46.—Sir W. Jones, 378.—2 T. R. 617.—1 Saund. 195.—2 Sel. Prac. 175, 6. 7. Some forms state the issuing of a writ *retorno habendo*, but this is unneces-

sary. As to the damages, see 1 Chit. Col. Stat. 675, note. 3 Bing. 56.—5 B. & C. 290.—4 T. R. 433. 2 Hen. Bla. 547. The sureties in the bond may be witnesses to prove whether they were sufficient or not, 1 Saund. 195. 5 Taunt. 225.

(y) It is not necessary to prove the execution by the sureties, Ry. & Moo. C. N. P. 264; and see 3 Stark. C. N. P. 168.—Roscoe on Evid. 418.

(z) Examine with the bond and condition, and let this correspond.

value of the said [cattle,] goods, and chattels so distrained as aforesaid, or any or either of them, or any part thereof. By means of which said premises the said plaintiff hath been and is wholly deprived of the said [cattle,] goods, and chattels, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and the said costs and charges by him in and about his suit in that behalf expended, and in and about the endeavoring to obtain a return of the said [cattle,] goods, and chattels, to wit, at, &c. (*venue*) aforesaid.—[*A count may be added for not taking sureties generally.*]

FOR TAK-
ING INSUF-
FICIENT
PLEDGE.

*[*As in the count for an escape, ante, 737, to the end of the statement of the arrest, and then proceed as follows:*—And the said plaintiff in fact further saith, that the said E. F. being so arrested and in the custody of the said defendant, so being such sheriff as aforesaid, under and by virtue of the said writ, for the cause aforesaid, the said defendant, as such sheriff, afterwards, and before the return of the said writ, [*or* “precept,”] to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, took bail for the appearance of the said E. F. in the said court of our said lord the king, before the king himself, at the return of the said writ [*or* “precept,”] according to the form of the statute in such case made and provided, and on that occasion the said defendant, so being such sheriff as aforesaid, then and there, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, took of the said E. F. and two other persons, as his sureties or bail, according to the form of the said Statute, a certain writing obligatory, commonly called a bail bond, in the penal sum of £—lawful money of Great Britain, conditioned for the appearance of the said E. F. at the time and place aforesaid, to answer to the said plaintiff in the plea and bill aforesaid; and the said plaintiff in fact further saith, &c. [*state the non-appearance of the party arrested, and the consequent forfeiture of the bail-bond (b), as ante, 449, and then proceed as follows:*—And although the said plaintiff, [by G. H. his lawful attorney in that behalf,] did (c) afterwards, and whilst the said defendant was such sheriff as aforesaid, to wit, on, &c. (*day of request to assign, or about it*) at, &c. (*venue*) aforesaid, request the said defendant to assign the said writing obligatory to the said plaintiff, *in the said action, according to the form of the Statute in such case made and provided; and although the said plaintiff was then and there ready and willing, and then and there offered to pay to the said defendant the costs payable to the said defendant in that behalf, according to the form of the said last-mentioned Statute: yet the said defendant, so being such sheriff as aforesaid, not regarding the duty of his said office as such sheriff, nor the Statute in such case made and

[*755]
Against
the sheriff
for not as-
signing a
bail bond,
on 4 An-
ne, c. 16.
s. 20 (a).

[*757]

(a) Though an action cannot be supported against the sheriff for not taking a bail bond, or for taking insufficient sureties by the plaintiff in the suit, (see Tidd's Prac. 9th edit. 223, and 2 Saund. 61. (f), yet if a bond be taken, the sheriff is, by the 4 Anne, c. 16. s. 20, bound, on the request of the plaintiff or his attorney, to assign such bond as therein mentioned, and if he refuse to do so, he is liable to an action on the case, 7 T. R. 122.—2 Saund. 61 a; and if there be any doubt whether the sheriff

has taken a bail bond, it is advisable to demand an assignment, and to add this count to those for an escape, and not taking the defendant, as ante, 737, 740; see 5 Taunt. 325.

(b) This statement does not appear to be absolutely necessary, as the bond may be assigned before it is forfeited, Tidd's Prac. 9th ed. 298; and see the words of the statute 4 Anne, c. 16. s. 20.

(c) See the words of the statute 4 Anne, c. 46. s. 20.

FOR NOT
ASSIGNING
BAIL
BOND.

provided, but contriving, and wrongfully and unjustly intending to injure the said plaintiff in this behalf, and to hinder and prevent him from bringing any action or actions on the said writing obligatory, and to deprive him of the means of recovering the damages [*if in debt, say* "debt and damages,"] aforesaid, did not nor would, at the said time when he was so requested as aforesaid, assign the said writing obligatory to the said plaintiff (*d*), but on the contrary thereof then and there wholly neglected and refused, and hath from thence hitherto wholly neglected and refused so to do, and by means of the premises last aforesaid, the said plaintiff hath been and is hindered and prevented from bringing any action or actions on the said writing obligatory, and hath been and is deprived of the means of recovering the said damages [*or if in debt say* "debt and damages,"] and is likely to lose the same, to wit, at, &c. (*venue*) aforesaid. — [*If it be doubtful whether a bail bond was taken, add a count for an escape, as ante, 737; see 7 T. R. 109.*]

FOR NOT
OBTAINING
SUBPENA.
Against a
witness
who had
been served
with a
duces tecum
for neglect-
ing to pro-
duce the
papers
mentioned
in the
subpœna,
whereby
the plain-
tiff was
nonsuited
(*e*).

[*758]

For that whereas the said plaintiff, before the committing of the grievances by the said defendant, as hereinafter mentioned, to wit, in — Term, in the — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, [*or if in C. P.* "before his majesty's justices,"] at Westminster, impleaded one E. F. in a certain plea of [trespass on the *case] to the damage of the said plaintiff of £—, and such proceedings were thereupon had in the said court of our said lord the king, before the king himself, in that plea, that afterwards, to wit, at the sittings at Nisi Prius, holden in [the Great Hall of Pleas, commonly called Westminster Hall, at Westminster,] on, &c. before the Right Honorable Charles Lord Tenterden, then and still being chief justice of our said lord the king, a certain issue before then joined in the said plea, between the said plaintiff and the said E. F. in due manner came on to be tried by a jury of the country, then and there chosen, tried, and sworn for that purpose, to wit, at, &c. (*venue*). And whereas, before the trial of the said issue, and also before the committing of the grievances by the said defendant hereinafter next mentioned, to wit, on, &c. at, &c. (*venue*) the said plaintiff prosecuted out of the court of our said lord the king, before the king himself, his said majesty's writ of subpœna, directed to [G. H., I. K., and] the said defendant, by which said writ our said lord the king commanded [the said G. H., I. K., and] the said defendant (*f*), that all other things being set aside, and leaving every excuse, he [*or they*] should appear in his proper person [*or their proper persons respectively,*] before the said Charles Lord Tenterden, the said chief justice of our said lord the king, assigned to hold pleas in his said majesty's court at Westminster Hall, in the county of Middlesex, on —

(*d*) Or if the assignment were not sufficient, state "by indorsing the same, &c." as in 4 Anne, c. 16. s. 20.

(*e*) See 9 East, 473. This action lies at common law, Dougl. 561. The party may proceed by action founded on the statute 5 Eliz. c. 9. s. 12. for the penalty of 10*l.*, and also for the further recompense given by

that statute, if it has been previously assessed by the court, out of which the process issued, Dougl. 561. No action lies unless the cause has been called and jury sworn, Peake, 60.—13 East, 15.—Vide 3 B. & A. 598—3 Moore, 579, 222.

(*f*) Set out the subpœna in its terms.

then next, that is to say, on the — day of —, by nine o'clock of the forenoon of the same day; and that [the said G. H., I. K., and] the said defendant, [or either of them,] should produce and show forth, at the time and place aforesaid, a [certain warrant granted to them, or one of them, by the then, &c. upon a certain writ of *non omittas testatum fi. fa.* issued out and under the seal of the said court of our said lord the king, &c. on or about the 13th day of May then last, between — plaintiff, and — defendant, and the paper-writing or instruction which accompanied the same warrant,] and then and there to testify and show all and singular those things which they knew of the bill of exchange therein mentioned, warrant, papers, writings, records, and ordinances, might report of and concerning the said action then in his said majesty's court, between the said A. B. plaintiff, and the said E. F. defendant, of a plea of trespass on the case on the plaintiff's part, and at the said day by, *a jury, &c. to be tried, which said writ the said plaintiff afterwards, and before the committing the grievances by the said defendant as hereinafter mentioned, to wit, on, &c. caused to be made known and shown to the said defendant, and then and there caused a copy to be left with the said defendant, and then and there paid to the said defendant a certain sum of money, to wit, the sum of one shilling, being a reasonable sum of money, for his costs and charges in and about his attendance as a witness, according to the tenor of the said writ of subpœna. And although the said defendant, in part obedience of the said writ of subpœna, did afterwards, to wit, on, &c. at, &c. (*venue*) appear as a witness on the trial of the said issue, and although the said defendant could and might, in obedience to the said writ of subpœna, have produced and shown forth at the time and place aforesaid, on the said trial of the said issue, the said warrant, and the said papers, writings, or instructions, so mentioned and referred to in the said writ of subpœna as aforesaid, and thereby so required to be produced and shown forth as aforesaid; and although the production and showing forth of the said warrant, and papers, writings, or instructions, were material evidence for the said plaintiff on the said trial, and would have enabled the said plaintiff to have obtained a verdict on the said issue against the said E. F., to wit, at, &c. (*venue*) aforesaid, whereof the said defendant there had notice; yet the said defendant, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending to injure the said plaintiff, and to deprive him of the benefit of the same evidence on the trial of the said issue, and thereby to prevent him from obtaining a verdict against the said E. F. thereon, and to put him to great charges and expenses of his monies, did not nor would, at the time and place aforesaid, on the said trial of the said issue, produce and show forth the said warrant, papers, writings, or instructions, so mentioned and referred to in the said writ of subpœna as aforesaid, although the said defendant was then and there solemnly called upon for that purpose, and had no lawful or reasonable excuse or impediment to the contrary, but then and there wholly neglected and refused so to do, and by reason thereof the said plaintiff was then and there forced and obliged to become, and was then and there, nonsuited in the said action. And such proceedings were thereupon had, that afterwards, to wit, in — Term, in, &c. it was adjudged in and by the said court that *the said E. F. should recover against the said plaintiff £—, for his costs and charges by him laid out in and about his defense in that behalf,

FOR NOT
OBEYING
SUBPœNA.

[*759]

[*760]

FOR NOT
OBTAINING
SUSPENSE.

as by the record and proceedings thereof more fully appears; by means of which said several premises he the said plaintiff was not only forced and obliged to pay, and did necessarily pay, the said E. F. the said sum of £—, so recovered against him as aforesaid, but was also greatly hindered and delayed in the recovery of his damages in the plea aforesaid; and was forced and obliged to expend, and did necessarily expend, divers other sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—, in and about the prosecuting the said suit, and was and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.—[*Another count may be added more general.*]

INFRING-
ING COPY-
RIGHTS.
On the 54
Geo. 3. c.
156, for in-
fringing
the copy-
right of a
book (g).
[*761]

[*Commencement as ante*, 596.]—For that whereas the said plaintiff, before and at the time of the committing of the grievances by the said defendant [in this and the — next succeeding counts] hereafter mentioned, was the [author and (h)] proprietor of the copy-right of and in a certain book, first published within twenty-eight years last past, to wit, a certain book, intituled, &c. [*set forth the title accurately.*]—And the said plaintiff so being the [author and] proprietor of the said book as aforesaid, the said plaintiff, before the time of the committing of the grievances hereinafter *next mentioned, had printed and published for sale, divers, to wit, — copies thereof, to wit, at, &c. (*venue*); yet the said defendant well knowing the premises, but contriving, and wrongfully and injuriously intending (i) to injure the said plaintiff, and to deprive him of the profits, emoluments, and advantages, which he might and otherwise would have derived and acquired from the sale of the said book, and also to deprive him of benefit of his said copyright, heretofore, and after the passing of a certain act of parliament made and passed in the 54th year of the reign of his late Majesty King George the third, intituled “An act to amend the several acts for the encouragement of learning, by securing the copies and copyright of printed books to the authors of such books or their assigns,” to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill [*or if in C. P. or by original*, “before the commencement of this suit,”] to wit, at, &c. (*venue*) aforesaid, wrongfully and injuriously, and without the consent of the plaintiff or of any other proprietor of the said copyright of and in the said book, first

(g) See a form on the 8 Anne, c. 19. in prior editions of this work. See the statutes 8th Anne, c. 19. s. 1.—41 Geo. 3. c. 107, and the 54 Geo. 3. c. 156, (which extends the copyright to twenty-eight years, and during the life of the author, and gives a special action on the case and double costs,) 1 Chit. Col. Stat. 181, 188, and notes. As to the law of copyrights, &c. see Godson on Patents.—2 Chit. Com. Law, 240, &c.—An action lies at common law, 7 T. R. 627.—1 Campb. 97, n. a. An action lies to recover damages for printing the new corrections and editions to an old work, 1 East, 359. An action does not lie

for infringing the copyright of an immoral publication, 5 B. C. 173. 2 T. & P. 163. See other declarations, 7 T. R. 620.—2 Bla. Com. 407.—2 Wood. Vin. Lec. 392 to 396.—8 Wentw. Index, xxxii. Lil. 67.—7 T. R. 620.—1 Campb. 94.—2 Campb. 27.—1 East, 358.—4 Burr. 2305.—19 Ms. Mr. J. Ashurst's Paper Books, 321. To enable an assignee to sue, the assignment must have been in writing, 4 Campb. 8. 3 M. & S. 7.—2 B. & C. 861.

(h) If the plaintiff was not the author, omit the words “author and.”

(i) This allegation is immaterial, see 1 Campb. 98.

had and obtained in writing (*k*) *printed and reprinted*, to wit, — copies of the said book, and contrary to the said Statute in such case made and provided by means whereof the said plaintiff hath been greatly injured, and hath been hindered and prevented from selling divers, to wit, — copies of his said book, and his said copyright therein hath been and is greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.—And whereas also the said plaintiff so being the [author and] proprietor of the copyright of and in the said first-mentioned book as aforesaid, yet the said defendant well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the said plaintiff, and to deprive the said plaintiff of the profits, emoluments, and advantages which he might and otherwise would have derived and acquired from his said book, and also to deprive him of the benefit of his said copyright therein; heretofore, and after the passing of the said Statute, to wit, on the day and year aforesaid, and on the said other days and times, to wit, at, &c. (*venue*) aforesaid, wrongfully and injuriously, and without the consent of the said plaintiff, or other proprietor of the copyright of and in the said book, first had and obtained in writing, sold divers, to wit, — copies of the said book, which said last-mentioned copies had before that time been wrongfully and injuriously, and without the consent of the said plaintiff or other proprietor of the copyright of and in the said book, first had and obtained in writing, printed and reprinted, and which the said defendant at the times aforesaid, well knew, and contrary to the form of the Statute in such case made and provided, and thereby the said plaintiff hath been greatly injured and damnified; and thereby the said plaintiff hath been hindered and prevented from selling divers, to wit, — copies of his said book, and his copyright therein hath been greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.

INFRINGING COPYRIGHTS.

Second count, for exposing to sale pirated copies.

[Add other counts, as the case may suggest, which may be a third count like the second, omitting the word sold, and saying, "published;" a fourth count like the second, omitting the word sold, and saying, "exposed to sale;" a fifth count like the second, omitting the word sold and saying, "caused to be sold;" a sixth count like the second, omitting the word sold, and saying, "caused to be published;" a seventh count like the second, omitting the word sold, and saying, "caused to be exposed to sale;" an eighth count like the second, omitting the word sold, and saying, "had in his possession for sale;" add also counts similar to these, omitting the averment of plaintiff's being the author, and only stating him to be the proprietor. But the case may not require all these counts, and the Pleader should select only those most applicable.]

Other counts.

For that whereas the said plaintiffs, before and at the time of the committing the grievances hereinafter mentioned, were the proprietors of the copyright of and in a certain book, being a musical composition, called "Vive Henri Quatre, the celebrated National French Air, with an Introduction and eight Variations for the Piano-forte," first printed and pub-

On 54 Gen. 3. c. 155, for infringing the copyright of a musical composition (*l*).

(*k*) The declarations do not usually negative a written license, 7 T. R. 620.

(*l*) This was the form adopted in 2 B. &

C. 861.—4 D. & R. 598, S. C.; see that case. See also 2 B. & A. 298.

INFRING-
ING COPY-
RIGHTS.

lished within fourteen years last past, to wit, at Westminster, in the county of Middlesex, yet the defendant well knowing the premises, but contriving, and *fraudulently intending to injure and aggrieve the said plaintiffs in this behalf, heretofore, and after the passing of a certain act of parliament made and passed in the 54th year of the reign of his late Majesty King George the Third, intituled "An Act" &c. [here set forth the title of the act, which see, ante, 761.] to wit, on the 26th day of January, A. D. 1822, and on divers other days and times between that day and the day of exhibiting the bill of the said plaintiffs against the said defendant, to wit, at Westminster aforesaid, in the county aforesaid, knowingly, and wrongfully, and injuriously, and without the consent of the said plaintiffs, so being the proprietors of such copyright as aforesaid, of and in such book, first had and obtained in writing, printed and caused to be printed divers, to wit, 2000 copies of the said book of the said plaintiffs, by means whereof the said plaintiffs have been and are greatly injured, aggrieved, and damnified, to wit, at Westminster aforesaid, in the county aforesaid.

For in-
fringing
the copy-
right of a
print (m).

[Commencement as ante, 596.]—For that whereas the said plaintiff, after the 24th day of June, in the year of our Lord 1777, mentioned in a certain act of parliament made and passed in the 17th year of the reign of our lord the late King George the Fourth, to wit, on, &c. and before was, and from thence hitherto hath been, and still is, *the proprietor of certain prints*, which had been heretofore etched in Great Britain, that is to say, of a certain print, intituled —, and of a certain other print, intituled —, and of a certain other print, intituled —. And the said plaintiff, during all the time aforesaid had, and was lawfully entitled to and still hath, and is lawfully entitled to the sole right and liberty of printing and reprinting the said prints, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, well knowing the premises, but disregarding the Statute in such case made and provided, and contriving, and wrongfully and unjustly intending to injure the said plaintiff, so being the proprietor of the said prints as aforesaid, after the said 24th *day of June, A. D. 1777, aforesaid, and whilst the said plaintiff was such proprietor of *the said prints as aforesaid, to wit, on the day and year aforesaid, and on divers other days and times between that day and the day of exhibiting this bill [or if in C. P. or by original, say, "the day of the commencement of this suit,"] to wit, at, &c. (*venue*) aforesaid, did publish, and cause and procure to be published, divers, to wit, — copies of each of the said prints, whereof the said plaintiff so was the proprietor as aforesaid, without the consent of the said plaintiff, and against his will. By means of the committing of which said last-mentioned grievances the said plaintiff hath been and is greatly injured in his said property in the said prints, and hath lost and been deprived of divers great gains and profits which he would otherwise have derived and acquired by the printing and selling of the said prints, to wit, at, &c. (*venue*) aforesaid.

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(m) See the statutes 8 Geo. 2. c. 13. s. 1. —7 Geo. 3. c. 48.—17 Geo. 3. c. 57.—1 Chit. Col. Stat. 192, and notes, observed upon in 5 T. R. 41.—7 T. R. 625. 3 Wils. 60.—4 Bing. 234.—2 Bla. Com. 407.—2 Woodd. Vin. Lec. 392 to 396. The assignee of a print may sue on the last stat-

ute, which gives damages and double costs. As to the declaration, see 5 T. R. 41.—See 1 Campb. 94.—2 Id. 25. 11 East. 244.—See a form of pirating a book, 3 Campb. 111.—For law, see Godson on Patents.—8 Chit. Com. Law, 252.—5 B. & A. 737.

And whereas also whilst the said plaintiff was the proprietor of the said prints as aforesaid; the said defendant well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the said plaintiff, so being the proprietor of the said prints.—[*Same as the above count from the asterisk to the end, but stating only that the defendant "exposed to sale, &c."*]

INFRING-
ING COPY-
RIGHTS.
Second
count.

[*Commencement as ante, 596.*—For that whereas the said A. B. (*the patentee*) before and at the time of making the letters patent, and of the committing of the grievances by the said defendant as hereinafter mentioned, was the true and first inventor of a certain — [*describing the invention concisely as in the patent,*] to wit, at, &c. (*venue*) and thereupon our said lord the king, heretofore, to wit, on, &c. at, &c. (*venue*) aforesaid, by his letters patent *bearing date at Westminster, the day and year aforesaid, under the great seal of England, [or, "the United Kingdom of Great Britain and Ireland," according to the fact,] (and which said letters patent the said plaintiffs now bring here into court (o),) reciting that, &c. [*Here set forth the recital, the grant of the patent, and the condition as to enrolling a specification, and those clauses which prohibit others from exercising it; if the recital be long it should be omitted.*—As by the said letters patent, reference being thereunto had, will, amongst other things, more fully and at large appear. [*Here set forth the performance of the conditions in the patent, which may be thus, mutatis mutandis:*—And the said plaintiffs further say, that the said A. B. (*the patentee*) did afterwards, to wit, on &c. at, &c. (*venue*) aforesaid, in pursuance of the said proviso, and of the said letters patent, by an instrument in writing under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed, and did afterwards, and within one calender month next and immediately after the date of the said letters patent, to wit, on, &c. cause the said instrument in writing to be enrolled in his said Majesty's High Court of Chancery, at Westminster, in the county of Middlesex; as by the record of the said instrument in writing now remaining of record in the said High Court of Chancery, more fully appears (q).—And the said plaintiffs further say, that the said A. B. (*the patentee*) afterwards, and before the committing of the several grievances hereinafter mentioned, to wit, on, &c. at, &c. (*venue*) aforesaid, by a certain indenture, then and there made between the said A. B. of the one part, and the said C. D. of the other part, which said indenture, sealed with the seals of the said A. B. and C. D. respectively, they the said plaintiffs now bring here into court, the date whereof is the day and year last aforesaid, for the con-

INFRING-
ING
PATENTS
For the in-
fringment
of a pa-
tent, by
patentee
and as-
signee(n).
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Enrol-
ment of
the speci-
fication
(p).

Assign-
ment by
A. B. of a
moiety of
his interest
to C.
D.

(n) These parties may join where the patentee has not assigned *all* his interest, 2 Wils. 423.—2 Saund. 115, 116 a.—*Ante*, vol. i. 16, 76.—As to the law relating to patents, see 21 Jac. 1. c. 3.—1 Chit. Col. Stat. 197.—Bul. Ni. Pri. 7th edit. 75. Com. Dig. Patent.—8 T. R. 95.—1 T. R. 602. 2 Hen. Bla. 463.—8 Went. 431, and *Id.* Index, xxxii.—Godson on Patents.—Davies on Patents. 2 Chit. Com. Law,

192 to 212. What assignment renders the patent void, see 6 B. & C. 169.

(o) As to the profert, see 1 T. R. 149.—1 Saund. 9 b. note 1.

(p) What is a sufficient specification, see 11 East, 101—9 Chit. Com. Law, 196 to 205, and cases there collected, 10 B. & C. 22.

(q) Query this allegation, see 8 Went. 430.

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ING
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siderations therein mentioned, did amongst other things, assign, transfer, and set over unto the said C. D. one moiety of, &c.—[*State the words of the assignment.*] As by the said indenture, reference being thereunto had, will, amongst other things, more fully and at *large appear. And the said plaintiffs further say, that the said A. B. (*the patentee*) did always, from the time of the making of the said letters patent as aforesaid, until the making of the said indenture, by himself, his deputies, servants, and agents in that behalf, make, use, exercise, and vend his said invention, to wit, at, &c. (*venue*) aforesaid, [and that they the said plaintiffs have always, from the time of making the said indenture hitherto, by themselves, their deputies, servants, agents, made, used, exercised, and vended the said invention, to their great advantage and profit, to wit, at, &c. (*venue*) aforesaid (*r*).] Yet the said defendant, well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the said plaintiffs, and to deprive them of the profits, benefits, and advantages which they might, and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters patent and of the said indenture, and within the said term of years in the said letters patent mentioned, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [*or if by original, or in C. P. say, "the day of the commencement of this suit,"*] and within that part of the United Kingdom of Great Britain and Ireland called England, to wit, at, &c. (*venue*) aforesaid, unlawfully and unjustly, without the leave or license, and against the will of the said plaintiffs, or either of them, made and sold divers, to wit, — in imitation of the said invention of the said A. B. (*the patentee*) as aforesaid, [in breach of the said letters patent, and against the privilege so granted to the said A. B. (*the patentee*) and his assigns as aforesaid, whereby the said plaintiffs have been and are greatly injured and deprived of a great part of the profits and advantages which they might and otherwise would have derived and acquired from the said invention, to wit, at, &c. (*venue*) aforesaid (*s*).]

Second
count, for
making
imitations
of the in-
vention.

And the said plaintiffs further say, that the said [A. B. so being such inventor, and the said letters patent having been so made as aforesaid, and the said instrument in writing having been so made and enrolled as aforesaid, and the said indenture having been so made as aforesaid, and the said invention having been so made, used, exercised, and vended by the said plaintiffs as aforesaid, the said (*t*)] defendant well knowing the premises, but further contriving and intending as aforesaid, after the making of the said letters patent and of the said indenture and within the said term of years in the said letters patent mentioned, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, in England aforesaid, to wit, at, &c. (*venue*) aforesaid, unlawfully and unjustly, and without the leave or license, and against the

(*r*) This allegation between the brackets is sometimes omitted. *joyment thereof, to wit, at, &c. aforesaid."*

(*s*) Sometimes, instead of the averment within the brackets, the form runs thus: "*and thereby hindered and prevented the said A. B. in the sole use, exercise, and en-*

(*t*) The second and subsequent counts generally commence as above, with this summary of the allegation in the first count as between the brackets, but the statement may be omitted.

will of the said plaintiffs, *made* divers, to wit, — *on the said improved plan, and in imitation of the said invention of the said A. B. in breach of the said letters patent, and against the privilege so granted to the said A. B. and his assigns as aforesaid. Whereby the said plaintiffs have been and are greatly injured, and have lost and been deprived of divers great gains and profits which they might, and otherwise would have derived and acquired from the said invention, to wit, at, &c. (*venue*) aforesaid.

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*The other counts vary from the second only in the insertion of the following words, instead of the words in italics: Third count, "used and put in practice."—Fourth count, "did counterfeit the said invention, and did use and put in practice."—Fifth count, "did imitate the said invention, and did use and put in practice."—Sixth count, "did imitate in part the said invention, and did use and put in practice."—*Some of these counts may be omitted or others inserted, according to the facts of each particular case.*

Other
counts (w)

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[Commencement as ante, 596.]—For that whereas the said plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned, was the owner and proprietor of divers goods and chattels, to wit, &c. [*here specify them according to the exact description, or as in trover*] of great value, to wit, of the value of £— and which said goods and chattels had been and were, before then, let to hire to one E. F. for a certain time then to come and unexpired, and the same were then in the possession of the said E. F. under and by virtue of the said letting, to wit, at, &c. (*venue*). Yet the said defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the said plaintiff in his reversionary interest and property in the said goods and chattels, and to deprive him of the benefit and advan-

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IN REVER-
SION.

For an in-
jury to
plaintiff's
reversion-
ary inter-
est in
goods in
possession
of a tenant
(w).

(w) In a declaration settled by a very eminent Pleader, the second count was similar to the above as far as the asterisk, except that it omitted the words in that count within the brackets. At the asterisk was inserted as follows: "*with certain improvements on the construction thereof respectively, which were then and there intended to imitate and resemble, and did imitate and resemble, the said improvements so invented by the said A. B. as aforesaid, whereby, &c.*" Conclusion as in the above second count. The third count stated, that the defendant "*did counterfeit and resemble.*" The fourth count, "*with part of, &c.*" The fifth count, "*did imitate in part, and did make a certain addition to the said invention, whereby to pretend himself the inventor or deviser thereof, and did then and there put in practice the said imitation, in part, with such additions as aforesaid, whereby, &c.*"

(w) The general property in goods draws to it a possession in law sufficient to enable

the owner to maintain trespass or trover, unless the right of possession be in a third person, at the time of the injury complained of; 2 Saund. 47, n. But if the right of possession be in such third persons, the general owner, whose reversionary interest has been prejudiced, cannot support trespass or trover, but must declare specially; 4 T. R. 489.—7 Id. 9.—Ry. & M. C. N. P. 99. However, in the case of trees cut down and taken away by a stranger, pending a lease, as the interest of the lessee remains no longer than whilst the trees are growing upon the premises, the landlord may support trespass or trover, 7 T. R. 13.—Vin. Ab. Trespass, S. pl. 10.—4 Leon. 162.—1 Saund. 322, note 5.—4 B. & C. 465.—Ante, vol. i. 206—Quare if the statement "that defendant absolutely sold," shows a sufficient cause of action, in as much as the sale could only pass the tenant's interest in the goods, and not affect the reversionary interest, 3 B. & A. 471, 473, and post, 777, n.

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SION.

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tage thereof, whilst the said plaintiff so was the owner and proprietor of the said goods and chattels, and whilst the same were so let to and in the possession of the said E. F. as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, wrongfully and unjustly broke, damaged and spoiled the said goods and chattels, [or, "seized and took the said goods and chattels of the said plaintiff, from and out of the possession of the said E. F. and converted and absolutely sold and disposed thereof to his own use," according to the **fact*.] And thereby the said plaintiff hath been and is greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said goods and chattels, to wit, at, &c. aforesaid.—[Add a count as in *trover*, and conclude as *ante*, 596.]

TO HOUSES
OR LAND
IN POSSES-
SION.

III. FOR TORTS TO REAL PROPERTY CORPOREAL.

See the forms of declarations for different nuisances to houses in possession, 8 *Wentw. Index*, 62.—3 *Ld. Raym.* 259.—*Lil. Ent.* 81, 82.—*Mall. Ent.* 143, 146.—2 *Rich. C. P.* 140.—*Morg.* 330, 333. The following forms are those most frequently called into use. See a form of declaration for erecting a smith's shop, 1 *Lutw.* 69; for undermining a house, 2 *Hen. Blä.* 276.—2 *Saund.* 397; for obstructing an entrance to a house, 4 *T. R.* 794. As to the law, see *Com. Dig. Action on the Case for a nuisance*.—3 *Blä. Com.* 208 to 309, and the notes there, by Chitty. In a late case, an action on the case was brought by a reversioner of a house in Cheapside, London, against the owner of an adjoining house for pulling it down, without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down: it was held, first that upon this declaration the plaintiff could not recover, on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that as the plaintiff had not alleged or proved any right to have his house supported by the defendant's, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it, 9 *B. & C.* 735. In declarations of this nature, the immediate cause of the injury must be stated; and under an averment of the remote cause, and an allegation that by means of the premises, the noxious matter annoyed the plaintiff's house, it is not competent to give evidence of the intermediate causes. Thus a declaration stated that defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away down a ditch at the back of his house. The evidence was, that the heap was not originally placed so as to obstruct the water, but that in process of time earth from the heap was trodden down, and fell into the ditch and obstructed it, and this variance was held fatal, 5 *Taunt.* 534. But in case for negligently pulling down a wall adjoining a wall of the plaintiff's cellar, whereby the roof of the latter fell in, and a quantity of wine was destroyed, and it appearing that the proximate cause of the damage was the placing a quantity of bricks (in taking down the wall) on the roof of the cellar, it was held no variance, 1 *Dow. & Ry. C. N. P.*

35.—3 Stark. 162, S. C.; and see 1 D. & R. 497, and other case as to describing injuries to water-courses, post, 788.

[Commencement as ante, 596. The venue is local, ante vol. i. 298.]—For that whereas the said plaintiff, before *and at the time of the committing of the grievance hereinafter next mentioned, was and from thence hitherto hath been, and still is, lawfully possessed (y) of a certain messuage or dwelling-house, with the appurtenances, situate and being in the parish of

TO 4981
OR LAND
IN POSSESS-
SION.
For ob-
structing
ancient
windows.
(z).
[*769]

(z) Formerly it was held, that a party could not maintain an action for a nuisance to an ancient light, unless he had gained a right to the window by prescription, 1 Leon. 168.—Cro. El. 118. But the modern doctrine is, that upon proof of an adverse enjoyment of light for twenty years or upwards, unexplained, a jury may be directed to presume a right by grant or otherwise, 2 Saund. 175 a.—1 Esp. Rep. 148; but if the window was opened during the seisin of a mere tenant for life, or a tenancy for years, and the owner in fee did not acquiesce in, or know the use of the light, he would not be bound, 11 East 372.—3 Campb. 444. 4 Id. 616. And where the adjoining land was glebe land, in the possession of a rector, tenant for life, it was held that there could be no presumption of a grant, so as to preclude a purchaser thereof under 55 Geo. 3. c. 147, from building and obstructing an ancient light, 4 B. & A. 579. But where the window has been proved to have been in existence upwards of twenty years, and its origin cannot be traced, the purchaser from the owner in fee cannot disturb it, though no evidence that the latter acquiesced in the window can be adduced, 2 B. & C. 686.—4 D. & R. 234, S. C. If the owner of land build a house in part, and afterwards sell the house to one person, and the rest of the land to another, the vendee of the house may maintain an action against the vendee of the land for obstructing his light, though the house was not an ancient one, because the law will not suffer the vendor, or any person claiming under him, to derogate from his own grant, and consequently less than twenty years' use of the light suffices, 1 Lev. 122.—1 Ventr. 237.—1 Price, 27.—R. M. 24. 1 M. & M. 400.—2 Saund. 114, n. 4. Where A. the owner of two adjoining-house, granted a lease of one of them to B. and afterwards leased the other to C. there then existing in it certain windows, and B. afterwards accepted a new lease of his house from A. it was held that B. could not alter his tenement so as to obstruct windows existing in C.'s house at the time of C.'s lease from A. though the windows were not twenty years old at the time of the alteration, 1 M. & M. 396. But if an ancient window has been completely blocked up above twenty years, it loses its privilege, 3 Campb. 514. And even the presumption of right from twenty years' undis-

turbed enjoyment, is excluded by the custom of London, which entitles every citizen to build upon an ancient foundation as high as he pleases, Com. Rep. 273.—2 Swanst. 333. But the circumstances of a window being built contrary to the Building Act, affords no defense to an action for obstructing it, 1 Marsh. 140. And if ancient windows be raised and enlarged, the owner of the adjoining land cannot legally obstruct the passage of light and air to any part of the space occupied by the ancient window 3 Campb. 80. Total deprivation of light is not necessary to sustain this action, and if the party cannot enjoy the light in so free and ample a manner as he did before, he may sustain the action, but there should be some sensible diminution of light or air, 4 Esp. Rep. 69.—2 C. & P. 465.—Chilton v. Sir T. Plumer, in the King's Bench, A. D. 1822.—The building a wall which merely obstructs the prospect, is not actionable, 9 Rep. 53. b.—1 Mod. 55. Nor is the opening the window and destroying the privacy of the adjoining property, but such new window may be immediately obstructed, to prevent a right to its being acquired by twenty years' use, 3 Campb. 82.

The person in actual possession, whether lawfully or not, may support this action against a wrong-doer, 1 East, 244.—1 Show. 7, n. a.—Cro. Car. 325.—A landlord may also sue for an injury during the tenancy, Com. Dig. Action on Case for Nuisance, B.; but the form of the declaration will in such case be different, see the forms, post, 777, and 8 Went. 548. A reversioner may sue, see 4 Burr. 2141. 3 C. & P. 817; and see a form at the suit of a reversioner, 8 Wentw. 948.

The action may be either against the party who made or continued the nuisance, Com. Dig. Action for Nuisance, B. 1 B. & P. 404, and generally against the occupier of the adjoining premises, 4 T. R. 318.—2 Hen. Bla. 350; or an agent, 6 Moore, 47.—Ante, vol. i. 95. Or it may be against the lessor for a nuisance erected by him, and continued by his tenant, 2 Salk. 460.—12 Mod. 636.

(y) Possession in fact is sufficient, 1 East, 244. 4 T. R. 719.—1 Show. 7, note a; and the term "lawful" is unnecessary, 5 East, 276; and it is improper to declare on a seisin in fee, or otherwise to state the plaintiff's title, 2 Saund. 113 a, n. 1.—Com. Dig. Plead. C. 39, and ante, vol. i. 202, 414.

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SION.

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— in the county of — (z), in which said messuage or dwelling-house, during all the time aforesaid, there were, and still of right ought to be (a), divers, to wit, — [ancient (b)] windows, through which the light and air, during all the time aforesaid, ought to have entered, and still ought to enter into the said messuage or dwelling-house, for the convenient and wholesome use, occupation, and enjoyment thereof. Yet the said defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure the said plaintiff, and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of the said messuage or dwelling-house, with the appurtenances, heretofore, to wit, on, &c. (c) wrongfully and injuriously * [here state the means of obstruction which may be thus, mutatis mutandis] erected and raised, and caused and procured to be erected and raised, a certain wall and building (d), near to the said windows, and wrongfully and injuriously kept and continued the said wall and buildings so there erected and made, for a long space of time, to wit, from the day and year aforesaid, hitherto (e). By means of which said premises the said *messuage or dwelling-house, with the appurtenances, during all the time aforesaid, was, and still is, greatly darkened (f), and the light and air were and are hindered and prevented from coming and entering into and through the said windows into the said messuage or dwelling-house and the same hath thereby been rendered and is close, uncomfortable, unwholesome, and unfit for habitation, and the said plaintiff hath thereby been, and still is greatly annoyed and incommoded in the use, possession, and enjoyment of his said messuage or dwelling-house, with the appurtenances. And also, by means of the premises, the said plaintiff hath been forced and obliged, for the obtaining light in his messuage or dwelling-house, to lay out and expend a

If a title be stated, and it appear to be insufficient, the declaration will be demurrable, 2 Lord Raym. 1228.—Salk. 365; and if not demurred to, it must be proved as stated, 2 Saund. 206 a, note 22, 207 a, note 24.

(z) The venue is local, Com. Dig. "Action," N.; but it is not necessary to give a local description of the nuisance, 2 East, 497.—11 East, 226.—1 Taunt 379; and if there be any doubt as to it, merely say it was situate "in the county of—."

(a) This is a sufficient statement of the right, 1 Show. 7.—2 Saund. 113 b.

(b) Lil. Ent. 84, note. It is usual to insert the word "ancient," but it is unnecessary, and in cases where the windows are not so, should be omitted, Com. Dig. Action for Nuisance, E. 1.—Show. 7. Lil. Ent. 81, 2.—2 Saund. 113 b, 114. Twenty years' uninterrupted use of the windows is sufficient, see ante, 765 a, note.

(c) The precise day is not material, Cro. Eliz. 191.—2 Saund. 24 a.

(d) It is not necessary to allege that the building was on a new foundation; though in London a person may build upon an ancient foundation against the lights of an-

other, Yelv. 215, 216.—1 Rol. 558.—1 Burr. 248.—9 Rep. 58 b.—2 Swanst. 333. Such custom to obstruct lights must be confined to cases where all the four walls of the building belong to the party, and will not justify him in raising an obstruction by means of three walls of his, so as to darken the light in a fourth wall belonging to his neighbor, 3 C. & P. 615. 1 M. & M. 350. If the mode in which the injury were committed be doubtful, add a count generally for obstructing the light, without stating the means, as post, 770, and which will be sufficient, 3 Leon. 13.—Cro. Jac. 606.—Willes, 577.—1 B. & P. 180.—Lord Raym. 452.

(e) In some cases this *adhuc existit* would be improper, 1 Show. 366.—3 Lev. 345; and in a declaration in the Common Pleas, it seems more correct here to insert a particular day, but in K. B. by bill, the *adhuc existit* is always proper, as the writ may be issued before the cause of action accrues, 4 East, 75.—7 T. R. 4; but in all cases it is improper to declare for damages which can only have accrued after the time of declaring, 2 Saund. 169 to 171.

(f) Any diminution is actionable, 4 Esp. Rep. 69.—2 Selw. N. P. 4th edit. 1046.

large sum of money, to wit, the sum of £— in and about the making of a sky-light therein (*g*), to wit, at, &c. (*venue*) aforesaid.

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SION.

[*Second count same as the first to the asterisk, and then proceed as follows* :]—“kept and continued, and caused to be kept and continued a certain wall and building, before then wrongfully erected and raised near the said window, for a long space of time, to wit, hitherto.” By means, &c.—[*Conclude as in the first count.*]

Second
count for
contin-
ing the
nuisance
(*h*).

And whereas also the said plaintiff, long before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage and premises, with the appurtenances, situate and being in the *county aforesaid, in which said last-mentioned messuage and premises, with the appurtenances, during all the time aforesaid, there were, and still of right out to be, divers, to wit, — windows, unto, into, and through which the light and air, during all the time aforesaid, ought to have entered, and still of right ought to enter, into the said last-mentioned messuage and premises, with the appurtenances, for the convenient and wholesome use, occupation, and enjoyment thereof, and of which said premises the said defendant hath always had notice, to wit, in the county aforesaid. Yet the said defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the said plaintiff, and to deprive him of the use, benefit, and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of the said last-mentioned messuage and premises, with the appurtenances, heretofore, to wit, on, &c. [*any day about the time*] and on divers other days and times aforesaid, and before the commencement of this suit, in the county aforesaid, wrongfully and injuriously greatly darkened the said windows, and hindered and prevented the light and air from coming and entering unto, into, and through the said windows, into the said last-mentioned messuage and premises, with the appurtenances, and the same have thereby been rendered and are uncomfortable, unwholesome, and unfit for habitation; and the said plaintiff hath thereby been, and still is, greatly annoyed and incommoded in the use, possession, and enjoyment of his said last-mentioned messuage and premises, with the appurtenances, to wit, at, &c. (*venue*) aforesaid.

Third
count,
more gen-
eral, and
not stating
the means
of ob-
struction.
[*771]

[*Commencement of ante, 596. The venue is local.*]—For that where- as the said plaintiff, before and at the time of the committing of the griev-

For not
repairing
a privy
adjoining
plaintiff's
house (*i*).

(*g*) Omit this if not the fact.

(*h*) Case is the proper remedy, though trespass is sometimes maintainable, see ante, vol. i. 145, 206.—1 Stark. 22.—When case does not lie, 2 Stark. 534.—See Lil. Ent. 82. In a declaration for the continuing of a nuisance, it is not necessary to show the time when the nuisance was erected, Cro. Eliz. 191.—As to this count in general, see Lord Raym. 370.—1 Salk. 10.—Carth. 455. If the action is not brought against the original erector of the nuisance,

but against his feoffee, lessee, &c. it may be necessary to allege a special request to the defendant to remove the nuisance, Willes, 583.—Cro. Jac. 555.—5 Co. 100, 1.—Jenk. 260. A notice of removal left at the premises, is evidence against a subsequent occupier to render him liable, Ry. & Moo. C. N. P. 189.

(*i*) See the general note, ante, 768; and the precedents, 3 Lord Raym. 324.—Morg. 333, 347, 353, 354, 357, 449.

TO HOUSES
OR LAND
IN POSSES-
SION.

[*772]

ances hereinafter mentioned, was and from thence hitherto hath been, and still is, lawfully possessed (*k*) of a certain dwelling-house, with the appurtenances, situate and being in the county of — [or at, &c.] and in which said dwelling-house, with the appurtenances, the said plaintiff and his family, at the times hereinafter mentioned, inhabited and dwelt, and still do inhabit and dwell, to wit, in the county [or at, &c.] aforesaid (*l*). And whereas also the said defendant, before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is, possessed of a certain other dwelling-house, with the appurtenances, and of a certain privy near to the said dwelling-house of the said plaintiff, to wit, in the county [or at, &c.] aforesaid; and by reason of the possession of his said dwelling-house and privy, with the appurtenances, during all the time hereinafter next mentioned, the said defendant *ought to have repaired, and still of right ought to repair (*m*), a certain wall adjoining the said privy, and near to the said premises of the said plaintiff, as often as need or occasion hath been or required, or should be or require, to wit, in the county [or at, &c.] aforesaid. Nevertheless the said defendant well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff, and to incommode and annoy him and his family in the possession, use, occupation, and enjoyment of the said dwelling-house, with the appurtenances, heretofore, to wit, on, &c. and from thence for a long space of time, to wit, hitherto, in the county aforesaid, wrongfully and unjustly suffered and permitted the said wall to be and continue, and the same during all that time was, and still is, out of repair for want of needful and necessary reparation thereof, and by means thereof, on the day and year aforesaid, and on divers days and times, during that time, divers large quantities of excrement and filth penetrated, issued, and flowed from and out of the said privy, through the said wall, unto and into the said premises of the said plaintiff, and staid, continued and remained therein, during all the time aforesaid *; and also thereby divers noisome, noxious, offensive, and unwholesome smells, vapors, and stench, during the time aforesaid, ascended and came unto and into the said premises of the said plaintiff, and on those several days and times there greatly annoyed and incommoded the said plaintiff and his family in their said habitation of the said dwelling house of the said plaintiff, and also by means of the premises, the said plaintiff hath been and is hindered and prevented from exercising and carrying on his trade and business of a — in so beneficial a manner as he, before the committing of the said grievances by the said defendant, had been used and accustomed to do, and would have continued to do, and hath thereby been deprived of divers great gains and profits which he otherwise might and would have deprived and acquired, to wit, in the county [or at, &c. aforesaid.]

Second
count, for
not empty
ing the
cesspool.

And whereas also the said plaintiff, being so possessed of his said dwelling-house, with the appurtenances as aforesaid, the said defendant before and at the time of committing of the grievance hereinafter

(*k*) This is sufficient, ante, 769, note *y*.

(*l*) This is to be considered as the venue, and not as a local description, and therefore need not be proved, 2 East, 497.—5 Taunt.

789.

(*m*) This allegation of *debit reparare* is sufficient, 1 Salk. 360.—Lord Raym. 1092.—3 T. R. 766.—2 Saund. 114 a, b, c.

mentioned, was possessed of a certain privy and cesspool, near to the said dwelling-house, *with the appurtenances, of the said plaintiff, and by reason thereof the said defendant, before and at the time of the committing the grievance by the said defendant as hereinafter mentioned, ought to have hindered and prevented the excrement, filth, and water, from time to time being in the said privy and cesspool, from running and proceeding therefrom, unto and into the said dwelling-house, with the appurtenances, of the said plaintiff, to wit, in the county [or at, &c.] aforesaid. Nevertheless the said defendant well knowing the said last-mentioned premises, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff, and to incommode and annoy him and his family in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, heretofore, to wit, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, to wit, in the county [or at, &c.] aforesaid, wrongfully and unjustly suffered and permitted divers large quantities of excrement, filth, and water, to penetrate, issue, and flow, from and out of the said last-mentioned privy and cesspool, unto and into the said premises of the said plaintiff, and to stay, continue, and remain therein during all the time last aforesaid, and also thereby, &c.—[Same as in first count from the asterisk to the end. Add other counts more general, in effect similar to the second count, post, 774.]

TO HOUSES
OR LAND
IN POSSES-
SION.
[*773]

For that whereas the said plaintiff, before and at the time of the committing of the grievances by the said defendant as hereinafter mentioned, was, and from thence hitherto hath been, and still is, possessed of a certain messuage or dwelling-house, and premises, situate in the county of —, [or at, &c.]; and the said messuage or dwelling-house, and premises, the said plaintiff, with his family, at the times hereinafter mentioned, occupied and inhabited, and still doth occupy and inhabit, to wit, in the county [or at, &c. (o).] And whereas also the said defendant, before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is possessed of a certain piece or parcel of ground contiguous and near to the said messuage or dwelling-house, and premises, of the said plaintiff, to wit, in the county [or at, &c.] aforesaid. Nevertheless the said defendant contriving and intending to injure, prejudice, and aggrieve the said plaintiff, and to incommode and annoy him and his family in the possession, occupation, and enjoyment of his said messuage or dwelling-house, and premises, heretofore, to wit, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, [or if in C. P. say, "commencement of this suit,"] wrongfully and injuriously erected and built a certain building and erected on the said piece or parcel of ground of the said defendant, so being contiguous and near to the said messuage or dwelling-house and premises of the said plaintiff as aforesaid, and wrongfully and injuriously kept and continued, and caused to be kept and continued, the same building and erection so erected and made, for a long space of time, to wit, hitherto; and on the several days and times aforesaid, to wit, in the county [or at, &c.] aforesaid, wrongfully and injurious-

For man-
ufacturing
candles
near a
dwelling-
house (n).

(n) See other forms, Morg. Prec. 333. (o) See ante, 771, note.
656, 304, 357, 449.—8 Wentw. Index.

TO HOUSES
OR LAND
IN POSSES-
SION.

ly exercised and carried on in the said house or building, the trade or business of a candle-maker or manufacturer of candles, and made, and caused and procured to be made and manufactured, divers large quantities of candles therein. By means of which several premises, divers noisome, noxious, and offensive vapors, fumes, smokes, smells, and stench, on the several days and times aforesaid, rose, issued, and proceeded from the said buildings and erections, and entered into and spread and diffused themselves over and upon, into, through, and about the said messuage or dwelling-house and premises of the said plaintiff, and the air over, through, and about the same, was thereby greatly filled and impregnated *with the said noisome, noxious, and offensive vapors, fumes, smokes, smells, and stench, and was rendered, on the said several days and times aforesaid, and became and was, and still is corrupted, offensive, unwholesome, unhealthy, and uncomfortable, and the said plaintiff hath thereby been, and still is, greatly annoyed and incommoded in the use, possession, occupation, and enjoyment of the said messuage or dwelling-house and premises, and hath been, and is, by means of the committing of the grievances aforesaid, by the said defendants as aforesaid, otherwise greatly injured and damnified, to wit, in the county [or at, &c.] aforesaid.

[*774]

Second
count
more gen-
eral.

And whereas also the said plaintiff, before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage and premises, situate in the county aforesaid, [or at, &c.] and which said last-mentioned messuage and premises, the said plaintiff and his family, at the said several times hereinafter next mentioned, occupied, inhabited, and dwelt in, and still do occupy, inhabit, and dwell in, to wit, in the county [or at, &c.] aforesaid; yet the said defendant, well knowing the premises, but contriving and intending to injure, prejudice, and aggrieve the said plaintiff, and to incommode and annoy him and his family in the possession, occupation, and enjoyment of his said last-mentioned messuage and premises, *heretofore, to wit, on the day and year aforesaid, and on the several days and times aforesaid, wrongfully and injuriously caused and procured divers noxious, offensive, and unwholesome vapors, fumes, smokes, smells, and stench, to arise and ascend near to, in, and about the said last-mentioned messuage and premises of the said plaintiff, and the same have thereby been rendered and are become uncomfortable, unhealthy, and unwholesome, and unfit for habitation; and the said plaintiff hath thereby been and still is greatly annoyed and incommoded in the possession, use, occupation, and enjoyment of the said last-mentioned messuage and premises, and hath been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, in the county [or at, &c.] aforesaid.

[*775]

For keep-
ing a
slaughter-
house near
to plain-
tiff's
house,
whereby
plaintiff,

For that whereas the said plaintiff before and at the time of the committing of the grievances in this count mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain dwelling-house and premises, with the appurtenances, situate in the county of — [or at, &c.] and in which said dwelling-house, with the appurtenances, he the said plaintiff, at the said several times in this count hereafter mentioned, used, exercised, and carried on the business and employ-

ment of a school-master; and also, at the said several times did, together with his family, and divers, to wit, — scholars, by him boarded and lodged in his said dwelling-house, inhabit and dwell, and still doth inhabit and dwell, to wit, at, &c. (*venue*). And whereas also the said defendant, before and at the time of the committing of the said grievances, was, and from thence hath been, and still is, possessed of a certain other dwelling-house and piece of ground, with the appurtenances, near to the said dwelling-house of the said plaintiff, to wit, at, &c. (*venue*) aforesaid; yet the said defendant, well knowing the premises, but contriving and wrongfully intending to injure and aggrieve the said plaintiff, and to incommode and annoy him, together with his said family and scholars, in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, to wit, on, &c. at, &c. (*venue*) wrongfully and injuriously erected and made, on the said piece of ground, a certain slaughter-house, and also divers, to wit, — sheep-pens, — cattle-pens, and — hog-sties, and the same so erected and made, wrongfully and injuriously kept and continued for a long space of time, to wit, from the day and year aforesaid, hitherto, and on divers days and times during the said space of time, killed and slaughtered divers cattle and beasts, to wit, — oxen, — calves, — sheep, and — hogs, in the said slaughter-house, and put and placed in and near the same, divers large quantities of blood, garbage, and offal, arising from the carcasses of the said cattle and beasts, and the same so there put and placed, wrongfully and injuriously kept and continued for divers long spaces of time, to wit, for the space of — hours next after the respective times of so putting and placing the said blood, garbage, and offal as aforesaid, whereby, during the times aforesaid, divers noxious and offensive smells and stenchs arising from the said blood, garbage, and offal, penetrated and entered and came into the said dwelling-house of the said plaintiff, and rendered the same unwholesome and uninhabitable; and the said defendant also, on the said several days and times, wrongfully and injuriously kept and continued in the said sheep-pens, cattle-pens, and hog-sties, divers, to wit, — sheep, — oxen, — calves, and — hogs; by means whereof divers loud and offensive sounds and noises arising from the bleating, lowing, and grunting of the said sheep, oxen, calves, and hogs, entered and came into and about the said dwelling-house of the said plaintiff, and further greatly annoyed, incommoded, and disturbed the said plaintiff, together with his said family and scholars, in the possession and enjoyment thereof, so that, by means of the several premises aforesaid, the said plaintiff hath been, during all the time aforesaid, and yet is, not only disturbed and annoyed, injured and prejudiced in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, and hindered and prevented from occupying and enjoying the same in so ample and beneficial a manner as he otherwise might, could, and would and ought to have done, but is also much injured in his said business of a school-master, and likely to lose many of his said scholars, and to be prevented from procuring others, and thereby to lose great profits arising therefrom, to wit, at, &c. (*venue*) aforesaid.—[*Add another count more general, merely stating that defendant caused the offensive vapors and noises to arise and be made, upon the principle of the general count, ante, 774.*]

TO HOUSES
OR LAND
IN POSSESSION.

who was a
school-
master,
was pre-
vented
from in-
habiting
his house,
and lost
many
scholars.

[776]

to houses,
or land
in posses-
sion.
For cut-
ting down
trees in an
avenue, to
the shade
of which
plaintiff
was enti-
tled as oc-
cupier of a
messuage.

For that whereas the said plaintiff, on, &c. and long before, was, and continually from thence hitherto hath been, and still is, lawfully possessed of and in a certain messuage or dwelling-house, with the appurtenances, situate and being at the parish of — in the county of — and by reason thereof, during all the time aforesaid, was, and still is, lawfully entitled to the use and enjoyment of a certain coachway or avenue, and of a certain foot-walk or avenue there near adjoining and leading to the said messuage or dwelling-house, and to the shade, shelter, protection, and ornament of divers trees, to wit, — elm trees, — lime trees, and — other trees, during all the time aforesaid, growing and being in and near the said way-walk avenues; yet the said defendant, well knowing the premises, but contriving, and wrongfully intending to hurt, injure, and prejudice the said plaintiff in this behalf, and to obstruct him in the use and enjoyment of the said walks and avenues, and to deprive him of the shade, shelter, protection, and ornament of the said trees there, whilst the said plaintiff was so possessed and entitled as aforesaid, to wit, on the same day and year aforesaid, and on divers other days and times between that day and the day of exhibiting the bill of the said plaintiff, at, &c. (*venue*) aforesaid, wrongfully and injuriously cut, lopped, and topped the said trees, to wit, — of the said elm trees, — of the said lime trees, and — of the said other trees. By means whereof the said plaintiff hath been greatly obstructed and prejudiced in the use and enjoyment of the said way-walk and avenues, and hath been and is greatly deprived of the shade, shelter, protection, and ornament of the said trees so lopped, topped, and out as aforesaid, to wit, at, &c. (*venue*) aforesaid.

For erect-
ing a
building
next to
plaintiff's,
so that the
rain water
ran there-
from on
plaintiff's
house and
injured it,
and plain-
tiff there-
by lost
lodgers,
&c.

For that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage and premises, with the appurtenances, situate in the county aforesaid, and in which said messuage and premises, the said plaintiff and his family have, for and during all the time aforesaid, resided and dwelt, and still do reside and dwell, to wit, at, &c. (*venue*); nevertheless the said defendant, contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in the possession, use, occupation, and enjoyment of his said messuage and premises, and to render the same inconvenient, unfit for habitation, and of little or no use or value to the said plaintiff, whilst the said plaintiff was so possessed thereof, and so resided and dwelt with his family as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, wrongfully and unjustly erected and built, and caused and procured to be erected and built, a certain building near to the said messuage and premises of the said plaintiff, in so careless, negligent and improper a manner, that by reason thereof, afterwards, to wit, on the day and year aforesaid, and on divers other times afterwards, and before the commencement of this suit, divers large quantities of rain water ran and flowed from the said building down to, upon, against, and into, the said messuage and premises of the said plaintiff, and the walls, roofs, ceilings, beams, wainscottings, papering, floor, stairs, doors, and other parts thereof, and therein being, and thereby greatly weakened, injured, wetted, and damaged the said messuage and premises of the said plaintiff, and the said walls, roofs, ceilings, wainscottings, paperings, floors,

stairs, doors, and other parts thereof, and by reason of the premises, ^{to recover} ~~the~~ said messuage and premises of the said plaintiff became, and were and are damp, incommodious, and less fit for habitation; and also, by reason of the premises, one E. F. who before the time of committing of the said grievances had resided and lodged in the said messuage and premises of the said plaintiff as a lodger, at a certain rent and profit payable by the said E. F. to the said plaintiff in that behalf from the time of the committing of the said grievances, hath hitherto ceased to reside or lodge in such messuage and premises as a lodger or otherwise, and thereby the said plaintiff hath lost divers great gains and profits, which she would have otherwise enjoyed and received, to wit, at, &c. (*venue*) aforesaid.—[*Add another count more general, omitting the statement as to defendant having erected a building, and merely stating that he caused divers quantities of water to run, &c. into and upon plaintiff's premises.*]

[*Commencement as ante, 596. The venue is local.*].—For that whereas, before and at the time of the committing of ^{to recover} ~~the~~ grievances by the said defendant as hereinafter mentioned, a certain messuage and premises, with the appurtenances, situate in the county of — [or at, &c. (*q*)] was in the possession and occupation of a certain person, to wit, one E. F. as tenant thereof (*r*) to the said plaintiff, (the reversion thereof then and still (*s*) belonging to the said plaintiff) to wit, at, &c. (*venue*). Yet the said defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in his reversionary estate and interest of and in the said messuage and premises, with the appurtenances, whilst the said messuage and premises were so in the possession and occupation of the said tenant, as such tenant thereof to the said plaintiff as aforesaid, and whilst the said plaintiff was so interested therein as aforesaid, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] at, &c. (*venue*) afore-

to recover
on behalf
of plaintiff
By rever-
sioner for
damage
done to a
messuage
in the pos-
session of
his tenant
(*s*).
[778]

(*p*) See forms, 9 Wentw. 186.—8 Wentw. Index, 61 to 63.—Morg. 363.—Plead. A. 76.—2 Wils. 361.—1 Taunt. 136.—2 M. & S. 234. See a form at the suit of reversioner for stopping a way, 8 Wentw. 550. That reversioner may sue, see Com. Dig. Action on Case, Nuisance, B.—3 Lev. 360. In 4 Burr. 2141, it was held, that case lies by a reversioner for obstructing ancient lights, and see a form of declaration in such a case, 8 Wentw. 548. As to an action by a remainder-man of copyhold premises, see Lev. 130. Fisher on Copyh. 114. By a remainder-man against a tenant for life, see 2 Saund. 252 a. The statement of the reversionary interest is merely inducement, and though a seisin in fee, &c. is often stated in a declaration by a reversioner, (see 3 Wils. 461,) yet in order to avoid the necessity of proving the precise estate as alleged, it may be advisable to adopt the above form, which will suffice, 2 Saund. 133 b, 253 d.—Com. Dig. Pleader, C. 39. The plaintiff must distinctly allege and prove such a permanent injury as to affect his reversionary interest; an injury merely affecting the possession will not

suffice, 1 M. & S. 234. The want of such an allegation will be a cause for arresting the judgment; therefore, when the plaintiff declared as a reversioner of a yard and part of a wall, which W. F. occupied as tenant to him, and that the defendant, wrongfully placed on the wall quantities of bricks and mortar, and raised it to a greater height than before, and placed pieces of timber on the wall, overhanging the yard, *per quod* the plaintiff during all the time lost the use of the wall, and by means of the timber overhanging the wall, the rain, flowed from the wall on the yard, and thereby the yard and wall were injured, and did not state that his reversion had been prejudiced, the court arrested the judgment, 1 M. & S. 234. If the tenant holds under a written agreement, it must, it seems, be procured, 4 B. & C. 465.

(*g*) The precise local situation of the premises need not be inserted.

(*r*) A mortgagor is tenant to mortgagee. —5 B. & A. 604.

(*s*) The allegation as to the possession or title still continuing, is immaterial, and need not be proved, 3 Taunt. 137.

TO HOUSES
OR LAND
IN REVER-
SION.

said, wrongfully and unjustly, without the leave or license of, and against the will of the said plaintiff [*here state the nuisance or subject-matter of complaint, and which must be shown to have been of such a permanent nature as to affect the reversionary interest, 1 M. & S. 234. The description of the injury will necessarily vary according to the circumstances of each case; see the forms referred to below in the note, conclude thus:*] By means of which said several premises the said plaintiff hath been and is greatly injured, prejudiced, and aggrieved in his reversionary estate and interest (t) of and in the said messuage and premises, with the appurtenances, so in the possession and occupation of the said E. F. as tenant thereof to the said plaintiff as aforesaid, to wit, at, &c. (*venue*) aforesaid.

For a nuisance to a house in which plaintiff had reversion, and for stopping up a chimney, whereby the rooms were rendered smoky, &c.
(u).

[*779]

For that whereas, long before and at the time of the committing of the several grievances by the said defendant hereinafter *mentioned, a certain messuage and premises, with the appurtenances, situate in the county of — [or at, &c.] was in the possession and occupation of a certain person, to wit, one E. F. as tenant thereof to the said plaintiff, the reversion thereof expectant on the determination of the said tenancy then and still belonging to the said plaintiff, to wit, at, &c. (*venue*). And whereas also, before and at the time of the committing of the several grievances hereinafter mentioned, the said defendant was and still is possessed of a certain other messuage and premises, with the appurtenances, situate and being near and adjoining to the said messuage and premises first mentioned, to wit, at, &c. (*venue*) aforesaid. And whereas for divers and very many years before and until and at the time of committing the grievance hereinafter next mentioned, there was, and of right ought to have been, and still of right ought to be, a certain flue, funnel, or passage, for smoke, leading from and out of a certain room in and parcel of the said first-mentioned messuage and premises, unto and into and communicating with a certain chimney, being in the said messuage and premises of the said defendant, into, through, and out of, which said chimney, so being in the said messuage and premises of the said defendant, the smoke which might from time to time arise and proceed from the wood, coals and other fuel, kindled, burnt, and consumed at and in a certain fire-place in the said room for the necessary heating, and the wholesome and convenient use and occupation thereof, during all the time aforesaid until the committing of the grievance hereinafter next mentioned, was used and accustomed, and of right ought, by and by means of the said flue, funnel, or passage, to enter, pass, ascend and be carried away, to wit, at, &c. (*venue*). Yet the said defendant well knowing the premises, but contriving, and wrongfully intending to injure prejudice, and aggrieve the said plaintiff in his reversionary estate and interest of and in his said messuage and premises, with the appurtenances, whilst the said messuage and premises were so in the possession and occupation of the said E. F. as tenant thereof to the said plaintiff as aforesaid, whilst the said plaintiff was so interested therein as aforesaid, to wit, on, &c. at, &c. (*venue*) wrongfully and unjustly, and without the

(t) This allegation is necessary, and must be proved, 1 M. & S. 234, 239.

(u) See ante, 777, note.

TO HOUSES
OR LAND
IN REVER-
SION.

[*780]

leave or license of the said plaintiff, by and by means of divers large quantities of bricks, stones, and mortar, shut, closed, stopped up, and obstructed the said flue, funnel, or passage, and the same so shut, closed, stopped up, and obstructed as aforesaid, kept and continued for a long space of *time, to wit, from the day and year aforesaid, hitherto, and still doth keep and continue, whereby such smoke was and is wholly hindered and prevented from entering, passing, ascending, and being carried away, into, and through and out of the said chimney from the said room, by or by means of the said flue, funnel, or passage, and the said room hath thereby been rendered and still is uncomfortable, unwholesome, and unfit for habitation; and the said messuage and premises, with the appurtenances of the said plaintiff, is thereby become greatly deteriorated and lessened in value. By means of which said several premises, the said plaintiff hath been and is greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said messuage and premises, with the appurtenances, so in the possession and occupation of the said E. F. as tenant thereof to the said plaintiff as aforesaid, to wit, at, &c. (*venue*) aforesaid.—[Add other counts, stating the injury less particularly.]

NOT RE-
PAIRING
FENCES.
For not
repairing
a fence
between
plaintiff's
and de-
fendant's
closes,
whereby
plaintiff's
cattle es-
caped, and
were hun-
ted and
damaged,
and de-
fendant's
cattle got
into plain-
tiff's close
and com-
mitted
damage
(w).

[*781]

[*Commencement as ante*, 596. *The venue is local*.]—For that whereas the said plaintiff heretofore, to wit, on, &c. was, and from thence hitherto hath been, and still is, *lawfully possessed*, and in the occupation of a certain close, situate and being in the parish of — in the county of —. And the said defendant, during the time aforesaid, was, and still is, possessed of, and in the occupation of a certain other close, situate and being in the parish and *county aforesaid, and contiguous and next adjoining to the said close of the said plaintiff. And the said defendant by reason of the possession of his said close, with the appurtenances, during all the time aforesaid, of right ought (x) to have repaired and amended, and still of right ought to repair and amend, a certain hedge or fence, between the said close of the said plaintiff and the said close of the said defendant as often as occasion hath required, to prevent cattle lawfully feeding and depasturing, or being in those respective closes from erring or es-

(w) See the forms, Bro. Rep. 62, 486.—Herne, 61, 62.—1 Bro. Ent. 66.—8 Wentw. Index, lxx.—Morg. Prec. 436.—1 Rich. C. P. 131.—Lil. Ent. 64, 69. As to the law, see Vin. Ab. Fences.—1 Taunt. 529.—Harrison, Landl. & Ten. 455. When the defendant's cattle have escaped into plaintiff's close, he may declare either in case or trespass, 1 Salk. 335. The action should in general be against the occupier and not the landlord, who is not in possession, 4 T. R. 318.—2 Hen. Bla. 360.—12 Mod. 168. If a man who ought to inclose against land, do not inclose, whereby the cattle of his tenants enter into the land and do damage, the owner may have his remedy, Bul. N. P. 74. So an action on the case lies for breaking the fences of a third person, whereby the cattle of the plaintiff escape into the land of the former and are distrained, 1 Lord Raym. 273. Where the plaintiff declared in case against the tenant

for not repairing his fences *per quod*, the plaintiff's horse escaped into the defendant's close, and were there killed by the falling of a hay-stack, it was held that the damage was not too remote, and that the action was maintainable, 2 Y. & J. 391.

(x) This is now determined to be a sufficient allegation of the defendant's liability to repair. 1 Salk. 335.—1 Ventr. 264.—2 Ld. Raym. 804.—3 T. R. 766. It is not necessary to introduce the word "tenants," unless the defendant be owner as well as occupier of the soil, as it is only in the latter capacity that a mere lessee can be sued, 4 T. R. 318.—2 Hen. Bla. 360.—12 Mod. 168. *Debit reparare* is sufficient, without showing how the defendant is liable, 3 T. R. 766.—Cro. Jac. 665.—1 Salk. 335, 360.—2 Saund. 114 a, b, c.—1 Price, 27. It seems sufficient although the defendant was bound to repair by agreement, see 6 B. & C. 333, 338.

NOT RE-
PAIRING
FENCES.

escaping from and out of the one into the other of the said closes, through the defects and insufficiencies of the said hedge or fence, and doing damage in those respective closes. Yet the said defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and aggrieve the said plaintiff in that behalf, whilst the said plaintiff and defendant were so respectively possessed of their said respective closes, with the said appurtenances as aforesaid, to wit, on the day and year aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, to wit, at, &c. (*venue*) aforesaid, wrongfully and unjustly suffered and permitted the said hedge or fence between the said close of the said plaintiff, and the said close of the said defendant, to be and continue, and the same then was ruinous, prostrate, fallen down, out of repair, and in great decay, for want of needful and necessary repairing and amending of the same, whereby divers cattle, to wit, — horses, — cows, — sheep, &c. of the said plaintiff, lawfully feeding and depasturing in the said close, piece or parcel of land of the said plaintiff, on the several days and times aforesaid, went, erred, and escaped from and out of the same, through the said defects and insufficiencies of the said hedge or fence, into the said close of the said defendant, and were then and there driven about and hunted in the said *close of the said defendant. And thereby one of the said cattle, to wit, a certain cow of the said plaintiff, then and there prematurely calved, and became and was greatly injured and damaged. And the said plaintiff was forced and obliged to lay out and expend a large sum of money, to wit, the sum of £5, in and about the endeavoring to cure his said cow, and also by reason of the said defects and insufficiencies of the said hedge or fence on the several days and times aforesaid, divers other cattle, as well of the said defendant as of divers other persons, feeding and depasturing, and being in the said close of the said defendant on the several days and times aforesaid, through the said defects and insufficiencies of the said hedge or fence, erred and escaped out of the said close of the said defendant, into the said close of the said plaintiff, and ate up, trod down, trampled upon, consumed, and spoiled, other the grass and herbage of the said close then and there growing and being of great value, to wit, of the value of £20.— [Conclude as ante, 596.]

FOR
WASTE,
&c.

[*785]

By reversioner in fee against his tenant for years, for voluntary waste by cutting down trees, or other waste (y).

[Commencement as ante, 596.]— For that whereas the said defendant, before and at the time of the committing of the *grievances hereinafter

(y) See precedents, 8 Wentw. Index, 67 to 71. As to when this action lies, see ante, vol. i. 160, &c. By landlord against tenant, or by remainder-man in fee against the tenant for life, see 2 Saund. 262 c, d.—Mod. Emt. 201.—3 Lev. 128.—3 East, 38; and see the forms of stating the particular waste whether voluntary or permissive, in houses, lands, or woods, 2 Saund. 262 d, e, f.—3 East, 38. This action may be supported by any person who has the immediate remainder or reversion, whether in

fee, in tail, for life, or years, against the tenant in possession, or a stranger, see the instances, 2 Saund. 262, n. 7, where, see the mode of declaring in general. If the declaration be against a stranger for waste, at the suit of a reversioner, the right of the plaintiff, and the possession of the tenant should be described as in the precedent, ante, 777. An action on the case in the nature of waste lies at the suit of a landlord against his tenant, for acts done by the latter while holding over after the

AND
WASTE,
&c.

next mentioned, held and enjoyed a certain messuage or dwelling-house, and land, with the appurtenances, situate in the parish of — in the county of — as tenant thereof to the said plaintiff, that is to say, as tenant thereof from year to year, for so long a time as they the said plaintiff and defendant should respectively please, to wit, at, &c. aforesaid. Yet the said defendant contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in his reversionary estate and interest of and in the said messuage or dwelling-house, and land, with the appurtenances, whilst the same so were in the possession of the said defendant as tenant thereof to the said plaintiff as aforesaid, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [or, if in C. P. "before the commencement of this suit,"] at, &c. (*venue*) aforesaid, wrongfully and unjustly felled (z), cut down, and prostrated, and caused and procured to be felled, cut down and prostrated (a), divers trees, to wit, — oaks, — elms, — apple-trees, — walnut trees, and — other trees of the said plaintiff, of great value, to wit, of the value of £—, then standing, growing, and being in and upon the said land, and took and carried away the same, and converted and disposed thereof to his own use. Whereby the said plaintiff hath been and still is greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said messuage or dwelling-house, and land, with the appurtenances, to wit, at, &c. (*venue*) aforesaid.—[Add a count in trover, and conclude as ante 596.]

For that whereas the said defendant, before and at the time of the committing of the grievances hereinafter next mentioned, held and enjoyed divers, to wit, [1000] acres of land with the appurtenances, situate and being in the parish of — in the county of — as tenant thereof to the said plaintiff, under and by virtue of a certain demise thereof theretofore made, for a term which is since determined, to wit, at, &c. (*venue*). Yet the said defendant contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in his reversionary estate and interest of and in the said land, with the appurtenances, whilst the same were so in the possession of the said defendant, as tenant thereof to the said plaintiff as aforesaid, to wit, on, &c. and on divers other days and times between that day and the — day of — A. D. — at, &c. (*venue*) aforesaid, wrongfully and unjustly felled, cut, pros-

The like
in another
form, by a
reversioner,
against a tenant
who had
quit-tened
premises,
for having
cut down
timber
and com-
mitted
waste.

expiration of a notice to quit, 1 Campb. 360. The landlord of a tenant from year to year, although there be no reservation of the timber on the premises, may support an action of trespass *vi et armis* against a third person for carrying it away after it has been cut down, 2 Chit. Rep. 686. Where a lessor during the term cut down some oak pollards growing upon the demised premises, which were unfit for timber, it was held, that as the tenant for life or years would have been entitled to them if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them, 5 B. & C. 897.—8 D.

& R. 651, S. C.

(z) It is necessary in this action, as well as in the writ of waste, to state in the declaration the nature and kind of waste which is the subject of the action. See the several forms in 2 Saund. 252 d, e, f.

(a) When trees are excepted in the lease, trespass is sustainable, and not case, 8 East, 190; and, if not excepted, the interest of the lessor in the body of the trees continues, so that he may support trespass for carrying them away, 1 Saund. 322, n. 5.—2 T. R. 13.—2 Campb. 491. But if a lessor, during the term, cut down trees growing upon the demised premises, which are fit only for firewood, and the lessee take them away, trespass will not lie against the lessee at the suit of either the lessor or his vendee, 8 D. & R. 651.—5 B. & C. 897, S. C.

FOR
WASTE,
&c.

trated and destroyed, and caused and procured to be felled, cut, prostrated, and destroyed, divers timber trees, and other trees, and divers saplings and standards likely to become timber, that is to say, 500 timber trees, 500 other trees, 2000 saplings, and 2000 standards likely to become timber, and also large quantities of coppice wood and underwood, to wit, 2000 cart-loads of coppice wood, and 2000 cart-loads of underwood, at those times respectively standing, being, and growing, in and upon the said land, the coppice wood and underwood, so felled and cut as aforesaid, at the several times of felling and cutting thereof, not being of fit, proper, and seasonable growth for being felled and cut; and the said timber trees, other trees, saplings, standards, coppice wood, and underwood, being of great value, to wit, of the value of £1000, and took and carried away the same respectively, and converted and disposed thereof to his own use; and the said defendant also, on the said several days and times aforesaid, and during his said tenancy, took down, pulled down, prostrated, and destroyed a certain kiln, to wit, a lime kiln, of great value, to wit, &c. standing and being on the said premises, and took and carried away the same, and the materials thereof, containing, to wit, 50 cart-loads of bricks, 50 cart-loads of stone, 50 cart-loads of mortar, 100 weight of iron, and 500 other building materials, and carried away the same, and converted and disposed thereof to his own use, whereby the said plaintiff hath been and still is, greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said land, with the appurtenances, to wit, at, &c. (*venue*) aforesaid.

Second
count, for
not cut-
ting down
timber, as
defendant
ought to
have done.

And whereas also the said defendant, before and at the time of the committing of the grievances hereinafter next mentioned, held and enjoyed divers, to wit, 1000 acres of other land, with the appurtenances, comprising, amongst other land, divers, to wit, 300 acres of coppice wood, and 300 acres of underwood, situate and being in the county aforesaid, as tenant thereof to the said plaintiff, to wit, at, &c. (*venue*) aforesaid; and thereupon it then and there became and was the duty of the said defendant to cut the coppice wood and underwood, growing in and upon the said premises, at due and proper times and seasons. Yet the said defendant contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff, in his reversionary estate and interest of and in the said land, with the appurtenances, whilst the same were so in the possession of the said defendant, as tenant thereof to the said plaintiff, as aforesaid, to wit, on, &c. and from thence, for a long and unreasonable time, to wit, until the — day of — A. D. — wrongfully delayed cutting, and did not cut divers, to wit, 100 acres of coppice wood, and 100 acres of underwood, of and belonging to the said premises, which ought to have been cut before, to wit, in the year of our Lord — and wrongfully and injuriously cut the same, after the expiration of such reasonable time as aforesaid, to wit, on the — day of — in the year of our Lord — and just before the expiration of the said tenancy of the said defendant, by reason whereof he the said plaintiff was, by the said defendant, wrongfully and unjustly deprived of the benefit of the fresh growth of the said underwood and coppice wood, after the time when the same ought to have been cut, and which he would have had if the same

had been cut at due and proper time in that behalf, and thereby the said plaintiff hath been, and is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said lands, with the appurtenances, to wit, at, &c. (*venue*).

FOR
WASTE,
&c.

[*Commencement as ante*, 596.]—For that whereas the said defendant, heretofore, to wit, on, &c. at, &c. (*venue*) was, and from thence hitherto hath been, and still is, tenant to the said plaintiff, of a certain messuage, farm, land, and premises, with the appurtenances, situate in the parish of — in the county of —, and by reason thereof, during *all that time it was the duty of the said defendant, as such tenant as aforesaid, to manage, use, and cultivate the said farm, lands and premises, with the appurtenances, in a good and husbandlike manner, and according to the custom of the country where the said farm, lands, and premises were so situate as aforesaid, to wit, in the parish and county aforesaid. Yet the said defendant, not regarding his duty in that behalf, but contriving, &c.— [State the breaches according to the fact, as in *assumpsit*, ante, 307 to 313. If the action be not for repairing, the obligation to repair, and the breach should be stated as ante, 307 to 313. When the action is for the breach of an express covenant, it is usual in one count, immediately after the statement of the tenancy, to allege the terms of the tenancy, the breach of which is complained of as follows:—"under and subject to certain terms and conditions to be performed and fulfilled by and on the part of the said defendant, that is to say, that, &c." Then set forth the covenant in the lease, &c. Add a count in *trover*, if there be any evidence to support it, and conclude as ante, 596. By incoming tenant against outgoing, 16 East, 71.]

By land-
lord
against
tenant, for
not cultivating
according to
good husbandry,
or for not repairing,
&c. (d).
[*786]

[*Commencement as ante*, 596.]—For that whereas the said plaintiff, before and at the time of the committing of the said grievances by the said defendant hereinafter mentioned, was, and from thence hitherto hath been,

TO WATER-
COURSE,
&c.
For diverting
the water
of a river
from
plaintiff's
mill (c).

(b) See forms in *assumpsit*, and notes, ante, 307.—When case is maintainable, *id.* and ante, vol. i. 162.

(c) See forms, 8 Wentw. Index, lxx.—2 East, 497.—4 Id. 107.—6 Id. 208.—Lil. Ent. 55.—Plead. A. 74, 78, 108, 226, 251, 300, 307, 311, 365.—Morg. 349, 365.—2 Rich. C. P. 163. And a form against a canal company for not managing the canal according to act of parliament, 3 Y. & J. 60.—See a more general form, 1 Mall. 141.—Post, 794, 5, and the notes to the form, ante, 769, most of which are applicable. An action lies for diverting or obstructing a water-course to which the plaintiff has a right, and whereby he has sustained damage. Running water is originally *publici juris*, and an individual can only acquire a right to it by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. But where the plaintiff alleged that defendant had erected one dam above plaintiff's premises, and widened an-

other, and thereby prevented the water from running in its usual course, and in its usual calm and smooth manner to the plaintiff's premises, and thereby the water run in a different channel, and with great violence, and injured the banks and premises of plaintiff, but did not allege an injury from the want of a sufficient quantity of water, and the jury found that plaintiff's premises were not injured, but were of opinion that defendant had no right to stop the water, or keep it pent up in the summer time: it was held that the plaintiff could not recover damages for the erection of the dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water, 2 B. & C. 910.—4 D. & R. 583, S. C.—The owner of land through which a river runs, cannot, by enlarging a channel of certain dimensions, leading out of the river through which the water had been used to flow, before any appropriation of it by another, divert more of it to the prejudice of any other land-owner lower down the river, who had at any time before such en-

TO WATER
COURSE,
&c.

[769]

and still is (d), lawfully possessed (e) of certain [iron and tin] works and premises, with the appurtenances, situate and being in the county of — [or at (f), &c.] and by reason thereof before (g) and at the time of the committing of the grievances hereinafter mentioned, of right (h) ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or *water-course in the county aforesaid, which during all that time of right ought to have run and (i), flowed and until the diversion thereof hereinafter mentioned, of right had run and flowed, and still of right ought to run and flow unto (k) the said works of the said plaintiff, for the supplying the same with water for the working (l), thereof to wit, at, &c. (venue) aforesaid. Yet the said defendant well knowing

largement appropriated to himself the surplus water which did not escape by the former channel, 6 East, 208. And the occupier of a mill may maintain an action for forcing back water, and injuring his mill, although he has within a few years previous, erected a wheel requiring less water than the one he had previously used. 1 B. & A. 258.

But where the defendant erected a dam above the mill of the plaintiff, by which the water was diverted from its accustomed channel, but to which it returned long before it reached the plaintiff's mill, which diversion affected the regularity of the supply, though it produced no waste of water, it was held that the plaintiff was entitled to recover, 7 Moore, 345. Where a plaintiff, who had a right to irrigate his meadow, by placing a dam of loose stones across a small stream, and occasionally a board or fender fastened (the board by means of two stakes) which had never been done by his predecessor, and the defendant, who had rights on the same stream, having removed the stakes and the boards also, a verdict was given for the plaintiff, in an action for such removal; the court refused to set it aside, holding, that the defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency, incompatible with the defendant's rights, 6 Bing. 379. After twenty years' uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues above ground, and the owner of an adjoining close cannot lawfully cut a drain, whereby the supply of water to the spring is diminished, 1 Campb. 463. If one has anciently pits, which are separated by a rivulet, he may cleanse them, but cannot change or enlarge them to the injury of the water-course, 1 Wils. 174.

(d) This allegation is immaterial, and need not be proved. 3 Taunt. 137, 8, 9.

(e) The statement of possession is sufficient, ante, 769.

(f) The venue is local, but a local description of the nuisance is unnecessary, 2 East, 477. A variance in a statement of

the local situation from that proved, would be fatal. Describing a weir to have been erected by the defendant, at H., when it was erected at a lower part of the same water, at T., the variance was held fatal, 1 New Rep. 290. 2 Smith's Rep. 677, S. C.

(g) Sometimes this allegation would be improper, 4 East, 107.—6 Id. 438.—1 Taunt. 205, 206.—1 B. & P. 37. And where one declared in case for obstructing a water-course upon his possession of a mill, with the appurtenances, and that by reason of such his possession, he had a right to the use of the water running in a certain tunnel to the mill; it was held, that such allegation was not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose, for a certain consideration, but of which no conveyance was made by him to the plaintiff, and he had since refused assent, because the plaintiff had not the water by reason of his possession of the mill, but by parol license or contract which could not pass the title to the land, and the license was revocable and revoked, 4 East, 107; and see 5 B. & C. 221.—7 D. & R. 783, S. C.

(h) Ante, 769, and 6 East, 208.

(i) It is not necessary to show any other title in a declaration for the diversion of a water-course than "*quæ ad terram*," &c. of plaintiff "*currens consuevit*;" 2 Saund. 114.—Ante, 769.—Cro. Car. 500, 575.—3 Lev. 139.—3 Mod. 49.—1 Show. 64.—3 Show. 243.—Carth. 85.—1 Leon. 247.—Palm. 290.—3 Lev. 133, S. C.—2 Vent. 292.—Fitz. N. B. 123, and see 6 M. & S. 29.

(k) It is not necessary to show the termini of a water-course, Skin. 389.—Comb. 231.

(l) If the defendant was entitled to irrigate, here insert in one count the following qualifications of the plaintiff's right; viz. "*save and except at such times when it should and might be reasonable and proper to water a certain close in the occupation of the said defendant, near the said water-course, with reasonable quantities of the water thereof.*"

the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the said plaintiff in this respect, and to deprive him of the use, benefit, and advantage of the water of the said stream, and to hinder and prevent the said plaintiff from working his said works in so ample and beneficial a manner as he had theretofore done, and of right ought to have done, and to injure him in the way of his trade and business of a manufacturer of [tin plates] which he, during all the time aforesaid, exercised and carried on, and still doth exercise and carry on, at the said works and premises, and to put him to great charge, expense, trouble, and inconvenience, whilst the said plaintiff was so possessed of his said works and premises, with the appurtenances as aforesaid, and so exercised and carried on his said trade and business therein, to wit, on, &c. and on divers other days and times, between that time and the day of exhibiting the bill of the said plaintiff, against the said defendant in this behalf, [or if in C. P. "before the commencement of this suit,"] to wit, in the county aforesaid (m) wrongfully and injuriously cut (n), dug, and made, and caused to be cut, dug, and made, in and out of the sides of the said stream or water-course above the said works and premises, divers, to wit, — sluices, — trenches, — channels, and — cuts, of great depth and width, to wit, of the width of — feet, and of the depth of — feet, and kept and continued, and caused to be kept and continued the said sluices, trenches, channels, and cuts, on the sides of the said stream or water-course, for a long space of time, to wit, from thence hitherto, and thereby during all the time aforesaid, unlawfully and wrongfully diverted and turned divers *large quantities of the water of the said stream or water-course out of and away from the said works of the said plaintiff, and stopt, prevented, and hindered the water of the said stream or water-course from running or flowing along its usual course to the said works, and from supplying the same with water for the necessary working thereof, as the same of right ought to have done, and otherwise would have done, and by reason thereof the water of the said stream or water-course, sufficient for the supplying of the said works of the said plaintiff, during all or any part of that time, could not nor did run or flow to the same, as the same of right ought to have done, and otherwise would have done, and the said plaintiff thereby, for want of such sufficient water, could not, during that time, use his said works and premises, or follow, use, or exercise his said trade or business therein in so large, extensive, and beneficial a manner as

the water
occasion;
etc.

[*790]

(m) If the defendant was not entitled to irrigate, then insert the following words: "*and at times when it was not reasonable or proper to water the said close of the said defendant, with the said stream or water-course.*"

(n) It seems that a declaration for obstructing a water-course, without showing how, is bad on demurrer, but not after verdict, 1 Ld. Raym. 452, *sed Quere*. The injudicious act should be described according to the fact, see ante, 771, n.; a count for diverting and turning, &c. is not supported by proof of penning back and checking a stream, 6 Price, 1; and 5 Taunt. 534. Where the declaration alleged that defendant placed and raised a dam across the

stream, and thereby diverted and turned the water, and prevented it from running along its usual course to the plaintiff's mill, and from supplying the same with water for the necessary working thereof, as the same of right ought and otherwise would have done: it was held that such allegation was supported by proof, that in consequence of the dam, the water was prevented from being regularly supplied to the plaintiff's mill, although the stream was not diverted, as the dam was erected above the mill, and the water returned to its regular course long before it reached the mill, and there was no waste of water occasioned by the erection of the dam, 7 Moore, 345.

TO WATER
COURSES,
&c.

Second
count, sta-
ting a gen-
eral diver-
sion of the
water, with-
out showing
the means
(o).

[*791]

Third
count,

he might and otherwise would have done, but was thereby during all that time deprived of the use and enjoyment of his said works and premises, and of all the benefits, profits, gains, and advantages which he otherwise might and would have made, by carrying on his trade and business therein, to wit, at, &c. (*venue*) aforesaid.—And whereas also the said plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of certain other works and premises, with the appurtenances, situate and being in the county aforesaid, near to a certain other stream or water-course there, and which said last-mentioned stream or water-course, before and at the time of the committing of the grievances hereinafter next mentioned, had run and flowed, and been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow in great plenty and abundance, unto the said last-mentioned works of the said plaintiff, for the supplying the same with necessary water for the working thereof, to wit, at, &c. aforesaid. Yet the said defendant, well knowing the said last-mentioned premises, but contriving and intending to injure and prejudice the said plaintiff in this behalf, and to deprive him of the use, benefit, and advantage of the water of the said last-mentioned stream or water-course, and to deprive him of the benefit and profits of his said last-mentioned works, and of his trade and business as manufacturer *of [tin plates] as aforesaid, and to put him to great charge, trouble, expense, and inconvenience, whilst the said plaintiff was so possessed of the said last-mentioned works, with the appurtenances as aforesaid, and carried on the said business therein, to wit, on the day and year aforesaid, and on divers other days and times, between that day and the day of exhibiting this bill, [or if in C. P. “before the commencement of this suit,”] wrongfully and unjustly diverted and turned divers large quantities of the water of the said last-mentioned stream and water-course out of the same, and away from the said last-mentioned works of the said plaintiff, and hindered and prevented (p) the water of the said last-mentioned stream or water-course from running or flowing along its usual course to the said last-mentioned works of the said plaintiff, and from supplying the same with water for the necessary working thereof as the same ought to have done, and otherwise would have done, and by reason thereof the water of the said last-mentioned stream or water-course, sufficient for the supplying of the said last-mentioned works, during that time, could not nor did run or flow to the same, as the same ought to have done, and otherwise would have done, and the said plaintiff, for want of sufficient water, could not, during that time, use his said last-mentioned works, or follow, use, or exercise his trade and business therein, in so large, extensive, and beneficial a manner, as he ought to have done, and otherwise would have done, but was thereby, during all that time, deprived of the use and enjoyment of the said last-mentioned works and premises, and of all benefit, profit, gain, and advantage which he otherwise might and would have made, by carrying on his said trade and business therein, to wit, at, &c. (*venue*) aforesaid.—And whereas also

(o) See a more general form, 1 Mall. 141; but see ante, 789, note (n).

(p) *Quare*, if it ought not to be averred

how the defendant prevented the water flowing, &c. see 1 Lord Raym. 452—Ante, 789, note (n).

the said plaintiff, before and at the time of committing the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of certain other works and premises, with the appurtenances, situate and being in the county aforesaid, near to a certain other stream or water-course there, and which said last-mentioned stream or water-course, before and at the time of committing *the grievances hereinafter mentioned, had run and flowed, and had been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance, unto the said last-mentioned works of the said plaintiff, for the supplying of the same with necessary water for the working thereof, to wit, at, &c. (*venue*) aforesaid.—And whereas the said defendant, before and at the time of the committing of the same grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, possessed of divers, to wit, — closes of land, on the banks and sides of the said last-mentioned stream or water-course, and the said defendant, by reason thereof, during all that time aforesaid, of right ought to have repaired and amended, and still of right ought to repair (*r*) and amend, such parts of the banks of the said stream or water-course, which are situate within, and are parts of the same closes, as occasion hath required, or should require, to prevent the water of the said last-mentioned stream or water-course from escaping or running from the same through the same banks, through the defects and insufficiencies thereof. Yet the said defendant, well knowing the said last-mentioned premises, but contriving and intending wrongfully and unjustly to injure, prejudice, and aggrieve the said plaintiff in this behalf, and to deprive him of the use, benefit, and advantage of the water of the said last-mentioned stream or water-course, and of the benefits and profits arising from his exercising and carrying on his said trade and business in the said last-mentioned works and premises as aforesaid, whilst the said plaintiff was so possessed of the said last-mentioned works and premises, with the appurtenances, as aforesaid, and carried on his said trade and business therein, to wit, on, &c. and from thence for a long space of time, to wit, hitherto, wrongfully and unjustly suffered and permitted the said banks to be and continue, and the same, during all that time, were ruinous and in bad condition for want of needful and necessary repairing and amending the same, whereby divers large quantities of the water of the said last-mentioned stream or water-course which otherwise would have run and flowed to the said last-mentioned works of the said plaintiff, and have worked the same, on the said day and year aforesaid, and on divers other days and times, between that day and the *day of exhibiting the bill aforesaid, [or if in *C. P.* “before the commencement of the suit,”] escaped and ran from and out of the said last-mentioned stream or water-course, through the said defects and insufficiencies of the said banks, and became and were wholly lost to the said plaintiff, and never did run or flow to the said last-mentioned works, for the working thereof, as the same ought to have done, and otherwise would have done, and thereby the said plaintiff, for want of the said water, could not, during

TO WATER-
COURSES,
&c.

for not
keeping
the banks
of the riv-
er in re-
pair (*g*).
[*792]

[*793]

(*g*) See Plead. A. 226. This count is proper, in order to avoid the risk of not being able to prove that the defendant made the cuts, as stated in the first count.

(*r*) This is a sufficient allegation, *Ld. Raym.* 1568.—*Salk.* 360.—3 *T.* 766.—2 *Saund.* 113, 14.—*Ante*, 780, note.

TO WATER-
COURSE,
&c.

Fourth
count, for
widening,
&c. cuts
from the
stream (e).

[*794]

all or any part of the time last aforesaid, use or work his said last-mentioned works, or follow, use, or exercise his said trade or business therein, in so large, extensive, and beneficial a manner as he ought to have done, and otherwise would have done, and was thereby during all that time, deprived of the use and enjoyment of his said last-mentioned works, and of the benefits, profits, and advantages which he otherwise might and would have derived and acquired from carrying on his said trade and business, to wit, &c. (*venue*) aforesaid.—And whereas also the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is lawfully possessed of certain other works and premises, with the appurtenances, situate in the county aforesaid, near to a certain other stream or water-course, which before and until the time of the committing of the grievances by the said defendant as hereinafter mentioned, had run and flowed, and had been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance, unto the said last-mentioned works of the said plaintiff for the supplying of the same with necessary water for the working thereof, to wit, at, &c. (*venue*) aforesaid; yet the said defendant well knowing the said last-mentioned premises, but contriving, and intending unlawfully and wrongfully to injure and prejudice the said plaintiff in this behalf, and to deprive him of the use, benefit, and advantage, of the water of the said last-mentioned stream or water-course, and to deprive him of the benefit and profit of his said last-mentioned works, and his trade and business as such manufacturer as aforesaid, and to put him to great charge, trouble, expense, and inconvenience, whilst he the said plaintiff was so possessed of the said last-mentioned works and premises, with the appurtenances as aforesaid, and carried on the said *business therein, to wit, on the day and year aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, [or if in C. P. “before the commencement of this suit,”] wrongfully and injuriously widened, deepened, and enlarged, divers, to wit, — feeders, — sluices, — cuts, and — water-courses, leading from and out of the said stream or water-course in this count first above mentioned, and thereby, on those several days and times drew off, and diverted from the said stream or water-course, a much greater quantity of water than had before then used to flow, or ought then to have flowed from the said stream or water-course, and away from the said last-mentioned works of the said plaintiff, and hindered and prevented the water of the said last-mentioned stream or water-course from running or flowing along its usual course to the said last-mentioned works of the said plaintiff, and from supplying the same with water for the necessary working thereof, as the same ought to have done, and otherwise would have done, and wrongfully and injuriously kept and continued the said feeders, sluices, cuts, and water-courses, so widened, deepened, and enlarged, and the water so drawn off in larger quantities as aforesaid, from thence hitherto and by reason thereof, the water of the said stream or water-course, sufficient for the supplying of the said last-mentioned works, during all or any part of that time, could not, not did run or flow to the same, as the same ought to have done, and

(e) As to this count, 6 East, 208.—1 Wils. 175.

otherwise would have done, and the said plaintiff thereby, for want of such sufficient water, could not, during all or any part of that time, use his said last-mentioned works and premises, or follow, use, or exercise his trade and business therein, in so large, extensive, and beneficial a manner as he ought to have done, and otherwise might and would have done, but was thereby during all that time deprived of the use and enjoyment of the said last-mentioned works and premises, and of all the profits, benefits, and advantages, which he otherwise might and would have made by carrying on his said trade and business therein, to wit, at, &c. (*venue*) aforesaid.—[*Conclusion as ante*, 596.]

TO WATER-COURSES, &c.

For that whereas, before and at the time of the committing of the grievances by the said defendant hereafter next-mentioned, the said plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of a certain mill and premises, with the appurtenances, situate in the county of —, near unto a certain stream of water running towards the said mill and premises, and in and across which said stream of water there then was and of right ought to have been, and still of right ought to be a certain hatch, for the purpose of preventing the water of the said stream from running to the said mill, to wit, in the county aforesaid. Yet the said defendant well knowing the premises, but contriving and intending to injure and aggrieve the said plaintiff, heretofore, to wit, on, &c. in the county aforesaid, seized and took the said hatch, and cast and threw the same therefrom, and thereby and otherwise on the day and year aforesaid, and on divers other days and times between that day and the day of exhibiting of the bill of the said plaintiff in this behalf, [or if in *C. P.* “before the commencement of this suit,”] caused and procured divers large quantities of the water in the said stream to flow to the said mill of the said plaintiff, which would otherwise have run and flowed away from the same, and thereby the said plaintiff was, on those several days and times, hindered and prevented from repairing a certain wheel, with the appurtenances, of and belonging to the then said mill, whereby also the said plaintiff has been and is prevented from working his said mill so extensively and advantageously as he otherwise would have done, and has lost and been deprived of the profits and advantages which he otherwise might and would have derived and acquired from the said mill, to wit, in the county aforesaid.

Declaration for removing a hatch placed to prevent water from running to a mill, *per quod* plaintiff could not repair or work mill.

For that whereas before and at the time of committing the grievances by the said defendant hereinafter mentioned, a certain close of meadow land, with the appurtenances, situate and being in the parish of — in the county of — and near to a certain stream or water-course there, was in the possession and occupation of one W. H. as tenant thereof to the said plaintiff, (the reversion thereof then and still belonging to the said plaintiff) to wit, at, &c.—And whereas also, long before, and until, and at the time of the committing of the grievances hereinafter mentioned, a great part of the water of the said stream or water-course did run and flow, and of right ought to have run and flowed, and still of right

For interrupting plaintiff in his reversionary right to irrigate a meadow (c).

(c) This was the form of declaration *ante*, 788, note (c). used in the case in 6 Bing. 379, noticed.

TO WATER-
COURSES,
&c.

ought to run and flow therefrom, under a certain arch, unto and into, and along a certain channel, and thence unto, into, and over a certain close of the said defendant, and from thence through a hole under the cellar of a certain dwelling-house, unto and into a certain channel, and from thence unto and into the said close of meadow land, for the irrigating and watering of the said close, and the benefit and improvement of the soil thereof, to wit, at, &c. Yet the said defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in his reversionary estate and interest of and in the said close of meadow land, with the appurtenances, whilst the same was so in the possession and occupation of the said W. H. as tenant thereof to the said plaintiff as aforesaid, and whilst the said plaintiff was so interested therein as aforesaid, to wit, on, &c. at, &c. wrongfully and unjustly, without the leave or license, and against the will of the said plaintiff, pulled down and removed, and caused and procured to be pulled down and removed, a certain board before then erected, and then standing and being in and across the said stream or water-course, for the purpose of diverting and turning the said part of the said water there under the said arch, and unto and into, and along the said channel and close of the said defendant, unto and into the said close of meadow land, for irrigating and watering the same, and benefiting and improving the soil thereof as aforesaid, and wrongfully and unjustly kept and continued, and caused to be kept and continued, the said board so pulled down and removed as aforesaid, for a long space of time, to wit, from thence, hitherto, and thereby, during the time aforesaid, wrongfully and unjustly let down and drew off, and caused to be let down and drawn off, a great part of the water of the said stream or water-course, which, during the time aforesaid, ought to have run and flowed, and otherwise might and would have run and flowed, and hindered and prevented the same from running and flowing under the same arch, unto, into, and along the said channel, and thence, unto, into, and over the said close of the said defendant, and through the said hole and channel, unto and into the said close of meadow land, for the purposes aforesaid, and by means of the several premises aforesaid, the said close of meadow land, and the soil thereof, have been and are greatly impoverished, deteriorated, and lessened in value, and the said plaintiff has been and is thereby greatly injured, prejudiced, and aggrieved in his reversionary estate and interest, of and in the said close of meadow land, with the appurtenances, so in the possession and occupation of W. H. as tenant thereof to the said plaintiff as aforesaid, to wit, at, &c. aforesaid.

[*795]

Against
the owner
of a wharf,
for placing
a tree in
the River
Thames
without a
buoy, and
other tim-
ber, un-
fastened,

*For that whereas the said defendant, before and at the time of the committing the grievance hereinafter next mentioned, was possessed of a certain wharf near to and adjoining the River Thames, to wit, at, &c. (*venue*).—And whereas also the said plaintiff, before and at the time of the committing of the grievances hereinafter next mentioned, was a barge-master, and was retained and employed by certain persons, to wit, &c. to carry and convey a large quantity, to wit, — bricks, to the said wharf of the said defendant, and there, to wit, at the said wharf, to deliver the same to the said defendant, and before and at the time of the committing of the grievances hereinafter next mentioned, a certain barge or vessel of the said plaintiff, of great value, to wit, of the value of £— was used

and employed by him in and about the delivery of the said bricks, to wit, at, &c. aforesaid; yet the said defendant not regarding his duty, but contriving and intending to injure and damnify the said plaintiff, heretofore, to wit, on, &c. wrongfully and injuriously put and placed a certain large tree, or piece of timber, in the said River Thames aforesaid, and near to the said wharf of the said defendant, sunk in the water and out of view, without placing, or causing to be put or placed, any buoy, mark, or other thing, to denote the same being there, and also wrongfully and injuriously kept and continued divers large quantities of other timber of the said defendant in the said River Thames, near to the said wharf, floating and beating about, unfastened and insecure, to wit, at, &c. (*venue*) aforesaid; by reason of the premises, and whilst the said barge of the said plaintiff was at the said wharf, having been and being so used and employed as aforesaid, to wit, on, &c. aforesaid, and upon the tide and water ebbing there, and the said plaintiff and his servants being wholly ignorant of the said tree, or piece of timber, so lying and being in the said River Thames as aforesaid, the said barge or vessel of the said plaintiff dropped and fell, and came upon the said tree, or piece of timber, and struck upon and against the same, and thereby the bottom of the said barge or vessel became and was greatly broken and staved, and divers large quantities of water thereupon then and there penetrated and came into the said barge, and filled and sunk the same; and also, by means of the premises, and of the said barge not being in a state to rise upon the return of the tide, as it otherwise would have done, the said other timber of the said defendant so floating and beating about, and unfastened and insecure as aforesaid, then and there floated over and upon the said barge, and then and there forced the side of the said barge out, and broke and destroyed the same, and thereby the said barge being of the value aforesaid, became and was of no use or value to the said plaintiff, and he the said plaintiff, hath lost and been deprived of the use of his said barge, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. (*venue*) aforesaid.

TO WATER-
COURSE,
&c.

whereby
plaintiff's
barge
struck
against
the tim-
ber.

For that whereas before and until, and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, and after the making of a certain act of parliament made and passed in the 80th year of the reign of his late Majesty King George the Third, intituled, "An act for making and maintaining a navigable communication *between Stowmarket and Ipswich, in the county of Suffolk," the said navigable communication had been and was made from Stowmarket to Ipswich aforesaid, and all the liege subjects of our said lord the king had been used and accustomed to have, and of right ought to have had, and still of right ought to have, the said navigable communication for the carriage and conveyance of their goods, wares, and merchandizes, in boats, barges, and other conveyances, in, upon, and along the said navigable communication, subject to the terms and provisions in the said act men-

For turn-
ing and di-
verting the
course of a
navigable
canal,
whereby
plaintiff's
barges
were hin-
dered from
proceeding
(u).

[*796]

(u) The plaintiff obtained a verdict, after having been nonsuited, and a new trial granted, on the ground, that if an individual sustains any particular damage in consequence of a nuisance to the public, he

may support an action, see Willes' R. 71, 73.—Carth. 194.—3 M. & S. 472. 4 M. & S. 101.—2 Bing. 263, 156. See a form against a canal company, 3 Y. & J. 60.

to which
certain
the

[*797]

tioned, to wit, at, &c. (*venue*) aforesaid. And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, divers boats, barges, and other vessels, to wit, — boats, — barges, and — other vessels of the said plaintiff were proceeding in and upon, and along the said navigable communication, subject to the terms and provisions in the said act mentioned, to wit, at, &c. (*venue*). And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, divers boats, barges, and other vessels, to wit, — boats, &c. of the *said plaintiff, were proceeding in, upon, and along the said navigable communication, with divers goods, wares, and merchandizes therein, of the said plaintiff, to be carried and conveyed therein, in, upon, and along the said navigable communication, to wit, at, &c. (*venue*) aforesaid. Yet the said defendant well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the said plaintiff in this respect, and to deprive him of the use and benefit of the said navigable communication, and to put him to great trouble, charge, inconvenience, and expense, whilst the said boats, &c. and the said goods, wares, and merchandizes of the said plaintiff in and on board thereof, were so proceeding in, upon, and along the said navigable communication as aforesaid, to wit, on, &c. aforesaid, and on divers other days and times, between that day, and the day of exhibiting the bill of the said plaintiff, wrongfully, unjustly, and unlawfully diverted and turned divers large quantities of the water of the said navigable communication, off and away from the same, and thereby stopped, prevented, and hindered the water of the said navigable communication from running and flowing along its natural course, as it ought to have done, and otherwise would have done, and thereby the said boats, &c. of the said plaintiff, with the said goods, wares, and merchandizes of the said plaintiff so laden in and on board thereof as aforesaid, and so proceeding in, along, and upon the said navigable communication as aforesaid, were stopped, prevented, and hindered from proceeding in, upon, and along the said navigable communication, for a long space of time, then next ensuing, to wit, for the space of five days from the day and year first above mentioned, and thereby the said plaintiff was not only deprived of the use, benefit, and enjoyment of his said boats, &c. and of divers, to wit, — horses, kept by him the said plaintiff to draw the same, and of all the benefits, profits, gains, and advantages which he otherwise might and would have made by the use and employment of the said boats, &c. in the carriage and conveyance of his said goods, wares, and merchandizes, in, upon, and along the said navigable communication as aforesaid, but was also thereby hindered and prevented from selling and disposing of a large quantity, to wit, — chaldrons of coals then on board the said boats, &c. and which he otherwise might and would have sold for divers large *profits and advantages in that behalf, to wit, at, &c. (*venue*) aforesaid.—And whereas also, after the making of the said act of parliament, and before the committing of the grievances hereinafter next mentioned, a certain navigable canal had been and was made from Stowmarket aforesaid to Ipswich aforesaid, in pursuance of the said Statute, and all the liege subjects of our said lord the king then had been used and accustomed to have, and of right ought to have, the use of the said navigable canal, for the carriage and conveyance of their goods, wares, and merchandize, in boats, barges, and other ves-

[*798]
Second
count, that
defendant
was pos-
sessed of a
mill on the
said canal,
but
wrongful-
ly and at
impro-

sels, in, upon, and along the said navigable communication, subject to the regulations in the said act mentioned, to wit, at, &c. aforesaid; and whereas also, before and at the time of committing the said last-mentioned grievances, the said defendant was possessed of a certain mill, and certain works near to the said navigable canal, and was entitled to use, in a reasonable, proper, and moderate manner, and at reasonable and proper times, the water of the said navigable canal, for the purpose of working the said mill and works, to wit, at, &c. (*venue*) aforesaid; and whereas also, before and at the time of the committing of the grievances herein-after next mentioned, divers boats, barges, and other vessels of the said plaintiff were proceeding in, along, and upon the said navigable canal, with divers goods, wares, and merchandizes of the said plaintiff, to be carried and conveyed therein, in, and along the said navigable canal, to wit, at, &c. (*venue*) yet the said defendant well knowing the premises last aforesaid, but contriving, and wrongfully and unjustly intending to injure and prejudice the said plaintiff in this respect, and to deprive him of the use and benefit of the said navigable canal, and to put him to great charge, trouble, expense, and inconvenience, whilst the said last-mentioned boats, barges, and other vessels of the said plaintiff, with the said goods, wares, and merchandizes in and on board thereof, were proceeding in, upon, and along the said canal as aforesaid, to wit, on, &c. and on divers other days and times, wrongfully and unjustly, and in an unreasonable and immoderate manner, and at unseasonable and improper times, diverted and turned divers large quantities of water from and out of the said navigable canal, the same being much larger quantities of water than were necessary for the proper working of his said mill and works, out of and away from the said navigable canal; and thereby stopped, prevented, and hindered the water of the said navigable canal from running and flowing along its natural course as it ought to have done, and otherwise would have done, and thereby the said last-mentioned boats, barges, and other vessels of the said plaintiff, with the said goods, wares, and merchandizes, of the said plaintiff, so laden in and on board thereof, and so proceeding in and along the said navigable canal as aforesaid, were stopped, prevented, and hindered from proceeding in, upon, and along the said navigable canal, for a long space of time then next ensuing, to wit, for the space of — days from the said day and year last-mentioned, and thereby he the said plaintiff was not only deprived of the use, benefit, and enjoyment of his said boats, barges, and other vessels, and of divers, to wit, — horses, kept by the said plaintiff to draw and tow the same in and along the said canal, and all the benefits, profits, gain, and advantages which he otherwise might and would have made by the use and employment of his said boats, barges, and other vessels, in the carriage and conveyance of his said goods, wares, and merchandizes as aforesaid, in, upon, and along the said navigable canal as last aforesaid, but was also thereby hindered and prevented from selling and disposing of divers, to wit, — chaldrons of coals, then on board the said boats, barges, and other vessels, and which he might and would have sold for divers large profits and advantages in that behalf, to wit, at, &c. (*venue*) aforesaid.—And whereas also, before and until the time of the committing of the grievances by the said defendant hereinafter mentioned, there was a certain navigable canal from, &c. aforesaid, to, &c. aforesaid, and the said plaintiff was there lawfully proceeding, with divers boats, barges, and

TO WATER-
COURSES,
&c.

per times
used more
water
than was
neces-
sary.

[*799]

Third
count,
more gen-
eral, that

TO WATER-
COURSES,
&c.

—
defendant
was pos-
sessed of
flood-
gates on
the said
canal, and
wrongful-
ly suffered
them to
remain
open,
whereby
plaintiff
was pre-
vented
from pro-
ceeding.

other vessels, in, upon, and along the said navigable canal, with divers goods, wares, and merchandizes therein, of the said plaintiff to be carried and conveyed therein, in and along the said navigable canal, to wit, at, &c. (*venue*) aforesaid; and whereas the said defendant, before and at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto hath been, and still is, possessed of certain works and premises near to the said canal, and of divers, to wit, — flood-gates, — sluices, and — flashes, adjoining to the said last-mentioned canal, and the said defendant by reason thereof, before and at the time of the committing of the grievances hereinafter mentioned, of right ought to have kept the said flood-gates, sluices, and flashes closed and shut, to prevent the water of the said last-mentioned canal from running and flowing out of and away from the said last-mentioned canal; yet the said defendant well knowing the premises, but contriving and intending wilfully to injure the said plaintiff, and to put him to great charges, whilst the said last-mentioned boats, barges, and other vessels of the said plaintiff, with the said goods, wares, and merchandizes in and on board thereof, were so proceeding in, upon, and along the said last-mentioned navigable canal, to wit, on, &c. and on divers other days and times, wrongfully and unjustly permitted the said flood-gates, sluices, and flashes, to be and continue, and the same were, during all that time, open, whereby the water of the said navigable canal was wasted, and prevented and hindered from flowing in its usual course, as it ought to have done, and otherwise would have done, and thereby the said boats, barges, and other vessels, were prevented and hindered from proceeding in, upon, and along the said navigable canal, &c. [*as in the count, ante*, 794, 5.]

DISTUR-
BANCE OF
COMMONS.
For dis-
turbance
of plain-
tiff's com-
mon of
pasture,
by turn-
ing sheep
on the
common
(w).

[*800]

IV. FOR TORTS TO REAL PROPERTY INCORPOREAL.

[*Commencement as ante*, 596.]—For that whereas (x) the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed (y) of a *certain messuage, and divers, to wit, — (z) acres

(w) For the forms, see 8 Wentw. Index, 50 to 54.—2 East, 154.—3 Wils. 279.—Morg. 320 to 336, 342.—Pl. A. 214; and for such an injury, where certain common fields ought to be cultivated in rotation, post, 802; and for injuries to common by taking off dung, putting on dung heaps, and otherwise injuring right of common, post, 805. Trespass or replevin are in many instances preferable to an action on the case in order to compel the defendant in his plea to state his supposed right of common, or other justification.

(x) This is correct, 2 Mod. 141.

(y) Formerly the declaration usually stated the plaintiff's seisin in fee; see Lil. Ent. 62; and this is necessary in a plea, 4 T. R. 719. But it is not necessary to state in a declaration any title to the common either by prescription or otherwise, and it is sufficient to allege that the plaintiff was possessed of certain land, &c. (as the case

may be) and by reason thereof, 15 East, 118.—3 Taunt. 24, had a right of common in such a place for his commonable cattle *levant and couchant* upon his land, and that the defendant disturbed him, whereby the plaintiff could not enjoy his common in so ample a manner as he ought to have done, 1 Saund. 346, n. 2.—2 Id. 113, note 1.—Com. Dig. Action on the Case for Disturbance, B. 1.—Willes, 621.—4 Mod. 418.—1 Ventr. 319.—*Ante*, vol. i. 414. But the allegation, "by reason of the possession," &c. is improper, if the right do not depend thereon, 4 East, 107. 6 East, 438; see post, 801, n. (f); and as a title need not be shown, *vide supra*, it should seem that those words may be omitted, see 15 East, 108. In general, a variance in the title, which is set out by way of inducement only, is immaterial, 16 East, 33.—4 Mod. 218.—Cro. Eliz. 336.—3 Taunt. 137.—2 Bla. Rep. 840.

(z) It is said to be proper to state a par-

of land (a), with the appurtenances, situate in the parish of —, in the county of —; and *by reason thereof* (b), during all the time aforesaid, of right ought to have had, and still of right ought to have, common *of pasture for all his (c) commonable sheep (d), *levant and couchant* (e) in and upon his said messuage and land, with the appurtenances (f), in a certain place, waste, *or common, called the —, situate, &c. (g) every year, at all times of the year (h), as to the said messuage and land, with the appurtenances (i), belonging and appertaining (k), to wit, at, &c. (venue) aforesaid. Yet the said defendant (l) well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff in this behalf, whilst he was so possessed

DISTURBANCE OF COMMONS.

[*801]

Injury.

ticular quantity, 4 Mod. 423; but the precise quantity is not material, Palm. 269.—Cro. Jac. 629, S. C.—Cro. Eliz. 531.

(a) If the plaintiff state he was possessed of a messuage and land, when in fact he was possessed of land only, he may still recover *pro tanto*, 2 B. & A. 260.—1 Chit. Rep. 104, 112, S. C.; and see ante, 549, a, note (e).

(b) See note (y), in the preceding page.

(c) This is in general material, 1 Saund. 348 c. This allegation will be supported in evidence, though proof should be adduced that the common was not sufficient to support all the plaintiff's cattle, 2 Chit. Rep. 297.

(d) Or if for all his commonable cattle, say "for all his commonable cattle," but if there be any doubt as to the extent of the right, it is proper to qualify the statement of the right of common, and the plaintiff need not show more than makes for him, 2 Hen. Bla. 234.—2 Wils. 269. Where the plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but that he had never kept any sheep, it was held that this was evidence of a right for all commonable cattle to be left to the consideration of a jury, 4 B. & C. 161.

(e) This is necessary, unless the right of common be for a certain number, 1 Saund. 28, n. 4. 348 b, c.—2 Id. 327. A lease to plaintiff's testator for years, determinable upon lives, of a farm, &c. together with *reasonable common of pasture*, &c. will support this allegation, 6 M. & S. 47; and the right is not destroyed by a subsequent conveyance to the plaintiff in fee of the farm and common of pasture thereto belonging, for this operated as a new grant of common. Id.

(f) It is not always necessary in pleading to state the common as appurtenant to land *eo nomine*, for if it be laid as appurtenant to a thing which, in intentment of law, *prima facie* comprehends land, it is sufficient, 1 Saund. 348. b. Care must be taken to state the right to be incident only to the premises in respect of which it is claimable. An averment as above, that plaintiff was entitled to common of pasture for all his cattle *levant and couchant* upon

his land, is well supported by evidence that the plaintiff was a part owner with defendant and others of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out in common their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained on such land during the winter, and though the custom proved was to turn out in proportion to the extent, and not to the produce of the land in respect of which the right was claimed; and it was held also, that it was not necessary to state his right to be with the exception of his own land, but it was well laid to be over the whole common, 1 B. & A. 706.

(g) If the plaintiff has some land of his own in *locus in quo*, say "his own land therein excepted," see Willes, 320.—Vin. Ab. Prescription, Y. pl. 23; but this is not absolutely necessary, 1 B. & A. 706. 6 B. & C. 16.—See note (f), ante.

(h) This will be taken to mean "all usual times of the day," 2 Hen. Bla. 224. 234. If the right of common be only at certain times of the year, it must be so described; see the form, 2 Saund. 2, 3.—Willes, 320. As to describing the right from old St. Thomas's Day, see 3 Bing. 351.—Post, vol. iii. p. 1060 a.

(i) See note (g), preceding page, and supra, n. (a).—Willes, 319.—15 East, 108. It is better to repeat the premises than to say "the said tenements," 4 Mod. 423.

(k) These are the usual words descriptive of a right of common, see Lil. Ent. 62. But if the right of common be not by virtue of prescription, but by grant or demise, omit the latter words, 4 East, 107.—6 Id. 438.—1 Taunt. 205.—1 B. & P. 371.—15 East, 108. In Willes, 319, it was held not to be necessary in pleading to allege, in express terms, whether it be common appendant, appurtenant, or in gross.

(l) The declaration for disturbance *generally* is sufficient, as well against a commoner as a stranger, 2 Bla. Rep. 817.—3 Wils. 278.—1 Saund. 346 a. and see 1 B. & A. 706; and it is not necessary in such case to show in the declaration that the defendant has any right of common id. *ibid.*; but in

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ANCE OF
COMMONS.**

Second
count, for
obstruct-
ing the
commons,
not stat-
ing how.

For injury
to plain-
tiff's right
of com-
mon in
certain
common
fields,
which
ought to
be cultiva-
ted in ro-
tation, and
one of
them left
annually
fallow (q).

[*803]

of *his said messuage and land, with the appurtenances, and entitled (m) to such common of pasture as aforesaid, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [or if in C. P. "the day of the commencement of this suit,"] to wit, at, &c. (venue) aforesaid, wrongfully and unjustly† [put and caused to be put, divers, to wit, — sheep (n), in and upon the said place, waste, or common called the —, and kept and depastured the same there respectively for a long time, to wit, from the putting the same respectively, as aforesaid hitherto (o); whereby the said plaintiff, on those several days and times, and during all the time aforesaid, was and is greatly injured and disturbed in the use and enjoyment of his said common of pasture there, and could not nor can have or enjoy the same in so large, ample, or beneficial a manner (p) as he otherwise, during all the time aforesaid, might and would have had and enjoyed the same to wit, at, &c. (venue) aforesaid. —And whereas also, &c.—[*Proceed as in the first count to the†, and then thus*—incumbered and injured the said common, and obstructed and disturbed the said plaintiff in the use and enjoyment of his said common of pasture there, so that the said plaintiff on the several days and times, and during the time aforesaid, could not, nor can have or enjoy the same in so large, ample, or beneficial a manner as he otherwise, during all the time aforesaid, might and would have had and enjoyed the same, to wit, at, &c. (venue) aforesaid. To the damage, &c.

For that whereas the said plaintiff now is, and for divers, to wit, — years and more, now last past, hath been lawfully *possessed of and in a certain messuage, and divers, to wit, — acres of land, with the appurtenances, lying and being in the parish of —, in the county of —; and the said plaintiff further saith, that there now are, and from time

an action against the lord, it is said to be necessary to state a particular surcharge, 2 Mod. 6.—1 Lutw. 107.—3 Wils. 290. See the form of a declaration against the lord, Herne, 125.—1 Saund. 346 a. If the lord wantonly and unnecessarily exercise his manorial rights to the injury of commoners of pasture, he is, it seems, liable to an action, 4 D. & R. 318.

(m) Plaintiff need not show that he turned any cattle on the common at the time the injury was committed, 2 Bla. Rep. 1223.

(n) If the action be brought against the lord, it is said that the plaintiff must state a surcharge, 2 Mod. 7.—3 Wils. 268; but not against a commoner or stranger, 2 Lutw. 101, 102.—1 Saund. 346 a.—Ante, note (l).

(o) If cattle are permitted to depasture the common, whether they belong to a stranger, or are the supernumerary cattle of a commoner, or whether they are driven or escape there, a commoner may have an action on the case, in which it is not necessary to prove that he has sustained any *specific damage*, the infraction of the right being a sufficient injury, 1 Saund. 346 a.—2 East. 164.

(p) This allegation is necessary, 1 Saund. 346 a.—9 Rep. 113 a.—2 Bla. Rep. 1235; but no evidence of any specific da-

mage need be adduced, Id. Ib.—2 East. 164.—Supra, n. (b).

(q) See notes, &c. ante, 799.—1 Saund. 340 b.—2 Id. 2 & 3. Where there is no custom which has become binding upon the parties, the common law rule appears to be, that those persons only who are owners of land within an open common field are entitled to enjoy the right of inter-commoning; and such right can be exercised at those times only when the corn is off the land, that is, after all the corn and grain have been reaped and gathered, and before any more has been sown, 1 B. & A. 706.—Willes, 319. Where A. being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having also a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect; it was held, that if during the term the cattle of B. came upon the land of A. he might distrain them damage feasant, and that A. in his replication (in answer to a plea pleaded by B. of his right of common in bar of the cognizance of A.) might set forth the special circumstances of the agreement and covenants, 2 Hen. Bla. 4.

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whereof the memory of man is not to the contrary, there have been lying and being in the said parish of —, in the county of —, three common fields, that is to say, one common field called [the Home Field,] one other common field called [the Lower Field,] and one other common field called [the Upper Field,] and which said three several common fields have, from all the said time immemorial, been used and accustomed to be, and ought to be, tilled and cultivated in the following course and method of husbandry and tillage, to wit, in every year in rotation, and successively, one of the said three fields hath been and of right ought to be, sown with wheat, or other corn or grain, and in and during that year hath been usually known and distinguished by the name of [the Wheat Field,] and another of the said common fields hath in such year been, and of right ought to be sown with barley, or other corn and grain, and in and during that year hath been usually known and distinguished by the name of [the Barley Field,] and the other of the said common fields hath in such year lain, and of right ought to lie, fallow, and be summer-tilled, and in and during that year hath been known and distinguished by the name of [the Fallow Field, or Summer-Tilled Field,] so that by such rotation each and every of the said three fields has been, and ought to be, one year sown with wheat, or other corn and grain, another year sown with barley, or other corn or grain, and the third year hath lain and ought to be fallow and Summer-tilled in rotation; and the said plaintiff further says, that he the said plaintiff by reason of his being so possessed of his said messuage and lands, with the appurtenances, during the said space of four years above mentioned, hath had, and of right ought to have had, and still of right ought to have, common of pasture yearly and every year, in and throughout such of the said common fields as by and according to the said rotation hath lain, or ought to lie, fallow, and be summer-tilled, his own land in that field only excepted, for [fifty] sheep, *levant and couchant* in and upon his said messuage and lands, with the appurtenances, in every such year, from the — day of —, according to the new and present style now used in this kingdom, until such time as such common field, or some part thereof, after the manner following, has been sown with wheat, or other corn or grain, according to the aforesaid courses and method of husbandry, as belonging and appertaining to the said messuage and lands, with the appurtenances; and the said plaintiff further saith, that in the year of our Lord — the said common field called, &c. according to the aforesaid usage and custom of merchants, was fallow and summer-tilled; yet the said defendant well knowing the premises, but contriving and maliciously intending to hurt, injure, and prejudice the said plaintiff in this behalf, and to deprive him in a great measure of his said common of pasture therein, in that same fallow field, whilst he the said plaintiff was so possessed of his said messuage and lands, with the appurtenances, as aforesaid, and during the time that the said plaintiff had and of right ought to have had, such right of common as aforesaid, and during the said time that the said common field was laying, and ought to have been laying fallow, to wit, on, &c. and on divers other days and times between that day and the — day of — in that year, all the said days and times being between the said — day of — in that year, and such times as the said fallow field, or any part thereof, was sown with wheat, or other corn

DISTURBANCE OF COMMONS. or grain at the parish of, &c. wrongfully, &c. unjustly, &c.—[*Here state the injury to the common, as ante, 801, or as in the following forms.*]

[*804] **[Same as the form, ante, 799, to the *800, and then proceed as follows:]*—caused to be erected and built divers, to wit, — cottages, and — other buildings, in and upon the said waste or common, and then and there wrongfully and unjustly brought, laid, and placed, divers, to wit, — pieces of timber, into and upon other parts of the said waste or common and then and there made a certain deep trench and pit of great length and depth, to wit, — feet in length, and — feet in depth, in other parts of the said waste or common, and wrongfully and unjustly kept and continued the said cottages and buildings so erected and built as aforesaid, and the said pieces of timber so brought, laid, and placed as aforesaid, and the said trench and pit so dug and made as aforesaid, there for a great length of time, to wit, from thenceforth hitherto, &c. whereby, &c.—[*State the damage, as in the form, ante, 799, and add a count for merely continuing the buildings on the common, and a count for general obstruction, not showing how, as ante, 802, and conclude as ante, 596.*]

For inclosing part of the common (r). [*Same as the form, ante, 799, to the *800, and then proceed as follows:]*—erected and made, and caused and procured to be erected and made a certain fence, in and upon the said waste or common, and thereby and therewith then and there inclosed a great part, to wit, — acres of the said waste or common, and separated and divided the same from the

[*805] residue of the said waste or common, and wrongfully *and unjustly kept and continued the said fence so erected and made as aforesaid, and the said part of the said waste or common, so separated and divided as aforesaid, for a long space of time, to wit, from thence hitherto; whereby, &c.—[*Damage, as ante, 802, and add two counts, as directed in the preceding form.*]

For digging turves. [*Same as the form, ante 799, to the *800 and then proceed as follows.]*—with spades and other instruments, cut and dug a great part, to wit, 100 square yards of the turf of the said waste or common, and the turves, to wit, — cart loads of turves there then cut and dug, took and carried away; whereby, &c. — [*Damage, as ante, 802. See 7 East, 121.*]

[*See a form for keeping too many rabbits on common, Lill. Ent. 62.*]

Fortaking excrement and dung off common (s). [*Same as the form, ante, 799, to the *800, and then proceed as follows:]*—took and carried away from and off the said waste or common, and converted and disposed thereof to his own use, divers large quantities of excrement, manure, and dung, to wit, [500] cart loads of excrement, [500] cart loads of manure, and [500] cart loads of dung, which, before and on the said several days and times had been dropped and made on the said waste or common, by the cattle from time to time feeding and depasturing thereon, and which ought to have remained and continued thereon, for the purpose of nourishing, manuring and increasing the grass and herbage there,

(r) 1 Mall. 121.

(s) See 2 East, 164.

whereby the said waste or common, and the grass and herbage thereof, were then and there greatly impoverished for want of the said excrement, dung, and manure, which would otherwise have remained and continued on the said waste or common, and nourished and increased the grass and herbage thereof, and thereby the said plaintiff, on those several days and times, and during all the time aforesaid, was and is greatly injured and disturbed in the use and enjoyment of his said common of pasture there, and could not nor can have or enjoy the same in so large, ample, and beneficial a manner as he otherwise, during all the time aforesaid, might and would have had and enjoyed the same, to wit, at, &c. (*venue*) aforesaid.

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[*Same as the form, ante, 799, to the * 800, and then proceed as follows:*—put, placed, and laid, and caused and procured to be put, placed, and laid, divers, to wit, — heaps of dung and manure, in and upon the said waste or common, and wrongfully and injuriously kept and continued the said heaps of dung and manure so put, placed, and laid as aforesaid, for divers long spaces of time, to wit, from the respective times of putting, placing, and laying the same as aforesaid, until the day of exhibiting the bill of the said plaintiff against the said defendant; whereby the grass and herbage of and upon the said common, which might and would have there grown and become good, wholesome, and proper food for depasturing the commonable cattle of the plaintiff, then was hindered and prevented from growing; and whereby, &c.—[*State the general damage, as ante, 802.*]

In putting heaps of dung, &c. on the common.

*[*As in the form, ante, 799, to the * 800, and then proceed as follows:*] —with his feet, and the feet of his servants, in walking, and with the feet of divers, to wit, — horses, — mares, and — geldings, and with the wheels of divers, to wit, — carts, and — waggons, trod down, trampled upon, bruised, crushed, destroyed, and spoiled, the grass and herbage then growing and being in the said waste or common; whereby, &c. —[*Damage as ante, 802.*]

[*806]

For trespass on common with horses and carts.

[*Same as the form, ante, 799, to the * 800, omitting the statement of possession of land (u), and then proceed as follows:*]—of turbary, in a certain waste or common, called, &c. situate at, &c. to cut, dig, and take turf and peat in and upon the said waste or common, and to carry away the same for necessary fuel, to be spent, burned, and consumed in and upon his said messuage, with the appurtenances (v), every year, and at all times of the year, as occasion hath required, as to his said messuage, with the appurtenances, belonging and appertaining. Yet the said defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure the said plaintiff in this behalf, whilst he was so possessed of his said messuage, with the appurtenances, and entitled to such common of turbary as aforesaid, to wit, on, &c. and on divers other days

For disturbance of common of turbary (t).

(t) See the forms, Willes, 619. 8 Wentw. 613, 597; and Id. Index, xxx. li.

(u) Common of turbary is incidental to a messuage, and not to land, 4 Co. Rep. 37 a.—7 East, 121.

(v) It is necessary in general to state in the declaration that the turves were to use in the house, 1 Lev. 231.—Sid. 364.—7 East, 121.

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COMMONS.

and times between that day and the day of exhibiting this bill, at, &c. (*venue*) aforesaid, wrongfully and unjustly cut, dug, took and carried away, and caused to be cut, dug, taken, and carried away, divers large quantities, to wit, [50] cart loads of the turf then growing and being on and upon the said common or waste. Whereby the said plaintiff, on those several days and times, and during all the time aforesaid, was and is greatly injured and disturbed in the use and enjoyment of his said common of turbary there, and could not, nor can, have and enjoy the same in so large, ample, and beneficial a manner as he otherwise, during all the time aforesaid, might and would have had and enjoyed the same, to wit, at, &c. (*venue*) aforesaid.—[*Conclude as ante*, 596.]

[*807]
For dis-
turbance
of com-
mon of es-
tovers (w).

*[*Same as the form, ante*, 799, to the * 800, omitting the word "common," and the statement of the possession of land (x) and then proceed as follows:—]and take reasonable estovers of the bushes and underwoods, standing and growing in and upon a certain place, waste, or common, called the —, and situate at, &c. and to carry the same from thence to the said messuage, with the appurtenances, to be burnt, spent, and consumed for necessary fuel therein, every year, at all seasonable times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage, with the appurtenances. Yet, &c. [*Same as the preceding form, only instead of "turf," say, "bushes and underwood," and instead of "common turbary," say "common of estovers."*]

DIS-
TURB-
ANCE OF
WAYS.

For ob-
structing
plaintiff's
private
right of
way, ap-
purtenant
to a mes-
sage and
garden
(y).

For that whereas the said plaintiff, before and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed (z) of a certain messuage [and garden thereto belonging,] with the appurtenances, situate and being in the parish of — in the county of — (a). And, by reason thereof (b), the said plaintiff, *during all the time aforesaid, ought to have had, and still of right ought to have, a certain way (c) from and out of the said [garden,] unto, into, through, and

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(w) See the forms, 8 Wentw. Index, 1. ii.—Thomp. Ent. 377.—3 Wills. 456.—Morg. Prec. 456, and the notes to the above form, which are applicable.

(x) Ante, 806, note (u).

(y) As to private ways in general, whether by grant, prescription, or of necessity, see 1 Saund. 323, n. 6.—Com. Dig. Chimin. D.—1 Taunt. 279.—Harr. Land. & Ten. 555.—See the forms, 8 Wentw. Index, lv. to lvii.—1 Lutw. 19.—4 T. R. 794.—3 T. R. 766.—3 Lord Raym. 85.—Morg. 333, 337, for not repairing a private way, and 2 Saund. 113, n. 1. 172 a. n. 1. Ld. Raym. 1096.—Ante, 9. n. w. As to the statement of the right, 1 Vent. 274. 2 Lev. 148.—3 Keb. 528.—3 Lev. 266.—1 Lutw. 120.—2 Ld. Raym. 751, 1090.—3 Id. 86. See a form for obstructing a public

way, 4 M. & S. 101. 16 East, 196. 3 M. & S. 472.—Willes, 71.—2 Bing. 263.

(z) This allegation is sufficient, without stating any prescriptive right, 2 Saund. 113 a.—Butw. 119. See also ante, 799, n. (w).

(a) Describe the parish or place accurately. If any doubt as to it, merely say, the premises were situate "in the county of —."

(b) This is in general a sufficient description of the right, Id. ibid.—2 Saund. 114 a.—1 Saund. 346, n. 2.—Ante, 799, note (w). But if the right of way be not by reason of possession, but by special agreement, &c. it would be improper, 4 East, 107.—6 Id. 438.—15 Id. 108.—3 Taunt. 24; and see a form, 5 B. & C. 221.

(c) The term "passage," it is said, is too general. Yelv. 163, 164.—1 Brownl. 216.

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WATER.Injury.
[*809]

over a certain [close], in the parish aforesaid (d), and from and out of the same, unto and into [a certain wharf, or quay, of the said plaintiff in the parish aforesaid (e),] and so back again from the said [wharf, or quay,] unto and into, through, over, and along the said [close,] and from and out of the same unto and into the said [garden] of the said plaintiff for himself and his servants, on foot (f), to go, return, pass, and repass, every year and at all times of the year, at his and their free will and pleasure, as to the said messuage and garden, with the appurtenances of the said plaintiff belonging and appertaining (g). Yet the said defendant well knowing the premises, *but wrongfully and unjustly contriving, and intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of his said way, whilst the said plaintiff was so possessed of his said messuage [and garden,] with the appurtenances as aforesaid, to wit, on, &c. (h) and on divers other days and times between that day and the day of exhibiting this bill, [or if in C. P. "the day of the commencement of this suit,"] at, &c. (venue) aforesaid, wrongfully and injuriously (i) placed and erected, and caused to be placed and erected, divers large quantities of boards, planks, and wood, and across the said way, and put and placed, and caused and procured to be put and placed, divers other large quantities of wood and timber in the said way, and kept and continued the said boards, planks, and wood, so placed and erected in and across the said way, as aforesaid, and also the said other wood and timber in the same way as aforesaid, for a long space of time, to wit, hitherto, and thereby during all the time aforesaid, the said way was and still is greatly obstructed and stopped up, and the said plaintiff by means thereof could not, during the time aforesaid, or any part thereof,

(d) Where the right of way is stated to be over a private close, &c. the local situation thereof should be stated.—Noy, 9.

(e) In *Rouse v. Bardin*, 1 Hen. Bla. 353. Mr. Justice Wilson observed, "that in pleading a public highway, it is not necessary to state either the *terminus a quo* or the *terminus ad quem*; but where it is a private way, it is necessary to state them, because private ways are given for particular purposes, and the justification must show that they were used for those purposes." It is therefore necessary, in a declaration of this nature, either to show that the way leads to a common highway, (8 East, 4.—2 Leon. 10.—2 Saund. 128 d.—Com. Dig. Action on the Case, for Disturbance, B. 1.) or if it lead to a private close, to state some interest of the plaintiff therein, (Noy, 86.—Latch, 160.—Com. Dig. Action on the Case, for Disturbance, B. 1.—Vin. Ab. Chimin. H. pl. 14.—Com. Dig. Chimin. D. 2.) The word *highway* seems to be too uncertain a description of one of the *termini* of a private way; but if not demurred to it will be sufficiently proved by evidence of a public footway, 8 East, 4.—Yelv. 163, cited 8 East, 6, n. *sed query*, if not sufficient, see 2 Leon. 10.—2 Saund. 168 a. When it is doubtful whether the way may not have been extinguished by unity of possession, it may be advisable to state the right of

way to be "*towards*, &c." 1 East, 377, 381.—1 B. & P. 371, and see form, post, 810; and see further as to the *termini* of the way in describing a public way, 3 Burn, J. 26th edit. 68.

(f) It should be shown whether the way be a *cart-way*, *horse-way*, or *foot-way*. Yelv. 164.—Com. Dig. Action on the Case, for Disturbance, B. 1. Though in the case of a public way, the term "common highway" signifies a way for all manner of things. 2 Saund. 153 d.—8 East, 4.—1 Hen. Bla. 355.

(g) See the form in 1 Lut. 119. It is said that these words are improper, on the ground that a way is an easement, and not an appurtenant. Yelv. 169.—1 Bulst. 47.—1 Taunt. 205.—1 B. & P. 372.—Com. Dig. Chimin. D. And in a declaration it appears not necessary to insert this allegation, and in some cases it would be improper. 4 East, 107.—6 Id. 438; and see ante, 801, note d, and a form, 15 East, 25.

(h) The day is not material.

(i) It is not necessary to state the means by which the way was obstructed; it is sufficient to say, *quod obstruxit* or *obstupavit*, without saying how. 3 Leo. 13.—Willes, 583.—1 B. & P. 180.—Com. Dig. Action on Case for Disturbance, B. 1.—Cro. Jac. 606.—Lord Raym. 452.—See the next count.

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nor can he now have or enjoy his said way, as he of right ought to have done, and otherwise might and would have done, and hath been and is, by means of the premises, deprived of the use, benefit, and advantage thereof, to wit, at, &c. (*venue*) aforesaid.—[*Add the following counts.*]

**Second
count, for
a way to a
messuage
from a
highway,
without
stating the
means of
obstruction (k).**

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Injury.

And whereas also the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage, with the appurtenances, situate in the county aforesaid, and by reason thereof the said plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have a certain way from the said [messuage] of the said plaintiff, unto, *into, through, and over a certain [close] in the county aforesaid, unto and into a certain common and public highway (*l*), in the county aforesaid, and so back again from the same common and public highway, unto, into, through, and over the said close, and from thence into the said messuage of the said plaintiff, for himself and his servants to go, return, pass, and repass, on foot, every year, and at all times of the year, at his and their free will and pleasure. Yet the said defendant, well knowing the said last mentioned premises, but wrongfully and unjustly intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of his said last-mentioned way, whilst the said plaintiff was so possessed of the said last-mentioned messuage, with the appurtenances, and so entitled to the said way as aforesaid, to wit, on the day and year aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P. "before the commencement of this suit,"*] at, &c. (*venue*) aforesaid, wrongfully and injuriously stopped up and obstructed the said last-mentioned way; and the said plaintiff, by means thereof could not, during the time aforesaid, nor can he have or enjoy his said last-mentioned way, as he of right ought to have done, and otherwise might and would have done, and hath been and is deprived of the use, benefit, and advantage thereof, to wit, at, &c. (*venue*) aforesaid.—[*Conclude as ante*, 596.]

**Third
count,
more gen-
eral,
merely
stating
the way to
be to-
wards, &c.**

And whereas also the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage, with the appurtenances, situate in the county aforesaid. And by reason thereof the said plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from the said last-mentioned messuage of the said plaintiff, towards a certain close in the parish aforesaid, and into, through, and over the same, toward a certain common and public highway, in the county aforesaid, and into the same, and so back again from the same common and public highway towards the said close, into, through, and over the same, and from thence towards the said last-mentioned messuage of the said plaintiff, and unto and into the same, for himself and his servants, to go, return, pass, and

(k) See the form, 1 Lutw. 119, and the notes to the preceding count.

(l) The term "highway" is sufficient, 2 Saund. 158 b, n. 4.—3 East, 4—Lutw. 190. The *terminus ad quem* may be laid to be a

public highway and will be proved by evidence of a public footway and it is not necessary to state what description of highway, 2 Leon. 10.—2 Saund. 158 a. *Sed Quare*, 8 East, 4.—*Ante*, 808, note (e).

repass, on foot, every year, and at all times of the year, at his and their free will and pleasure. Yet the said defendant, well knowing the premises, but wrongfully and unjustly intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of his said last-mentioned way, whilst the said plaintiff was so possessed of the said last-mentioned premises, with the appurtenances, and so entitled to the said way as aforesaid, to wit, on the day and year aforesaid, and on divers, other days and times between that day and the day of exhibiting this bill, [or *if in C. P.* "before the commencement of this suit,"] at, &c. (*venue*) aforesaid, wrongfully and injuriously stopped up and obstructed the said last-mentioned way; and the said plaintiff, by means thereof, could not, during the time aforesaid, nor could he have or enjoy his said last-mentioned way, as he of right ought to have done, and otherwise might and would have done, and hath been and is deprived of the use, benefit, and advantage thereof, to wit, at, &c. (*venue*) aforesaid.

DISTUR-
ANCE OF
WAYS.

For that whereas, before and at the time of the committing of the grievances hereinafter mentioned, a certain messuage and premises, situate in the county of S. were in the possession and occupation of E. F. as tenant thereof to the said plaintiff, the reversion thereof then and still belonging to the said plaintiff, to wit, at, &c. (*venue*). And whereas for divers years before, and until the committing of the grievances hereinafter mentioned, there was, and of right ought to have been, and still of right ought to have been, a certain way from and out of the said messuage and premises, so in the possession and occupation of the said E. F. unto, into, through, over and across a certain close, in the county aforesaid, and from thence unto and into a certain common and public highway, in the county aforesaid, and so back again from the said common and public highway, unto, into, through, over, and across the said last-mentioned close, and from thence unto the said messuage and premises, for him the said plaintiff and his tenants, occupiers of the said messuage and premises, and for others to go, return, pass, and repass, on foot, every year, and at all times of the year, at his and their free will and pleasure, as to the said messuage and premises, with the appurtenances, belonging and appertaining (*n*). Yet the said defendant, well knowing the premises, but contriving and intending to injure and prejudice the said plaintiff in his reversionary estate and interest of and in the said messuage and premises, whilst they were in the possession and occupation of the said E. F. and whilst the said plaintiff was so interested therein as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) wrongfully and injuriously, and without the leave or license of the said E. F. or the said plaintiff, and against his will, built and erected, and caused and procured to be built and erected, divers large buildings (*o*) in and upon the said close, and in and upon the aforesaid way, whereby the said defendant, did thereby greatly encroach upon and encumber the said way, and by means thereof, the said plaintiff and his tenants, occupiers of the said messuage and premises, could not, from the

Case by
reversion-
er, for ob-
structing
a way, by
building
thereon
(*m*).

(*m*) A reversioner may sue for an injury to his reversionary interest, if the injury be such as to affect it, see 4 Burr. 2141. See the notes to the form, ante, 777.

(*n*) See, as to the description of the way,

and other observations, ante, 808.

(*o*) The obstruction must be of such a nature as would naturally injure the plaintiff's reversionary interest, see ante, 777.

**DISTURB-
ANCE OF
WAYS.**

day and year aforesaid, have and enjoy the aforesaid way in so ample and beneficial a manner as they of right ought to have done, and still of right ought to do, but have been thereby greatly injured and prejudiced in the use, benefit, and enjoyment of the said way, and the same is permanently obstructed by reason of the premises, and thereby the said plaintiff hath been and is greatly injured and prejudiced in his reversionary estate and interest of and in the said messuage and premises, with the appurtenances, to wit, at, &c. (*venue*).

**DISTURB-
ANCE OF
FERRIES.**

For dis-
turb-
ing
plaintiff's
ancient
ferry (*p*).
[*815]

For that whereas the said plaintiffs, before and at the time of the committing of the grievances hereinafter in this count mentioned, were, and from thence hitherto have been, and still are, entitled, as Trustees for the Society of Free Watermen of the River Thames, residing at Greenwich, in the county of Kent, called the Isle of Dogs Ferry Society, *to the fee-simple and inheritance of an ancient ferry, called Potter's Ferry, for foot-passengers and goods belonging to such foot-passengers, across the River Thames, to and from a certain place in the Isle of Dogs, in the parish of St. Dunstan Stebonheath, otherwise Stepney, in the county of Middlesex, from and to Greenwich, in the county of Kent, taking for the carriage and conveyance of such passengers and their goods, over and across such ferry, in any boat or boats kept by, or by the authority of them the said plaintiffs for that purpose, certain reasonable freights or ferryages, to wit, two-pence for every person on foot; nevertheless the said defendant, not being one of the free watermen aforesaid, but well knowing the premises and contriving to disturb and injure the said plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, to wit, on the — day of — in the year of our Lord — and on divers other days between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] to wit, at Westminster, in the county of Middlesex, injuriously and unlawfully, and against the will of the said plaintiffs, carried and conveyed, in a certain boat of him the said defendant, divers foot-passengers for hire, over and across the said River Thames and upon the said part of the same river where the said plaintiffs had such ferry as aforesaid, and upon the said ferry of them the said plaintiffs, by reason whereof the said plaintiffs have lost and been deprived of divers profits and emoluments, which would otherwise have arisen and accrued to them from the enjoyment of their said ferry, and have been and are greatly prejudiced and disturbed in the possession thereof, and their

(*p*) See Willea, 508.—8 Went. Index, lviii.—Com. Dig. Piscary, B.—2 Saund. 114; and see form, 6 B. & C. 703. It seems sufficient to state that the plaintiff was in possession of the ferry, *id.* No sum for the payment of passage money need be stated, *Id.* In this action it is sufficient for the plaintiff to prove that he was in possession of the ferry at the time the cause of action arose, 2 Y. & J. 285; and from an user of thirty-five years the jury may presume that a ferry had a legal origin. The

owner of a ferry need not have the property in the soil on either side of the river, 6 B. & C. 703. Neglect of duty in the owner of a ferry is no answer to an action for a disturbance. If there be an exclusive ferry from A. to B. it does not prevent persons from going by any other boat from A. directly to C. though it lie near B., provided it be not done fraudulently, and as a pretence for avoiding the regular ferry, 4 T. R. 666.—Hart. Landl. & Ten. 564.

right and title thereto, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid.—And the said plaintiffs further say, that they the said plaintiffs so being entitled, as trustees for the said society, to the fee-simple and inheritance of the said ferry as aforesaid, the said defendant not being one of the free watermen as aforesaid, but well knowing the premises, and further contriving to disturb and injure the said plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, and whilst the said plaintiffs were so entitled, as trustees as aforesaid, to the fee-simple and inheritance of the said ferry, to wit, on the said — day of — in the year of our lord — and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] to wit, at Westminster aforesaid, *in the county of Middlesex aforesaid, injuriously and unlawfully, and against the will of the said plaintiffs, carried and conveyed in a certain boat of him the said defendant, divers foot-passengers for hire, over and across the said River Thames, near to the said part of the same river, where the said plaintiffs had such ferry as aforesaid, and near to the said ferry of them the said plaintiffs; and by reason whereof the said plaintiffs have lost and been deprived of divers other profits and emoluments which would have arisen and accrued to them from the enjoyment of their said ferry, and have been and are greatly prejudiced and disturbed in the possession thereof, and their right and title thereto, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid.—And also, for that whereas the said plaintiffs, before and at the time of committing the grievances in this count mentioned, were and still are lawfully possessed (*q*) of a certain ancient ferry, with the appurtenances, upon and over the River Thames, to and from a certain place in the Isle of Dogs, in the parish of St. Dunstan Stebonheath, otherwise Stepney, in the said county of Middlesex, from and to Greenwich aforesaid, in the county of Kent aforesaid, for carrying and conveying, within the said last-mentioned ferry, all persons and their goods, having occasion for the same, in boats kept by, and by the authority of them the said plaintiffs there for that purpose, taking for the same certain reasonable freights and ferryages (*r*) to wit, two-pence for each person; yet the said defendant, well knowing the premises last aforesaid, but contriving to disturb and injure the said plaintiffs in the peaceable enjoyment of their said last-mentioned ferry, heretofore, to wit, on the said — day of — in the year of our lord — and on divers other times between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, unlawfully, injuriously, and wrongfully, carried and conveyed divers passengers, for hire, in a certain boat, over and across the said river, and upon the said part of the said river where the said plaintiffs had such ferry as last aforesaid, and over, upon, within, and across the said last-mentioned ferry of the said plaintiffs, and thereby they the said plaintiffs lost divers great gains and profits, which would otherwise have accrued to them *from the said last-mentioned ferry, and have been disturbed and disquieted in the possession thereof, and in their right and title thereto, to wit, at Westminster aforesaid, in the county of

**DISTURB-
ANCE OF
FERRIES.**
Second
count.

[*816]

Third
count.

[*817]

(*q*) That this is sufficient, see 6 B. & C. 703.

(*r*) This averment is not necessary, 6 B. & C. 703.

**DISTURBANCE OF
FERRIES.
Fourth
count.**

Middlesex aforesaid.—And the said plaintiffs further say, that they the said plaintiffs, so being possessed of the said last-mentioned ferry, with the appurtenances as aforesaid, the said defendant, well knowing the premises last aforesaid, but further contriving and intending as last aforesaid, heretofore, and whilst the said plaintiffs were so possessed of their said last-mentioned ferry, with the appurtenances as aforesaid, to wit, on the said — day of — in the year of our Lord — and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, unlawfully, injuriously, and wrongfully, carried and conveyed divers passengers for hire, in a certain boat of him the said defendant, over and across the said river, and near to the said part of the said river where the said plaintiffs had such ferry as last aforesaid, and near to the said last-mentioned ferry of the said plaintiffs, and thereby they the said plaintiffs lost divers other great gains and profits which would otherwise have accrued to them from the said last-mentioned ferry, and have been disturbed and disquieted in the possession thereof, and in their right and title thereto, to wit, at, &c. (*venue*) aforesaid. To the damage, &c.

**DISTURBANCE OF
PEWS.**

**For disturbance
of a pew
(e).**

Injury.

[*Commencement as ante, 596, The venue is local.*]—For that whereas the said plaintiff, before and at the time of the committing of the grievance hereinafter next mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage, with the appurtenances, situate in the parish of — in the county of — and therein, during all the time aforesaid, inhabited and dwelt, and still doth inhabit and dwell, with his family; and by reason thereof, he the said plaintiff, during all the time aforesaid, until the time of the committing of the grievance by the said defendant, as hereinafter next mentioned, had, and still of right ought to have, for himself and his family inhabiting in the said messuage, with the appurtenances, the use and benefit of a certain pew in the parish church of, &c. aforesaid, to hear and attend divine service celebrated therein, as to the said messuage and tenement belonging and appertaining. Yet the said defendant, well knowing the premises, but contriving, and wrongfully

(e) For the forms of declarations for disturbance of seats in churches, see 5 B. & A. 356.—8 Wentw. 518.—Morg. 340. Forrest's Exch. R. 14.—3 T. R. 659.—5 Id. 296.—1 Lev. 71.—1 Sid. 203.—2 Lev. 193.—3 Id. 73.—1 Wils. 326.—1 T. R. 428. As to the title, see 2 Saund. 175 c, d.—Com. Dig. Action on Case for Disturbance, A. 3. As to evidence, see 3 Campb. 288. This action does not lie unless the pew be annexed to a house or some other messuage in the parish, 5 B. & A. 356, and cases there collected on the subject; and see 1 Y. & J. 583. An action of trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession, and the possession of the church being in

the parson, 1 T. R. 428; but an action of trespass for breaking and entering a chapel, and destroying the pews, will lie at the suit of a perpetual curate of an augmented parochial chapelry, even against the chapelwarden, 2 Y. & J. 265. In pleading a prescription to a pew, it need not be alleged that the party and his ancestors had always repaired it; the pew might never have required repair. This at most is matter of evidence only, Lofft, 423. Even in an action against a stranger for disturbing plaintiff in his pew, but it is otherwise in a dispute with the ordinary, 1 Wils. 326.—See 8 B. & C. 288.—2 M. & R. 318, S. C. As to right of burial, see 8 Bar. & Crea. 288.—1 B. & Adolphus, 122.—2 B. & Ald. 806.

and unjustly intending to injure and prejudice the said plaintiff, and to deprive him of the use and benefit of the said pew, whilst the said plaintiff was so possessed of his said messuage, with the appurtenances, and dwelt and inhabited therein as aforesaid, and was entitled to the use and benefit of the said pew as aforesaid, to wit, on, &c. and divers other days and times between that day and the day of exhibiting this bill, at, &c. (*venue*) unlawfully, and without the leave or license, and against the will of the said plaintiff, entered, and caused and procured divers other persons to enter and continue in the said pew during the celebration of divine service in the said church, and thereby greatly disturbed the said plaintiff in the enjoyment of the said pew, and prevented him from having the use and benefit thereof in so full and ample a manner as he otherwise might and would, and ought to have done, and also unlawfully tore, wrenched, broke, and damaged the door of the said pew, and also unlawfully shut and fastened the door thereof, and kept the same so shut and fastened for a long space of time, to wit, hitherto, and thereby, during all that time, hindered and prevented the said plaintiff and his family inhabiting in the said messuage, with the appurtenances, from sitting in and using the said *pew for the purpose aforesaid, and whereby he the said plaintiff could not, during the time aforesaid, have or enjoy the use of the said pew for himself and his family inhabiting the said messuage in so ample and beneficial a manner as he otherwise might and ought to do, and would have done, and hath been greatly disturbed and molested in the use and enjoyment thereof, to wit, at, &c. (*venue*) aforesaid.—[*Second count similar to the first, except that instead of the words "use and benefit," say "the right, privilege, liberty of sitting in the said pew," and conclude as ante, 596.*]

DISTURBANCE OF PEWS.

[*818]

FOR DISTURBANCE OF A MARKET.
 EBT.
 For opening a new market, and thereby disturbing plaintiff's ancient market (c).

For that whereas the said plaintiff, before and at the time of the committing of the grievances next hereafter mentioned, to wit, on the [1st] day of [January] A. D. [1824] and from thence hitherto hath been, and still is, lawfully possessed of the manor of [Bradford] in the county of [York] and of a certain market to the said manor belonging and appertaining, that is to say, a certain market under and to be holden within the said manor, to wit, at [Bradford] in the said county of [York] upon every Tuesday, for the buying and selling of all goods, wares, and merchandizes, then and there to be bought and sold, together with certain stallage and other profits and emoluments to such market belonging and appertaining, whereby great gains, profits, and advantages, during all the time aforesaid, until the committing of the grievance hereinafter next mentioned, accrued to, and were received by, and still of right ought to accrue to, and be received by the said plaintiff, to wit, at, [Bradford] aforesaid, in the county aforesaid. Yet the said defendant, well knowing the premises, but contriving and wrongfully intending to injure and aggrieve the said plaintiff, and to deprive him of the profit and advantage of his

(c) As to disturbing a market, see the Owen, 109.—Cro. Jac. 43, 122.—3 Lev. forms and law, in 7 B. & C. 40.—5 B. & 190.—2 Lutw. 1617.—6 East, 438.—8 C. 363.—2 Saund. 172.—1 B. & P. 400.—Wentw. Index, lviii.

FOR DIS-
TURBANCE
OF A MAR-
KET.

Second
count.

said market, and to disturb him in the free enjoyment thereof, and of the emoluments arising therefrom, afterwards, to wit, on the same day and year aforesaid, to wit, at [Bradford] aforesaid, in the county aforesaid, and within the said manor of [Bradford,] without any lawful warrant or authority in that behalf, levied, kept, erected, and held, and caused and procured to be levied, kept, erected, and held, a certain new market, once in every week, and continued the said market so newly levied, kept, erected, and held, for a long space of time, to wit, from thence hitherto, whereby divers large quantities of goods, wares, and merchandizes, were during all the time aforesaid, sold in the said market so newly levied, held, erected, and kept, which otherwise would and of right ought to have been brought to the said market of the said plaintiff, so holden there as aforesaid, during all the time aforesaid, to be there sold, to the great damage of the said plaintiff, and the great nuisance of the market of the said plaintiff, by reason whereof the said plaintiff hath lost and been deprived of the stallage and other emoluments and profits of his said market, and also of other great gains, profits, and advantages, which he otherwise would and of right ought to have had and derived from his said market, to wit, at [Bradford] aforesaid, in the county aforesaid.—And whereas also, afterwards and before and at the time of the committing of the grievance next hereinafter mentioned, to wit, on the [1st] day of [January,] A. D. [1824,] to wit, at [Bradford] aforesaid, in the county aforesaid, the said plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of and in a certain market holden and to be holden at [Bradford] aforesaid, in the county aforesaid, upon every Tuesday, for the buying and selling of all goods, wares, and merchandizes, then and there to be bought and sold, together with certain stallages, profits, and emoluments, to such last-mentioned market belonging and appertaining, whereby great gains, profits, and advantages, during all the time last aforesaid, and until the committing of the grievance hereinafter next-mentioned, accrued to, and were received by, and still of right ought to accrue to, and be received by the said plaintiff, to wit, at [Bradford] aforesaid, in the county aforesaid. Yet the said defendant, well knowing the premises last-mentioned, but contriving, and wrongfully intending to injure and aggrieve the said plaintiff, and to deprive him of the profit and advantage of his said last-mentioned market, and to disturb him in the free enjoyment thereof, and of the stallage and other profits and emoluments arising therefrom, afterwards, to wit, on the same day and year aforesaid, within the town of [Bradford] aforesaid, and close and near adjoining to the place where the said market of the said plaintiff was held, without any lawful warrant or authority in that behalf, levied, erected, kept, and held, and caused and procured to be levied, erected, kept, and held, a certain other new market, held once in every week, and continued the said last-mentioned market so newly levied, erected, kept and held for a long space of time, to wit, from thence hitherto, whereby divers other large quantities of goods, wares, and merchandizes were, during all the time last aforesaid, sold in the said market so newly levied, erected, kept, and held, by the said defendant, which otherwise would and of right ought to have been brought to the said market of the said plaintiff, so holden there as last aforesaid, during all the time last aforesaid, to be there sold, to the great damage of the said plaintiff, and the great nuisance of the market of the said plaintiff, and the said plain-

tiff hath thereby lost and been deprived of the stallage and other emoluments of his said market, and also of other great gains, profits, and advantages which he otherwise would and of right ought to have had and received from his said market, to wit, at [Bradford] aforesaid, in the county aforesaid.—And whereas also, afterwards, and before and at the time of the committing of the grievance next hereinafter mentioned, to wit, on the [1st] day of [January,] A. D. [1824,] to wit, at [Bradford] aforesaid, in the county aforesaid, the said plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of and in a certain market holden and to be holden within the town of [Bradford] aforesaid, in the county aforesaid, in every week, and of certain stallage, profits, and emoluments to such last-mentioned market belonging and appertaining, whereby great gains, profits, and advantages, during all the time last aforesaid, and until the committing of the grievance hereinafter next mentioned, accrued to and were received by, and still of right ought to accrue to and be received by the said plaintiff, to wit, at [Bradford] aforesaid, in the county aforesaid. Yet the said defendant, well knowing the premises last-mentioned, but contriving and wrongfully intending to injure and aggrieve the said plaintiff, and to deprive him of the profit and advantage of his said last-mentioned market, and to disturb him in the free enjoyment thereof, and of the stallage and other profits and emoluments arising therefrom, afterwards, to wit, on the same day and year aforesaid, within the town of [Bradford] aforesaid, without any lawful warrant or authority in that behalf, levied, erected, kept, and held and caused and procured to be levied, erected, kept, and held, a certain other new market, held once in every week, so near to the said place where the said last-mentioned market of the said plaintiff was held, that by reason thereof, divers other large quantities of goods, wares, and merchandizes were, during all the time last aforesaid, sold in the said market, so hereby levied, erected, kept, and held by the said defendant, which otherwise would and of right ought to have been brought to the said market of the said plaintiff, so holden there as last aforesaid, during all the time last aforesaid, to be there sold, to the great damage of the said plaintiff, who hath thereby lost and been deprived of the stallage and other emoluments of his said last-mentioned market, and also of other great gains, profits, and advantages which he otherwise would and of right ought to have had and derived from his said market, to wit, at [Bradford] aforesaid in the county aforesaid.

FOR DISTURBANCE
OF A MARKET.
XET.

Third
count.

For the precedents and mode of declaring for a disturbance, subtraction, or other injury to FRANCHISES, see 4 Mod. 423. 1 Show. 18. 8 Wentw. Index, 58. At suit of a bailiff against a party for executing a writ within his jurisdiction, 9 East, 330. And generally, Com. Dig. Action on the Case for disturbance. For NOT GRINDING CORN at plaintiff's ANCIENT MILL, 2 Saund. 112, 113, note 1; 172, note 1. 8 Wentw. Index, 58. Dougl. 218. 2 B. & C. 827. 4 D. & R. 496, S. C. 6 M. & S. 69. In such action it suffices to declare generally on the custom to grind, 6 M. & S. 69; and see as to the evidence, id. Of OFFICERS, 10 Rep. 59 b. Cro. Eliz. 335. 8 Wentw. Index, 54.

DISTURBANCE OF
FRANCHISES, &c.
For disturbance of franchises, tolls, offices, &c.

BY PARTY
OBTAINED.

IV. ON STATUTES.

On 8 Ann.
c. 14
against a
sheriff for
taking
goods off
premises,
which
were seized
under a
f. fa.
without
first pay-
ing plain-
tiff half a
year's rent
which was
in arrear
(u).

['819]

For that whereas heretofore, to wit, on, &c. and for the space of [half] a year then last past, one J. H. held, used, *occupied, and enjoyed a certain messuage and tenements, with the appurtenances, situate in the parish of — in the county of — as tenant thereof to the said plaintiff, at and under a certain rent or sum of money therefore payable by the

(u) See form, 3 Wentw. 445. 6 Dougl. 666. In 1 Chit. Col. Stat. 664, will be found most of the following notes on this enactment.

In order to support the claim against the sheriff, a *subsisting* tenancy must be proved, and therefore where the landlord had brought an action of ejectment, and laid the demise before the seizure under the *f. fa.*; it was held that the sheriff had no right to allow the landlord a year's rent, 5 B. & A. 88. The money claimed must be due as rent; see 6 B. & C. 524. 2 C. P. 294, S. C. The occupation by the tenant must be proved, 7 Price, 690; but it will be for the sheriff to prove that the rent had been paid, *id.*

The act extends to an execution at the suit of a *defendant* for costs, notwithstanding the direction at the end of the section that the sheriff shall pay the *plaintiff* as well the rent as the execution money, 2 Wils. 140. But a commission of bankruptcy is not an execution within the meaning of this act, 15 East, 330. Goods taken on a *capias utlagatum* are within the act, Bunb. 5, 194, 269.—7 T. R. 264. So goods taken on a *pons per radios*, 6 B. & C. 467.

A bill of sale is a removal, Barnes, 211. The sheriff is bound to satisfy the landlord in the first instance, 4 Moore, 473. And an action lies, though only part of the goods be removed, *id.*—2 B. & C. 67.

The statute only extends to the immediate landlord, not to a ground landlord, 2 Stra. 787. An executor or administrator is entitled to the benefit of the statute, as to arrears accrued in the life-time of the deceased, 1 Stra. 212. A trustee of an outstanding satisfied term in trust for mortgagees, and to attend the inheritance, may sue, 4 Moore, 473. 2 B. & B. 67.

The act does not extend to rent which accrues during the continuance of the sheriff in possession, 1 M. & S. 245. And a sheriff taking corn in the blade under a *feri facias*, and selling it before rent due, is not liable to account to the landlord of the defendant, under the statute, 8 Anne, for rent accruing subsequently to the levy and sale, although he has given notice, and though the corn be not removed from the premises until long afterwards, when a considerable proportion of rent has become due, the landlord's remedy in such case is

by distress, 1 Price, 274. And the landlord of premises on which goods have been seized under an extent in aid, is not entitled, under the 8th Anne, to call on the sheriff to pay twelve month's rent, due before the *tests* of the writ, 2 Price, 17. But this claim may be supported for *forehand* rent, 7 Price, 690. The landlord is entitled to his rent without any deduction for poundage, Stra. 643. But where the landlord takes the security of a third person for the rent at the time of the execution, the sheriff is discharged as to the landlord's claim for rent, 3 Campb. 34.

Only one year's rent is to be paid, although there be two executions; *semble* 3 Str. 1024.—2 B. & B. 362.—5 Moore, 97, S. C.; unless the goods be not removed in a reasonable time, 1 Price, 277. 1 M. & S. 711.

The bailiff of a liberty is subject to the provisions of the act, 1 Stra. 212.

In order to render the sheriff responsible for non-compliance with the act, there should be a demand for the rent, before the removal, by the party entitled; and a demand by a person to whom administration is afterwards committed does not operate by relation, 2 Stra. 97; see 3 Taunt. 400. And a sheriff is not bound to find out what rent is due to a landlord, and pay it him, but the landlord must give him notice, 3 Taunt. 400. But no particular form of notice is necessary, 3 B. & A. 645.—*Id.* 440.—4 Moore, 473. And the court, on motion, will order a year's rent, out of the proceeds while in sheriff's hands, to be paid to landlord, though the sheriff had no notice of the rent being due till after removal, 3 B. & A. 440. But an action for money had and received cannot be sustained, 3 Campb. 260. In case of a removal contrary to the act, the landlord may maintain an action, and the want of alleging a demand is helped by verdict, 1 Stra. 212.—7 Price, 666; and it is not necessary to state in the declaration the particulars of the lease; but if they are stated, and there is any material variance, it is fatal, Dougl. 665. If the execution is overreached by an act of bankruptcy and commission, the sheriff in action by the assignees, can only avail himself of payment to the landlord, by proving that it was made before notice of the commission issued, 15 East, 230.

BY PARTY
GRIEVED.

said J. H. to the said plaintiff, for the same (*w*), to wit, at, &c. (*venue*). And whereas also heretofore, to wit, on the day and year aforesaid, a large sum of money, to wit, the sum of £— for and on account of the rent so payable by the said J. H. to the said plaintiff for the said messuage and tenements for one [half] year of the said tenancy, which ended at and upon that day, became and was due and payable, and continually from thence hitherto hath been, and still is, in arrear and unpaid, to wit, at, &c. (*venue*) aforesaid. And whereas also the said sum of £— of the said rent, so being in arrear and unpaid by the said J. H. to the said plaintiff as aforesaid, afterwards, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, the said defendant then being sheriff of the said county, by virtue of and under pretence of a certain writ of our said lord the king, called a [*fiери-facias*] against the said J. H. at the suit of H. W. and M. W. out of the court of our said lord the king, before the king himself (*x*), before that time sued forth and prosecuted (*y*), and directed to the sheriff of the said county of — took the goods and chattels of the said J. H. then being in the said messuage and tenements, with the appurtenances, so in the tenure and occupation of the said J. H. as aforesaid, to a large amount, to wit, beyond the amount* of the said arrears of rent so due and owing from the said J. H. to the said plaintiff, that is to say, to the amount or sum of £— of lawful money of Great Britain; and the said plaintiff further says, that, after the taking of the said goods and chattels so being in the said messuage and tenements, with the appurtenances, as aforesaid, and before the removal of the same, under pretence of the said writ, that is to say, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, the said plaintiff gave notice (*z*) to the said defendant, so being sheriff as aforesaid, of the aforesaid rent so being due and in arrear to the said plaintiff from the said J. H. as aforesaid, and then and there requested the said defendant, so being sheriff as aforesaid, that the said plaintiff might be paid his said rent, so due, in arrear, and unpaid, as aforesaid, before the said goods and chattels, or any part thereof, should be removed from or out of the said messuage and tenements, with the appurtenances: yet the said defendant, then being sheriff of the said county of — well knowing the premises, but not regarding the duty of his said office, nor the Statute in such case made and provided, but contriving, and wrongfully and deceitfully intending to deceive and defraud the said plaintiff in this respect, of the said arrears of the said rent so due to him as aforesaid, and of the said plaintiff's remedy for the recovery thereof, under color and pretence of the said writ, on the day and year last aforesaid, at, &c. (*venue*) wrongfully, injuriously, and deceitfully removed and carried away the said goods and chattels, so taken as aforesaid, from and out of the said messuage and tenements, with the appurtenances, contrary to the form of the Statute in that case made and provided, without paying or satisfying the said plaintiff the said arrears of the said rent so due and owing and in arrear to him as aforesaid, or any part thereof. And the said plaintiff

[*820]

(*) The particulars of the demise need not be stated, Dougl. 665.

(x) Stating the writ to have been sued out of the wrong court would be bad, 4 B. & C. 657.—Rv. & Moo. C. N. P. 286, S. C.

(y) In 8 Wentw. 455, the judgment is stated; but this seems unnecessary, as it is

not a judgment at the suit of the plaintiff, but of a third person, and therefore distinguishable from 1 Saund. 37.

(z) The omission of this is fatal, unless after verdict, when the averment of "well knowing the premises," &c. will suffice, 7 Price, 566.

BY PARTY
ORIGINED.

further saith, that he hath not, at any time since, been paid or satisfied the said arrears of the said rent or any part thereof, but the same, and every part thereof, is due, in arrear, and unpaid, from the said J. H. to the said plaintiff, whereby the said plaintiff hath been and is deprived of the benefit of a distress for the recovery and satisfaction of the said arrears of the said rent, and is in great danger of losing the same, to wit, at, &c. [*821] (*venue*) *aforesaid. To the damage, &c.—[*Add count in trover, see 7 Price, 691.*]

Against
sheriff, on
stat. 23 H.
6. c. 9, for
refusing
sufficient
bail (a).

For that whereas certain persons, to wit, C. S. and G. S. heretofore, to wit, on, &c. (b) sued and prosecuted out of the court of our said lord the king, before the king himself, against the said plaintiff, a certain writ of our said lord the king, called a [*latitat*] directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff (c) to take the said plaintiff, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said sovereign lord the king, on — [wheresoever his said majesty should then be in England,] to answer unto the said C. S. and G. S. of a plea of trespass upon the case upon promises, to the damage of the said C. S. and G. S. of £— which said writ afterwards, and before the delivery thereof to the said sheriff of the said county of — to be executed as is hereinafter next mentioned, to wit, on, &c. at, &c. (*venue*) was duly (d) marked and indorsed for bail for £—; and which said writ afterwards, and before the said return thereof, to wit, on, &c. at, &c. (*venue*) aforesaid, in the county last aforesaid, was delivered to the said defendant, who then and from thence until and at and after the time of the arrest, and from thence until and after the committing of the grievance hereinafter mentioned, was sheriff of the said county of — in due form of law to be executed; by virtue of which said writ the said defendant, so being sheriff as aforesaid, afterwards, and before the said return of the said writ, to wit, on the day and year last aforesaid, and within his bailiwick, as such sheriff, to wit, at — aforesaid, in the county aforesaid, took and arrested the said plaintiff by his body, and then had and detained him in his custody, as such sheriff, at the suit of the said C. S. and G. S. for the cause aforesaid, and continued in such custody until and after the committing of the grievance by the said defendant, as hereinafter next mentioned; and thereupon the said plaintiff afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, [*822] tendered and offered to the *said defendant, so being sheriff as aforesaid, reasonable sureties of sufficient persons, to wit, E. F., I. K., L. M., &c. (e) the same being then and there responsible and sufficient persons, and having, and each of them then having, sufficient within the county of — aforesaid, in which said county of — the said plaintiff was so arrested and so in custody aforesaid, and who then and there were willing and offered to become bail and sureties for the appearance of the said plaintiff at the return of the said writ, according to the exigencies thereof; yet the said defendant not regarding his duty in that behalf as such sheriff as aforesaid, nor the Statute in such case made and provided, but contriving

(a) See 15 East, 320.—1 Lil. Ent. 71. 2 Saund. 61, c. 5; and the statute, 1 Chit. Col. Stat. 42.

(b) The *teste* of the writ.

(c) Examine carefully with the writ.

(d) That it is not necessary to state the affidavit of debt, see ante, 739, n. (A).

(e) There were several tendered.

BY PARTY
GRIEVED.Second
count.

[*823]

and unjustly intending to injure, aggrieve, and oppress the said plaintiff in that behalf, then and there wrongfully and injuriously refused to accept the said sureties, so offered by the said plaintiff, as bail for his appearance at the return of the said writ, and wrongfully and injuriously then and there kept and detained him in his the said defendant's custody, under color and pretence of the said writ, for a long space of time after the said bail were so tendered and offered as aforesaid, to wit, until the — day of —, in the year aforesaid, contrary to the form of the Statute in such case made and provided; by means of which said premises, he the said plaintiff was kept and detained in prison a great and unreasonable length of time, and during all that time suffered great pain in body and mind, and was hindered and prevented from performing and transacting his lawful affairs and business, and hath been and is greatly injured in his credit and circumstances, and also hath incurred the risk of becoming and being proceeded against as a bankrupt, to wit, at, &c. aforesaid.—And whereas also heretofore, and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, to wit, on the said — day of —, in the year aforesaid, the said plaintiff had been and was in custody of the said defendant, as such sheriff as aforesaid, by virtue of a certain other writ, of our said lord the king, called a [*latitat*,] at the suit of the said C. S. and G. S. returnable in the said court of our said lord the king, before the king himself, on, &c. and which said last-mentioned writ had been and was indorsed for bail for £— to wit, at, &c. (*venue*) aforesaid; and thereupon he the said plaintiff afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid *tendered and offered to one J. M. who then and there was the agent of the said R. B. so being sheriff as aforesaid, and by him authorized to take bail according to the Statute in such case made and provided, reasonable sureties of sufficient persons, to wit, G. F., T. N., E. N., W. M. and T. E. F., the same being then and there responsible and sufficient persons, and having, and each of them then having, sufficient within the county of — aforesaid, in which said county of — the said plaintiff was so arrested and in custody as aforesaid, and who then and there were willing and offered to become bail and sureties for the appearance of the said plaintiff at the return of the said last-mentioned writ, according to the exigency thereof; yet the said defendant, not regarding his duty in that behalf as such sheriff as aforesaid, nor the Statute in such case made and provided, but contriving and unjustly intending to injure, aggrieve, and oppress the said plaintiff in that behalf, then and there by the said J. M. his said agent in that behalf, wrongfully and injuriously refused to accept the said sureties so offered by the said plaintiff, as bail for his appearance at the return of the said last-mentioned writ, and wrongfully and injuriously then and there kept and detained him in the said defendant's custody, under color and pretence of the said last-mentioned writ, for a long space of time after the said bail were tendered and offered as aforesaid, to wit, until the — day of —, in the year aforesaid, contrary to the form of the Statute in such case made and provided; by means of which said last-mentioned premises he the said plaintiff was kept and detained in prison a great and unreasonable length of time, and during all that time suffered great pain in body and mind, and was hindered and prevented from performing and transacting his lawful affairs and business, and hath been and is greatly injured in his credit and circum-

BY PARTY
GRIEVED.
Third
count.

[*824]

stances, and also hath incurred the risk of becoming and being proceeded against as a bankrupt, to wit, at, &c. (*venue*) aforesaid.—And whereas also heretofore, and at the time of the committing of the grievance by the said defendant, as hereafter mentioned, to wit, on the said — day of —, in the year aforesaid, the said plaintiff had been and was in custody of the said defendant, as such sheriff as aforesaid, by virtue of a certain other writ of our said lord the king, called a *pluries capias*, at the suit of the said C. S. and G. S. returnable in the said court of our said lord the king, before the king himself, on, &c. and which *said last-mentioned writ had been and was indorsed for bail for £—, to wit, at, &c. (*venue*) aforesaid; and thereupon it became and was the duty of the said defendant, as such sheriff as aforesaid, at all reasonable times afterwards, and before the return of the said last-mentioned writ, to be ready, or to cause and procure some person duly authorized by him the said defendant, as such sheriff as aforesaid, to be ready, within the said bailiwick of him the said defendant as such sheriff as aforesaid, to let out of prison and out of the custody of him the said defendant, as such sheriff as aforesaid, under and by virtue of the said last-mentioned writ, the said plaintiff, so in custody of the said defendant, as last aforesaid, upon reasonable sureties of sufficient persons, having sufficient within the said county of —, where the said plaintiff was so in custody as last aforesaid, and where he might be let to bail, as in the Statute in such case made and provided, to keep his day in such place as the said last-mentioned writ required, to wit, at, &c. aforesaid; and the said plaintiff further saith, that afterwards, and whilst he continued in the custody of the said defendant, as such sheriff as aforesaid, and before the return of the said last-mentioned writ, to wit, on the — day of —, in the year aforesaid, to wit, at, &c. (*venue*) aforesaid, the same then and there being a reasonable time in that behalf, he the said plaintiff was ready with reasonable sureties of sufficient persons, to wit, G. F., &c. the same being then and there responsible and sufficient persons having, and each of them having, sufficient within the county of — aforesaid, and the said last-mentioned persons were then and there willing to become bail and sureties for the appearance of the said R. M. at the return of the said writ, according to the exigency thereof, of all which said several premises the said defendant then and there had notice; yet the said defendant, so being such sheriff as aforesaid, not regarding his duty as such sheriff, but contriving, and unjustly intending to injure, oppress, and aggrieve the said plaintiff in this behalf, was not, at all reasonable times after he so had the said plaintiff in his custody as aforesaid, and before the return of the said last-mentioned writ, ready, nor did cause or procure any person duly authorized by him the said defendant, to be ready, within the said bailiwick of him the said defendant, as such sheriff as aforesaid, to let out of prison and out of the custody of him the said defendant as such sheriff as aforesaid, under and by virtue of the said last-mentioned writ, the said plaintiff, so in custody as last aforesaid, *upon such reasonable sureties of sufficient persons, having sufficient within the said county of —, to keep his day in such place as the said last-mentioned writ required, but wholly omitted and neglected so to do, contrary to his duty in that behalf, and contrary to the Statute in that case made and provided, to wit, at, &c. (*venue*) aforesaid, and was not at the said time when he the said plaintiff was so ready with the said sureties as

[*825]

aforesaid, and being such reasonable time in that behalf as aforesaid, ready to accept and receive such bail as aforesaid, or to let the said plaintiff out of his custody as aforesaid, on such bail; and by reason of the negligence and improper conduct of the said defendant as such sheriff as aforesaid, the said plaintiff was kept and continued in custody, and so imprisoned as aforesaid, for a long time after he was so ready, with such reasonable sureties as aforesaid, to be so let to bail as last aforesaid, to wit, from the said — day of — until the — day of —, in the year aforesaid, contrary to the form of the Statute in such case made and provided, to wit, at, &c. aforesaid; by means of which said premises he the said plaintiff was kept and detained in prison a great length of time, and during all that time suffered great pain in body and mind, and was hindered and prevented from performing and transacting his lawful affairs and business, and hath been and is greatly injured in his credit and circumstances, and also incurred the risk of becoming and being proceeded against as a bankrupt, to wit, at, &c. (*venue*) aforesaid, to the damage, &c.

BY PARTY
GRIEVED.

For that whereas the said defendant, on, &c. and long before, was, and from thence hitherto hath been, and still is, one of his majesty's justices assigned to keep the peace of our lord the now king, in the county of —, and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed within the said county, to wit, in the parish of —, in the said county of Middlesex. And whereas the said plaintiff, by the name and description of, &c. was, on, &c. aforesaid, to wit, at, &c. (*venue*) aforesaid, convicted before the said defendant, so being such justice as aforesaid, upon the information of one J. W. of the stamp-office, gentleman, who prosecuted as well for our said lord the king as for himself, in that behalf, for that after the *commencement of a certain act of parliament, made in the parliament of our lord the late King George the Third, holden at Westminster, in the 24th year of his reign, and intitled "An act for granting to his majesty certain duties on horses kept for the purpose of riding, and on horses, and in driving certain carriages in respect whereof any duty of excise is made payable;" and after the — day of — therein mentioned, to wit, on, &c. the said plaintiff so living in — aforesaid, being within the weekly bills of mortality, did keep and use one gelding for the purpose of drawing a certain carriage, and that the said plaintiff did not, within ten days after beginning to keep and use the said gelding, for the purpose aforesaid, give notice in writing, at the offices in London, for the stamping and making of vellum, parchment, and paper, of keeping and using the same, and of the parish and place where he resided, and pay down the duty of 10s. imposed by the said act for keeping and using the said gelding, according to the directions of the said act, but wholly neglected and failed so to do, and kept and used the same without giving such notice, and without making such payments as aforesaid, contrary to the form and effect of the said act; by reason whereof, and by force of the said act, the said plaintiff forfeited and became liable to pay the sum of £— for his said offence, one moiety thereof to his said majesty, and the other moiety thereof, with full costs of suit, which costs of suit amounted to and were adjudged at the sum of £— to the said J.

Against a
justice of
the peace,
for refus-
ing to take
bail on a
convic-
tion before
him,
where
plaintiff
intended
to appeal
to the ses-
sions (f).
[*826]

(f) See 3 B. & P. 551.—1 Burn, J. 26th edit. 308.

BY PARTY
GRIEVED.

[*827]

W. the said informer ; and the said plaintiff avers, that he the said plaintiff after he had been so convicted as aforesaid, for the supposed offence aforesaid, by the said defendant, so being such justice as aforesaid, and before the next general quarter sessions of the peace for the said county of Middlesex, to wit, on, &c. to wit, at, &c. (*venue*) aforesaid, finding himself aggrieved by the said conviction and judgment of the said defendant, so being such justice as aforesaid, in that behalf given as aforesaid, intended and was desirous of appealing to the justice of the peace at the then next general quarter sessions of the peace for the said county of Middlesex, against the said conviction and judgment of the defendant, and therefore the said plaintiff afterwards, to wit, on, &c. at, &c. (*venue*) aforesaid, applied to the said defendant, so being such justice as aforesaid, and then and there gave notice to the said defendant, and then and there offered to the said defendant security of good and sufficient persons, *to wit, of — the said plaintiff, and of P. M. of — street, in the parish of — in the said county of Middlesex, as surety for the said plaintiff and defendant, of, &c. in the said county, victualler, as another surety for the said plaintiff, J. M., and C. B. then and there being sufficient persons, and each of them then and there being sufficient in that behalf, to the amount of the value of the penalty forfeited, whereof the said plaintiff was so as aforesaid convicted, together with such costs as should be awarded in case such judgment should be affirmed, and then and there required the said defendant, so being such justice as aforesaid, to accept and take such security, in order that the said plaintiff might make and prosecute his said appeal to and before the said justices of the peace at the then next general quarter sessions of the peace for the said county of Middlesex, according to the form of the Statute in such case made and provided ; and although it was then and there the duty of the said defendant, so being such justice as aforesaid, to have accepted and taken such security as aforesaid ; nevertheless the said defendant not regarding the Statute in that case made and provided, nor his duty in that behalf, but contriving, and wrongfully intending unjustly to aggrieve and oppress the said plaintiff in this behalf, and to prevent and hinder him from making his said appeal to the said justices of the peace of the then next general quarter sessions of the peace for the said county of Middlesex, against his duty as such justice of the peace as aforesaid, and contrary to the statute aforesaid, and the laws of the land, absolutely refused to take or accept the security so offered as aforesaid, or any other security whatsoever, for the purpose aforesaid ; by means whereof the said plaintiff was prevented and hindered from making and prosecuting his said appeal to the said justices of the peace at the then next general quarter sessions of the peace for the said county of Middlesex, and from getting the said conviction quashed or reserved, and had his goods and chattels, of great value, to wit, of the value of £— sold by virtue of the said conviction, and was otherwise very much prejudiced and oppressed, and was obliged to pay, and did actually pay, by means of the said sale of his said goods and chattels, a large sum of money, to wit, the sum of £— in satisfaction of the said conviction and forfeiture, and the costs and charges attending the levying thereof, by virtue of the said conviction, to wit, at, &c. (*venue*) aforesaid, to the damage, &c.

[First and second counts for not levying the whole debt, and falsely returning to the fieri facias, that defendant had no more goods, nearly similar to those, ante, 748. Third count as follows:] And whereas also, heretofore, to wit, on, &c.—[Here state the recovery of the judgment and writ to the sheriff, and levy under it, as directed ante, 748, and *then proceed ;]—Yet the said defendant so being sheriff of the said county of — as aforesaid, not regarding his duty as such sheriff, nor the Statute in such case made and provided, afterwards, to wit, on, &c. at, &c. (*venue*) by reason and color of his said office of sheriff of the said county of — wrongfully, illegally, and oppressively, had, received, and took, of and from the said plaintiff, for the serving and executing of the said execution, more and other consideration and recompense than in the said act is limited and appointed in that behalf, that is to say, divers large sums of money, in the whole amounting in the sum of £— more than in the said act is limited and appointed in that behalf, whereby the said plaintiff is damaged and aggrieved to the amount of the said sum of £— contrary to the form of the statute in such case made and provided, to wit, at, &c. (*venue*) aforesaid, to the damage, &c.

BY PARTY
GRIEVED.
On stat.
28 Eliz. c.
4. against
sheriff for
extortion
at the suit
of the
plaintiff in
the action
(g).

[*828]

*VII. DECLARATIONS IN TROVER.

[*835]

[Commencement as ante, 596.]—For that whereas the said plaintiff, heretofore, to wit, on, &c. at, &c. (*venue*) was lawfully possessed, as of his own property (*h*) of certain [cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money,] goods and chattels, to wit, [ten horses, ten mares, ten geldings, ten bulls, ten cows, &c. (*k*) stating the different description of the cattle] and a certain indenture of release (*m*) bearing date the — day of —, purporting to be made between E. F. of the one part, and G. H. of the other part, and purporting to be a conveyance from the said E. F. to the said G. H. of certain

Common
count in
trover, for
cattle,
deeds,
bonds,
bills, and
notes,
bank-
notes, mo-
ney, and
goods (*i*).
Cattle.

Deeds (*l*).

(g) See form, 3 B. & C. 688.—5 D. & R. 495, S. C.; and see form in debt, ante, 504 b, and a form in debt on the 28 Eliz. by a common informer *qui tam* for the 40*l*. penalty. In 6 T. R. 771, 776, the statute was unnecessarily and improperly stated; and see 2 Bing. 256. See a form in debt on 32 Geo. 2. c. 28, s. 1. & 12, and 23 Hen. 6. c. 9, against bailiffs, &c. for extortion, ante, 501, 509, and notes there.—See the statute and notes in 1 Chit. Coll. Stat. 268. The sheriff is liable for the extortion of his bailiff, 2 T. R. 148.

(h) As to this allegation, see 7 T. R. 394, 399.—2 Saund. 47 i. k. In Selw. N. P. 5th edit. 1315. n. 11, it is said that the omission is aided by verdict, but not by judgment by default.

(i) As to the action of trover in general, see ante, vol. i. 167.—2 Saund. 46, note.—Bac. Ab. Trover, C. D.—Action on the Case, Trover; and ante, "*Detinue*," 593.

See forms, 2 Lutw. 1537.—1 Rich. C. P. 134. 2 Id. 161.—Plead. Ass. 507, 509; and see a form against baron and feme for trover, by feme before marriage, 2 Rich. C. P. 162. See 1 B. & A. 685.

(k) As to the description of the property, see ante, vol. i. 410, 11.—2 Stark. 247.—7 Taunt. 642. In trespass for taking "goods, chattels, and effects," plaintiff may recover the value of severed fixtures, 4 B. & A. 206; but not so if for taking "goods and chattels" only, *id*. Unsevered fixtures are not recoverable in trover, 2 B. & C. 76.—3 D. & R. 255, S. C.

(l) It is not necessary to state the date of the deed, 1 Wils. 116.—Bac. Ab. Trover, F. 1.—Bul. N. P. 37.—Ld. Raym. 276. Salk. 654.

(m) See this form of description held good to support "a lease and release," 1 Bing. 46.—7 Moore, 304, S. C.

IN TROVER. tenements therein mentioned, and a certain other deed purporting to be a mortgage of certain tenements by the said E. F. to the said G. H. and of a certain indenture of lease (n), bearing date, &c. and made between one J. K. of the first part, and one L. M. of the other part, by which said last mentioned indenture the said J. K. demised to the said L. M. certain tenements therein mentioned, for a certain term therein also mentioned and yet unexpired, and a certain writing obligatory, commonly called a bond, sealed with the seal of *one N. O., whereby the said N. O. became bound to the said plaintiff in the penal sum of £100, and then still being in full force, [and a certain bill of exchange in writing, made and drawn by one E. F. upon, and accepted by the said defendant, bearing date, to wit, the — day of —, whereby the said E. F. requested the said defendant, — months after the date thereof, to pay to the said plaintiff, or his order, the sum of £—,] and a certain other bill of exchange, accepted by the said defendant, for the payment by the said defendant of a certain sum of money, to wit, the sum of £—, at a certain day therein mentioned, and now past; and a certain promissory note, in writing, made and drawn by one E. F. whereby the said E. F. promised to pay to the said plaintiff, or his order, a certain sum of money, to wit, the sum of £— at a certain time therein mentioned, and now past; and divers, to wit, five notes of the Governor and Company of the Bank of England, commonly called bank notes, for the payment of the sum of £5 each; and divers to wit, twenty pieces of the current coin of this realm called guineas [or, “half-guineas, seven-shilling pieces, crowns, half-crowns, shillings, &c.”] and divers, to wit, twenty tables, twenty chairs, &c. [*specifying the goods, and avoiding any repetition of the same articles, and describing each as generally as possible, omitting the quality as “mahogany, silver, &c.”*] of great value, to wit, of the value of £— (r), of lawful money of Great Britain. And being so possessed, the said plaintiff afterwards, to wit, on the day and year [first] above mentioned, at, &c. (*venue*) aforesaid, casually lost the said [cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, and money,] goods and chattels, out of his possession; and the same afterwards, to wit, on the day and year [first] aforesaid, at, &c. (*venue*) aforesaid, came to the possession of the said defendant by finding. Yet the said defendant well knowing *the said cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, money, goods and chattels, to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving, and fraudulently intending craftily and subtly, to deceive and defraud the said plaintiff in this behalf, hath not as yet delivered the said cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, money, goods and

Release.

Mortgage.

Bond.

[*836]

Bills (o).

Notes.

Bank notes.

Money (p).

Goods (q).

The loss.

The finding.

The conversion.

[*837]

(n) See the declaration in 3 Wood. Vin. Lec. 103, note y.

(o) Damages, how calculated for, see 3 Campb. 477.

(p) This has been the usual description, 2 Rich. C. P. 161. Money, in an indictment, is now described, thus, “with force and arms, at, &c. eight pieces of the current coin of this realm, called guineas, of the value of thirteen pounds thirteen shillings,

of the monies of the said plaintiff, then and there being found, feloniously did steal, take, and carry away.” When trover lies for, and how to describe money, see 5 B. & A. 652.—1 D. & R. 282, S. C.

(q) As to the mode of describing them in general, see ante, vol. i. 410, 411.

(r) The property must be described to be of some value, 4 B. & A. 271.

chattels, or any or either of them, or any part thereof, to the said plaintiff, IN TROVER. although often requested so to do, and hath hitherto wholly refused so to do; and afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, converted and disposed of the said cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, money, goods and chattels, to his own use. To the damage, &c.—[*If a second count in trover be inserted in the declaration for the same property, the description should not be repeated, but the declaration should be for* “other cattle, goods and chattels, of the like number, quantity, quality, description, and value, as those in the said [first] count mentioned.”—[*Conclude as ante*, 596.] Second count in trover.

[*Commencement as ante*, 33.]—For that whereas the said E. F. before he became a bankrupt, to wit, on, &c. (*t*) at, &c. (*venue*) was lawfully possessed, as of his own property, of, &c. [*state the property as in the above form*] of great value, to wit, of the value of £—, and being so possessed thereof, the said E. F. afterwards, and before he became a bankrupt, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on the day and year aforesaid, there came to the possession of the said defendant by finding. Yet the said defendant well knowing the said goods and chattels to be the property of the said E. F. before he became a bankrupt, and of right to belong and appertain to the said plaintiff, as assignee as aforesaid, after the said bankruptcy, but contriving and fraudulently intending to injure the said E. F. before he became a bankrupt, and the said plaintiff, as assignee as aforesaid, since the said bankruptcy, in this behalf, hath *not, although often requested so to do, as yet delivered to them, or any or either of them, the said goods and chattels, or any or either of them, or any part thereof, but hath hitherto wholly neglected and refused so to do, and afterwards and since the said bankruptcy, to wit, on the — day of —, A. D. — converted and disposed thereof to his own use, to wit, at, &c. (*venue*) aforesaid. By assignees of a bankrupt. First count, on bankrupt's possession, and a conversion after the bankruptcy (s). [*838]

And whereas also the said plaintiff, as such assignee as aforesaid, after the said E. F. became a bankrupt, to wit, on, &c. at, &c. (*venue*) aforesaid, was lawfully possessed of certain other goods and chattels of the like number, quantity, quality, description, and value as the said goods and chattels in the said first count mentioned, as of the property of the said plaintiff, as such assignee as aforesaid; and being so possessed thereof, the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, casually lost the said last-mentioned goods and chattels out of his possession, and the same afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid; came to the possession of the said defendant, by finding. Yet the said defendant well knowing the said last-mentioned goods and chattels to be the property of the said plaintiff, as such assignee as aforesaid, and of right to belong and appertain to him as such assignee as aforesaid, but contriving, and fraudulently intending to injure the said plaintiff, as such assignee as aforesaid, in this behalf, hath not, although often requested so to do, delivered the said goods and Second count on the assignee's possession (u).

(s) See a form, 1 Rich. C. P. 472. If there was a conversion before the bankruptcy, add a count accordingly, stating it. (t) It is usual to insert a day before he became a bankrupt. (u) 2 Rich. C. P. 161.—Morg. 453.

IN TROVER. chattels, or any or either of them, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do; and afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, converted and disposed thereof to his own use. To the damage of the said plaintiff, as such assignee as aforesaid, of £—, and therefore he brings his suit, &c.

By the assignees of an insolvent debtor, on a possession and conversion before insolvent's petition.

[*Commencement as ante*, 33.]—For that whereas, heretofore, and before the said E. H. subscribed his petition to the court for the relief of insolvent debtors, for relief as such insolvent debtor as aforesaid, under the said Statute, and before the said plaintiff became assignee as aforesaid, to wit, on, &c. at, &c. (*venue*) he the said E. H. was lawfully possessed, as of his own property, of certain goods and chattels, to wit, [*here enumerate the goods*, &c.] of great value, to wit, of the value of £—, of lawful money of Great Britain; and being so possessed thereof, the said E. H. afterwards, and before he subscribed his said petition, and before the said plaintiff became assignee as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, casually lost the said goods and chattels out of his possession, and the said goods and chattels afterwards, and before the said E. H. subscribed his said petition, and before the said plaintiff became assignee as aforesaid, to wit, on the day and year aforesaid, there came to the possession of the said defendant by finding. Yet the said defendant well knowing the said goods and chattels to be the property of the said E. H. and of right to belong and appertain to him, but contriving and fraudulently intending, craftily, and subtly to deceive and defraud the said E. H. before he subscribed his said petition, and before the said plaintiff became assignee as aforesaid, in this behalf, did not deliver the said goods and chattels, or any or either of them, or any part thereof, to the said E. H. before he subscribed his said petition, and before the said plaintiff became assignee as aforesaid, in this behalf, did not deliver the said goods and chattels, or any or either of them, or any part thereof, to the said E. H. although often requested so to do, and afterwards, *and before the said E. H. subscribed his said petition, and before the said plaintiff became assignee as aforesaid, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, converted and disposed of the said goods and chattels to his, the said defendant's own use, and he never hath delivered the same to the said plaintiff, assignee as aforesaid, to wit, at, &c. (*venue*) aforesaid.]

Second count, on insolvent's possession, with a conversion after plaintiff was assignee. Third count, on the assignee's possession, and

[*Same as the first count to the*, and then conclude thus*] and after the said E. H. subscribed his said petition, and after the said plaintiff became assignee as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, converted and disposed of the said last-mentioned goods and chattels to his the said defendant's own use.

And whereas also the said plaintiff, as such assignee as aforesaid, afterwards, and after he became such assignee as aforesaid, to wit, on, &c. at, &c. (*venue*) aforesaid, was lawfully possessed, as of the property of the said plaintiff, as such assignee as aforesaid, of certain other goods and chattels, of the like number, quantity, quality, description, and value, as the said goods and chattels in the said first count mentioned; and being so possessed thereof, the said plaintiff afterwards, to wit, on the day and

year last aforesaid, at, &c. (*venue*) aforesaid, casually lost the said last-mentioned goods and chattels, out of his possession, and the same afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, there came to the possession of the said defendant by finding. Yet the said defendant well knowing the said last-mentioned goods and chattels to be the property of the said plaintiff, as assignee as aforesaid, and of right to belong and appertain to him as assignee as aforesaid, but contriving, and fraudulently intending, craftily and subtly, to deceive and defraud the said plaintiff as such assignee as aforesaid, in this behalf, hath not as yet delivered the said last-mentioned goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do, and afterwards, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, converted and disposed of the said last-mentioned goods and chattels to his, the said defendant's own use. To the damage of the said plaintiff, as such assignee as aforesaid, of £—; and therefore he brings his suit, &c.

INTROVER.
—
a conver-
sion after-
wards.

[*Commencement as ante*, 101.]—For that whereas the said E. F. in his life-time, to wit, on, &c. at, &c. (*venue*) was lawfully possessed of divers goods and chattels, to wit, &c. [*describe the property as ante*, 835.] of great value, to wit, of the value of £— of lawful, &c. as of his own property, and being so possessed thereof, the said E. F. in his life-time, afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards and in the life-time of the said E. F. to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, came to the possession* of the said defendant by finding. Yet the said defendant well knowing the said goods and chattels to be the property of the said E. F. in his life-time, and of right to belong and appertain to the said E. F. in his life-time, and to the said plaintiff as executor as aforesaid, after the decease of the said E. F. but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said E. F. in his life-time, and the said plaintiff as executor as aforesaid, since the death of the said E. F. in this behalf, did not deliver the said goods and chattels, or any of them, or any part thereof, to the said E. F. in his life-time, nor hath he as yet delivered the same, or any of them, or any part thereof, to the said plaintiff, executor as aforesaid, since the death of the said E. F. (although often requested so to do*) and the said defendant afterwards, and in the life-time of the said E. F. to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, converted and disposed of the said goods and chattels to his own use.

By an ex-
ecutor for
a trover
and con-
version in
the life-
time of
the testa-
tor (w).

[*839]

[*When the trover was in the life-time of the testator, but the conversion*

Second
count on a

(w) See *Lil. Ent.* 70.—1 *Mall.* 121. As to the counts in trover on the possession of the testator, and of the plaintiff as executor, and his liability to costs on the latter count, see *Tidd*, 9th ed. 978.—10 *East*, 293.—2 *Taunt.* 116.—4 *T. R.* 277.—3 *B. & P.* 253.—3 *B. & P.* 115.—9 *Bar. & Cres.* 666. It is in general sufficient to insert in the declaration the above count and the next but one; see 2 *Saund.* 47 k.—10 *East*, 293.—2 *Taunt.* 116. Indeed, when the con-

version has been since the death, the last count will suffice, 2 *Saund.* 116. In trover by an administrator, when the property was laid in the intestate, evidence is not admissible to dispute the plaintiff's title as administrator, or the sufficiency of the stamp on the letters of administration, but it is otherwise as the count on the plaintiff's possession, see 2 *Ld. Raym.* 824.—2 *Saund.* 47 k.—2 *M. & S.* 564.

IN TROVER. *after his death, the count runs as above to the statement of the conversion, at the asterisk, and then as follows:—*“And the said defendant afterwards, and after the death of the said E. F. to wit, on, &c. at, &c. (venue) aforesaid, converted and disposed of the said goods and chattels to his own use.”

trover in life-time of testator, and conversion after his death (x). Third count for trover, and conversion after testator's death (y). [*840]

And whereas also, the said plaintiff, as executor as aforesaid, afterwards, and after the death of the said E. F. to wit, on, &c. at, &c. (venue) aforesaid, was lawfully possessed of divers other goods and chattels, of like number, quantity, quality, description, and value, as the said goods and chattels in the said first count mentioned, as of his property as such executor as aforesaid, and being so possessed thereof, the *said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, casually lost the said last-mentioned goods and chattels out of his possession, and the same then and there came to the possession of the said defendant by finding; yet the said defendant well knowing the said last-mentioned goods and chattels to be the property of the said plaintiff as such executor as aforesaid, and of right to belong and appertain to the said plaintiff as such executor as aforesaid, but contriving, and fraudulently intending to deceive and defraud the said plaintiff as such executor as aforesaid in this behalf, hath not as yet delivered the said last-mentioned goods and chattels, or any part thereof, to the said plaintiff, (although often requested so to do) and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, converted and disposed of the said last-mentioned goods and chattels to his own use.—[Conclude, to the damage of the plaintiff, “as executor,” and with the profit as ante, 102.]

By an administrator. First count on intestate's possession (x).

[Commencement as ante, 109.]—For that whereas the said E. F. in his life-time, to wit, on, &c. at, &c. (venue) was lawfully possessed, as of his own property, of divers goods and chattels, to wit, &c. [describe the property, as ante, 835,] of great value, to wit, of the value of £— and being so possessed thereof, the said E. F. afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on the day and year aforesaid, at, &c. (venue) aforesaid, came to the possession of the said defendant by finding; yet the said defendant, well knowing the said goods and chattels to be the property of the said E. F. in his life-time, and at the time of his death, and after his decease, of right to belong to the said plaintiff, as administrator aforesaid, (to which the said plaintiff * after the death of the said E. F., to wit, on, &c. at, &c. (venue)

Grant of administration.

(x) This count, though sometimes added, see 4 T. R. 277, seems in no case necessary, and the next will suffice, see 10 East, 293. —2 Taunt. 116.

(y) See forms, Herne, 87.—Latch, 253. The property of the goods draws to it a possession in law, therefore an executor may declare on his own possession “as executor,” though in fact he never has had possession, 2 Saund. 47 k.—10 East, 293. 2 Taunt. 116. See the note, ante, 838; as

to this count in general, see 2 Saund. 47 k. The executor must, in support of this count upon the trial, prove himself to be executor, by producing the probate, Id.—2 M. & S. 554.—Ante, 838 b, note.

(z) As to the counts on the intestate's and the administrator's possession, and the costs, ante, 838 b, n. (w).—2 Saund. 138, n. 2, by baron and feme, executrix or administrator: 1 Salk. 114.—2 Lil. Ent. 70. Bac. Ab. Detinue, A.

~~the~~ aforesaid, administration of all and singular the goods, chattels, and credits which were of the said E. F. deceased, *at the time of his death, who died intestate, by — by Divine Providence, [Archbishop of Canterbury, Primate of all England and Metropolitan,] in due form of law was granted;) but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said E. F. deceased, in his life-time, and the said plaintiff as administrator as aforesaid, since the death of the said E. F. in this behalf, did not deliver the said goods and chattels, or any of them, or any part thereof, to the said E. F. in his life-time, nor hath he as yet delivered the same, or any of them, or any part thereof, to the said E. F. administrator as aforesaid, since the death of the said E. F. (although often requested so to do.*)—And the said defendant afterwards, and in the life-time of the said E. F. to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, converted and disposed of the said goods and chattels to his own use.

[*When the trover was in the life-time of the intestate, but the conversion after his death, the count runs as above, to the statement of the conversion, at the asterisk and then proceed as follows:*]—And the said defendant afterwards, and after the death of the said E. F. to wit, on, &c. at, &c. (*venue*) aforesaid, converted and disposed of the said goods and chattels to his own use.

And whereas also, the said E. F. in his life-time, to wit, on, &c. aforesaid, at, &c. (*venue*) aforesaid, was lawfully possessed of divers other goods and chattels of the like number, quantity, quality, description, and value, as the said goods and chattels in the said first count mentioned, as of his own property, and being so possessed thereof, the said E. F. afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, died so possessed thereof, after whose death, to wit, on the day and year last aforesaid, at, &c. (*venue*) aforesaid, the said goods and chattels came to the possession of the said defendant, by finding.—And afterwards, to wit, on, &c. at, &c. (*venue*) administration was granted to the said plaintiff as aforesaid, [or if this be the first count, state the administration fully, as *supra*.—Yet the said defendant, well knowing the said goods and chattels to be the property of the said E. F. in his life-time, and at the *time of his death, and to belong to the said plaintiff as administrator as aforesaid, after the death of the said E. F. but contriving and intending to defraud the said plaintiff as administrator as aforesaid, in this behalf, hath not as yet, &c.—[*Conclude as in the preceding count.*]

[*This count is similar to that at the suit of an executor, ante, 839, inserting the word "administrator," instead of "executor," and as the general property of the goods draws it to a possession in law, this count may be supported, though the administrator may never have had actual possession; 2 Saund. 47 k.—Ante, 839, note b.*]

(a) See the form, ante, 839, note (y).

(b) Com. Dig. Administration, B. 10. 2 Roll. Ab. 554.

(c) See form, Herne, 87.

Second count, on a trover in the life-time of intestate, and conversion after his death (a). Third count, on a trover, after the intestate's death, and before grant of administration (b).

[*842]

Fourth count, on possession of the administrator, and conversion after the death (c).

*IX. DECLARATIONS IN TRESPASS.

COMMENCEMENTS AND CONCLUSIONS.

In the King's Bench.

On — the — day of — (t),
in — Term, 1 Will. 4.

Com-
mence-
ment and
conclu-
sion in
King's
Bench.

[*847]

—, (to wit) (u) A. B. the plaintiff in this suit, complains of C. D. the defendant in this suit, being in the custody of the marshal of the Marshalsea of our said lord the now king, before the king himself, of a plea of trespass. For that (w) the said defendant on the — day of —, in the year of our Lord — (x), with force and arms, &c. made an assault (y) *[*&c. to wit, at, &c.—Here state the trespass according to

(t) It is in general advisable to entitle the declaration specially; see the note, ante, 12, n. a. and 2 Saund. 1, n. 1.

(u) In trespass to *persons* or to *personal* property the venue is transitory, unless in actions against justices of the peace, constables, &c. ante, vol. i. 298, 303.—21 Jac. 1. c. 12.—But in trespass to *real* property the venue is local, and in such an action, if there have been any removal of a personal chattel, it is usual to add a count *de bonis asportatis*, in order to avoid the danger of mis-description in the first count, 1 T. R. 479.

(w) The word "*whereas*" or "*wherefore*," the defendant committed the trespass, would in K. B. be bad on special demurrer, ante, vol. i. 421, 422.—2 Salk. 636.—1 Stra. 621.—Com. Dig. Pleader, C. 86.—Andr. 282. But when the proceedings are by original, or if in C. P. the writ is set out at length, the count-part may be aided by the prior recital of the supposed writ, and even a special demurrer could not then be supported, *id. ibid.*—1 Wils. 99.—Barnes, 452.—2 Wils. 203.

(x) In trespass for an assault, a declaration charging "that the defendant, *on such a day, and on divers other days and times, &c. made an assault,*" would be bad on special demurrer, as one assault cannot be made on different days. 6 East, 391, 395. Though in trespass for debauching a daughter, or for crim. con. the rule is otherwise. 6 East, 391.—Ante, 642, 3. And if the declaration state that the defendant on divers days, &c. assaulted the plaintiff, it would not, it seems, be bad. In trespass to lands, or for cutting down or carrying away trees, or for killing hares, &c. it may be stated that the defendant committed the trespasses on divers days and times, but trespass cannot be laid of loose chattels with a *continuando*, Salk. 638, 639.—Bul. N. P. 86, though it

may "*on divers days and times.*" 3 Bla. Com. 212.—1 Ld. Raym. 240.—Com. Dig. Pleader, 3 M. 10.—1 Saund. 24, n. 1.—Ante, vol. i. 438, 9. Formerly it was usual to declare with a *continuando*, as in 1 Saund. 24.—2 Rich. C. P. 423, but now it is more usual in trespass to land, to state "*that the defendant, on such a day, in such a year, and on divers other days and times, between that day and the day of exhibiting of this bill, (or if in C. P. 'between that day and the commencement of this suit,') with force and arms, &c. committed the trespasses,*" and the plaintiff may give in evidence any number of trespasses committed during the specified time. If only one day be mentioned, the plaintiff will not be permitted to give evidence of more than one act of trespass, and where the trespasses are stated, as above, to have been committed on divers days and times, between such a day and such a day, if the plaintiff intend to give evidence of *repeated* acts of trespass, he must confine himself to the time in the declaration, and therefore it is in general advisable, in trespass to real property, to lay the first day so far back as to be certainly anterior to the first act of trespass; however, as the precise day is not material in trespass, either to the person, personal, or real property, the plaintiff may succeed upon the trial as to any one *single* act of trespass, though committed prior to the time mentioned in the declaration. Bul. N. Pri. 86.—1 Saund. 24, n. 1.—2 Id. 5, note 3.—Co. Lit. 283 a.—Com. Dig. Pleader, C. 19.—1 Stark. 361.—Ante, vol. i. 439. If there were several trespasses, plaintiff should state them, for if the declaration avers a single act of trespass, which defendant justifies, there can be no new assignment. 7 Taunt. 156.

(y) A trespass should be stated to have been committed *vi et armis*, Com. Dig.

the facts, and as in the subsequent forms, and conclude as follows :]—And other wrongs (z) to the said plaintiff then and there did, against the peace of our said lord the king (a), and to the damage of the said plaintiff of £— (b), and therefore he brings his suit, &c.

Pledges, &c.

COM-
MEN-
CE-
MENTS
AND CON-
CLUSIONS.
Conclu-
sion.

*In the Common Pleas.

On — the — day of —
in — Term, 1 Will. 4.

[*848]

—, (to wit.) C. D. the defendant in this suit, was attached to answer A. B. the plaintiff in this suit, of a plea, wherefore the said C. D. with force and arms, &c. made an assault upon the said A. B. to wit, at, &c. and there gave and struck, &c. —.

The like
in the
Common
Pleas (c).

[The declaration in trespass in the Common Pleas usually recites the writ supposed to have been issued, and states the different acts of trespass at length, in one or more counts, but without particularizing the time when the trespass was committed, the number or quantity of the goods, &c. taken, or the value thereof, or the amount of the damages sustained, see 1 Saund. 318, n. 3. 339, n. 1; and the forms of declarations, for trespass to the persons, in 9 Wentw. 16, 17; for trespass to personal property Id. 65; and for trespass to real property, Id. 113, and Boote's Suit at Law, 193, 194. The declaration then proceeds as follows :—]

Writ part

And other wrongs to the said plaintiff there did, to the great damage of the said plaintiff, and against the peace of our lord the now king, &c. —And thereupon the said plaintiff, by E. F. his attorney, complains, for that the said defendant, on, &c. with force and arms, &c. made an assault upon the said plaintiff, to wit, at, &c. (venue) and then and there gave and struck, &c.

Conclu-
sion of
writ part.

[Here state the trespasses precisely as in the preceding part of the declaration, with the addition of time, number, quantity, and value, as in the count part of the precedents above referred to, and conclude as follows :—]

Count
part.

*And other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, and against the peace of our said lord the king.—Wherefore the said plaintiff saith, that he is injured, and hath sustained damage to the amount of £—, and therefore he brings his suit, &c.

Conclu-
sion.
[*849]

(Omit pledges.)

Pleader, 3 M. 7, but the omission will be aided unless the defendant demur specially. —2 Saund. 81, n. 1.—Ante, vol. i. 422.

(z) As to the *alia enormia*, see ante, vol. i. 442.—Cro. Jac. 664.

(a) The declaration in trespass should be *contra pacem*, Com. Dig. Pleader, 3 M. 8, but the omission is aided unless the defendant demur specially, ante, vol. i. 422.

(b) Any sum sufficient to cover the

amount of the damages, which it may be probable the jury will give.

(c) Observe the notes to the preceding form. This was formerly the usual mode of declaring in trespass in the Common Pleas, (see 2 Lil. Ent. 436.—2 Rich. C. P. 418, 420, 421, 430, 432.) but now, to avoid the prolixity and expense occasioned by the recital of the supposed writ, the next form is usually adopted, see the notes thereto ;

COM-
MON-
PLEAS
AND CON-
CLUSIONS.

The like
in the
Common
Pleas in a
more con-
cise and
better
form (d).

In the Common Pleas.

On — the — day of —,
in — Term, 1 Will. 4.
—, (to wit.) C. D. the defendant in this suit, was attached to answer A. B. the plaintiff in this suit, of a plea of trespass, and thereupon the said A. B. by E. F. his attorney, complains against the said C. D. for that the said defendant, on, &c. with force and arms, &c. made an assault, &c. to wit, at, &c. (*venue*).—[*Here state the trespasses as in the King's Bench, and as in the count-part of the last form, and according to the facts, and which may be stated as in the following forms, and conclude as in the last form from the asterisk.*]

[*850]

*I. TO PERSONS.

For an as-
sault,
spitting in
face, pull-
ing nose
and hair,
beating
with
sticks and
fists, pull-
ing down,
throwing
down,
kicking
and tear-
ing
clothes(f).

[*Commencement and conclusion as in the King's Bench, or Common Pleas, as ante, 846 to 849.*—For that (e) the said defendant, on, &c. (f) with force and arms, (g), &c. assaulted (h) the said plaintiff, to wit, at, &c. (*venue*) (i) and then and there [spit in the face of the said plaintiff (k), and] with great force and violence seized and laid hold of the said plaintiff [by his nose, and greatly squeezed and pulled the same, and then and there plucked, pulled, and tore divers large quantities of hair from and off the head of the said plaintiff,] and then and there [with a certain stick, and with his fists,] gave and struck the said plaintiff a great many

but see 2 Marsh. 101, where *semble*, that this was objected to, but the report is not distinct upon the point.

(d) It appears from 1 Saund. 318, n. 3, that at the present time a declaration in trespass in the Common Pleas, or by original in the King's Bench, would probably be deemed sufficient, though it merely state as above, that the defendant was attached to answer the plaintiff in a plea of trespass, without setting forth the supposed writ; and certainly as this concise mode avoids much prolixity and expense, it is preferable to the form, ante, 848, and is now more usually adopted.

(e) The word "*whereas*" would be improper, see ante, 846, note *w*.

(f) On "divers days and times" would not be improper in this case, where the word "*assaulted*" is used, ante, 846, note *z*. See 6 East, 396. If there were several trespasses, plaintiff should state them; for if plaintiff in his declaration avers a single act of trespass which defendant justifies, there can be no new assignment, 7 Taunt. 156. As to the utility of a second count, see 1 Campb. 473. The unnecessary introduction of several counts is censured, 1 Bla. Rep. 270.

(g) Ante, 847, note *y*.

(h) This may in some cases be preferable to "made an assault;" see observations in

6 East, 396.—Ante, n. *z*.

(i) The venue is in general transitory, ante, 846, note *u*.

(k) State only such acts of trespass as can be proved; an over statement, unsupported by evidence, affords ground for ridicule on the part of defendant's counsel.

(l) In using this and the other precedents, in trespass only such parts of them as are really applicable to the particular case should be inserted in the declaration, see the forms, 9 Wentw. Index, iii. to ix; and observe the notes to the forms, ante, 846 to 849. The principal formal allegations necessary to be attended to in framing a declaration for an assault, or other trespass, are, 1st. The statement of the *time* when the trespass was committed. 2dly. The insertion of the words *vi et armis*. 3dly. The *venue* or place. 4thly. That the matter injured was the *property* of the plaintiff, and its *value*. 5thly. The insertion of the words "*alia enormia*." 6thly. The words "*contra pacem*;" and 7thly. The conclusion *ad damnum*, &c. In other respects the declaration in trespass should be a *full* statement of the injuries, in the order in which they were committed, and of all the consequent *damages*; and no allegation should be inserted unless there be a probability of its being proved in evidence.

violent blows and strokes on and about divers parts of his body; and also, then and there, with great force and violence, shook and pulled about the said plaintiff, and cast and threw the said plaintiff down to and upon the ground, and then and there violently kicked the said plaintiff, and *gave and struck him a great many other blows and strokes, [and also then and there (*m*), with great force and violence, rent, tore, and damaged the clothes and wearing apparel, to wit, one coat, one waistcoat, one pair of breeches, one cravat, one shirt, one pair of stockings, and one hat, of the said plaintiff (*n*), of great value, to wit, of the value of [£20,] which the said plaintiff then and there wore, and was clothed with.] By means of which said several premises, the said plaintiff was then and there greatly hurt, bruised, and wounded, and became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, for the space of — weeks then next following, [or, “hitherto,”] during all which time the said plaintiff thereby suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business, by him during that time to be performed and transacted, and also thereby the said plaintiff was forced and obliged to, and did necessarily pay, lay out, and expend a large sum of money, to wit, the sum of £— of lawful money of Great Britain, in and about endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness, and disorder aforesaid, occasioned as *aforesaid, to wit, at, &c. (*venue*) aforesaid.—[*It is usual to add a count for a common assault, as follows:*]

ASSAULT
AND BATTERY.

[*851]

Damage, that plaintiff became bruised and ill, unable to transact his business, and was put to expense about his cure (o).

[*842]

And also, for that the said defendant, on the day and year aforesaid, with force and arms, &c. again assaulted [or “made another assault on,”] the said plaintiff, to wit, at, &c. and then and there again beat, bruised, wounded, and ill-treated him, *insomuch that his life was thereby then and there greatly despaired of* (*q*) and other wrongs, &c.—[*The conclusion in the King's Bench, or Common Pleas, is to be as ante, 846 to 849.*]

Second count, for a common assault (*p*).

For that the said defendant, on, &c. [*day of assault or about it*] at,

For firing a loaded pistol at plaintiff, and wounding him thereby, &c. (*r*).

(*m*) If there were a substantive and independent injury to *personal* property, it is advisable to state such injury in a distinct count, in order to entitle the plaintiff to full costs, for where an injury to personal property is either laid in the declaration, or proved merely in aggravation of damages, as a mode or qualification of the assault and battery or local trespass, 7 East, 325, it is within the stat. 22 & 23 Car. 2. c. 9. So where a *laceravit*, or tearing of the plaintiff's clothes, is laid in the declaration, or found by the jury to be merely consequential to, or committed at the same time as an assault and battery the plaintiff recovering less than 40s. damages, is not entitled to full costs without a certificate, Tidd's Prac. 9th ed. 964.—1 Hen. Bla. 291.—5 T. R. 482; and see 1 Taunt. 357. See the count *de bonis asportatis*, post, 859.

(*n*) A property or possession in the plaintiff must be stated, Com. Dig. Pleader, 3 M. 9.

(*o*) As to the statement of the special damage, ante, vol. i. 449. As to the words “wounding and mayhem,” see 1 Ld. Raym. 176.—3 Salk. 115, S. C.—1 Wils. 5.

(*p*) If there have been several assaults at different times, for which the plaintiff intends to proceed, distinct counts should be aided for each assault, 1 Saund. 299, n. 7. 1 Campb. 473. But otherwise it is not necessary, though usual, to insert a count for a common assault, for if the plaintiff prove any part of a special count, he will be entitled to a verdict *pro tanto*, though he fail in proving the residue, Rep. temp. Hardw. 121.—2 Saund. 74 b.

(*q*) This is the usual form of the count for a common assault, though there have been no battery; see 1 Saund. 14, n. 3; but the words in italics should be omitted, where the party was but slightly injured.

(*r*) The right of action would be merged in the felony if defendant maliciously shot at plaintiff.

**ASSAULT
AND BATTERY.**

&c. (*venue*) with force and arms, &c. made an assault upon plaintiff, and beat, bruised, wounded, and ill-treated him, and shot and discharged a pistol, then and there loaded with gunpowder and leaden bullets, which said pistol, so loaded, he the said defendant then and there held at and against the said plaintiff, and thereby then and there with shot, struck, and wounded the said plaintiff, in so grievous a manner that his life was, by means thereof greatly despaired of, and by reason of such wounding the said plaintiff then and there became lame, sick, and disordered, and continued so lame, sick, and disordered, for a long time, to wit, from thence hitherto, and was, during all that time, thereby rendered incapable of following and transacting his necessary affairs and business, by him during that time to be done, &c.—[*Conclude as usual, as in form, ante, 851, and add a count for a common assault, as supra.*]

For a battery, &c. on board a ship (s).

[*Commencement and conclusion in the King's Bench, or Common Pleas, as ante, 846 to 849.*—For that the said defendant, on, &c. with force and arms, &c. assaulted the said plaintiff in and on board of a certain ship or vessel called the — then on the high seas, to wit, at [London.] and then and there, with great force and violence, *struck and knocked the said plaintiff down to and upon the deck of the said ship or vessel, and then and there, with his fists, and also with a certain rope, gave and struck the said plaintiff a great many violent blows and strokes; and also then and there, without the license or consent, and against the will of the said plaintiff, put and placed the said plaintiff into irons, and then and there, without any reasonable or probable cause whatsoever, kept and continued the said plaintiff so in irons and imprisonment as aforesaid, for a long space of time, to wit, for the space of — hours then next following. By means, &c.—[*State the damage according to the fact, which may be as in the form, ante, 851. Add a count for false imprisonment, generally, as post, 857, and a count for a common assault, as ante, 851.*]

For forcibly excluding plaintiff, who was a parishioner and inhabitant, from the vestry-room, on a meeting about parish affairs, whereby he was prevented from consulting and giving his vote thereon.

For that the said defendant, on, &c. with force and arms, &c. assaulted the said plaintiff, to wit, at, &c. (*venue*) the said plaintiff then and there being a parishioner and inhabitant, paying scot and bearing lot in the said parish, and then and there being about to enter into the vestry-room of and within the said parish, to consult, treat, deliberate, and give his vote in a vestry of the inhabitants and parishioners, of the said parish, assembled in the said room to treat and deliberate upon and transact certain affairs and business of and concerning the public good and advantage of the said parish, and then and there pushed and shoved the said plaintiff from the said vestry-room, and hindered and prevented the said plaintiff from attending and being present at the said vestry assembled in the said vestry-room as aforesaid, whereby the said plaintiff was totally hindered, prevented, and excluded from attending and being present at the said vestry and also from consulting and giving his vote there, as such parishioner and inhabitant of the parish aforesaid, of and concerning divers weighty matters and affairs which concerned the public good and advantage of the said parish, to wit, at, &c. aforesaid.—[*Second count, for a common assault.*]

(s) Observe the notes to the forms, ante, 846 to 849, and 850, note s. The declaration should be framed according to the facts.

For that the said defendant, on, &c. with force and arms, &c. assaulted the said plaintiff, to wit, at, &c. (*venue*) and then and there hindered and prevented the said plaintiff *from entering into a certain building, where-in a certain congregation of persons, dissenting from the church of Eng-land, commonly called Quakers, was then and there assembled for ex-ercising religion, and which it was then lawful for the said plaintiff to enter, and then and there beat and ill-treated the said plaintiff, and im-prisoned him, and kept and detained him there imprisoned for a great length of time, to wit, &c. at, &c. (*venue*).—[*Second count for a common assault.*]

ASSAULT AND BATTERY.
[*854]
For pre-venting plaintiff from en-tering a Quaker's meeting-house during the exercise of religious worship (c).

[*Observe the commencements and conclusions in the King's Bench, or Common Pleas, as ante, 846 to 849.*] — (to wit.) A. B. and C. D. his wife, complains of E. F. and G. H. his wife, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king him-self, of a plea of trespass.—For that the said G. H. on, &c. with force and arms, &c. assaulted the said C. D. then and still being the wife of the said A. B. to wit, at, &c. (*venue*) and then and there beat, bruised, wound-ed, and ill-treated her, so that her life was then and there greatly despair-ed of and other wrongs to the said C. D. (*w*) then and there did, against the peace of our said lord the king, and to the damage of the said A. B. and C. D. (*x*) his wife, of £—. And therefore they bring their suit, &c.

BATTERY OF WIFE.
By hus-band and wife against husband and wife, for a bat-tery of one wife by the other (*w*).

Pledges.

[*Commencement in the King's Bench, or Common Pleas, as ante, 846 to 849.*]—For that the said defendant, *on, &c. with force and arms, &c. assaulted E. F. then and still being the wife of the said plaintiff, to wit, at, &c. (*venue*) and then and there violently beat, kicked, bruised, and ill-treated (*z*) the said E. F. so then and there being the wife of the said plaintiff as aforesaid, insomuch that the said E. F. by means of the pre-mises, then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, hitherto,

By hus-band alone for the bat-tery of wife, per quod, &c. (*y*).
[*855]

(c) As to the offense of disturbing meet-ing-houses, see 1 Burn, J. Dissenters, 26th edit. 966.

(u) Observe the notes to the forms, ante, 846 to 849. The different trespasses are to be described according to the facts, and may be stated as in the form, ante, 850, note (e). Care must be taken to declare only for the personal injury and suffering of the wife, and not to include any state-ment of an injury, which, in point of law, only affected the husband and not the wife, such as a statement of the battery of the husband, loss of her service, expense in her cure, &c. See 1 Salk. 119.—Com. Dig. Plead. 2. A.; and Jackson and Wife v. Mat-ravers, Michaelmas Term, 26 Geo. 3, vol. xxi. MSS. 379; and ante, vol. 1. 83 to 86; however, the statement of matters in ag-gravation will in some cases be aided after

verdict, 1 Salk. 119.

(w) This allegation appears proper, though *alia enormia eis intulit* is good. Cro. Jac. 664.—Com. Dig. Pleader, 2 A. 1.

(z) *Ad damnum ipsorum* is proper. Com. Dig. Pleader, 2 A. 1; and ante, vol. i. 451.

(y) Observe the notes to the forms, ante, 846 to 849. In this declaration no state-ment of the personal sufferings of the wife should be included, but the plaintiff should proceed merely for the consequential da-mage, and he may include counts for a bat-tery, or any other trespass to himself, or to his personal or real property, ante, vol. i. 84.

(z) The trespasses are to be described according to the fact, and may be stated as ante, 850, note (g).

BATTERY
OF WIFE.

whereby the said plaintiff during all that time lost and was deprived of all the comfort, benefit, and assistance of the said E. F. his said wife, in his domestic affairs, which he might and otherwise would have had; but thereby also the said plaintiff was then and there forced and obliged to pay, lay out, and expend, and hath necessarily paid, laid out, and expended, divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of £— in and about the endeavoring to heal and cure the said E. F. his said wife, of the sickness, soreness, lameness, and disorder aforesaid, occasioned as aforesaid, to wit, at, &c. (*venue*) aforesaid, and other wrongs to the said plaintiff then and there did, against the peace of our said lord the king, and to the damage of the said plaintiff of £— and therefore he brings his suit, &c.

Pledges, &c.

FOR CRIMINAL
CONVER-
SATION.

For criminal conversation,
vi et armis
(a)

[*856]

[*Commencement in the King's Bench, or Common Pleas, as ante, 846 to 849.*—For that the said defendant, *on, &c. and on other days and times between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] with force and arms, &c. assaulted and ill-treated E. F. then and still being the wife of the said plaintiff, to wit, at, &c. (*venue*) and then and there debauched and carnally knew her, whereby the said plaintiff, for a long space of time, to wit, from the day and year first above-mentioned, hitherto, hath wholly lost and been deprived of the comfort, fellowship, aid, and assistance of his said wife, in his domestic affairs, which the said plaintiff during all that time ought to have had, and otherwise might and would have had, to wit, at, &c. (*venue*) aforesaid.—And other wrongs to the said plaintiff then and there did, against the peace of our said lord the king, and to the damage of the said plaintiff of £— and therefore he brings his suit, &c.

DEBAUCH-
ING
DAUGHTER.

For debauching a daughter and servant, in trespass
(b).

[*Commencement in the King's Bench, or Common Pleas, as ante, 846 to 849.*—For that the said defendant heretofore, to wit, on, &c. at, &c. (*venue*) with force and arms, &c. assaulted, debauched, and carnally knew

(a) See the points relating to this action, in Selw. N. P. 4th edit. 8 to 26.—Bul. N. P. 26, 7th edit.—Bac. Ab. Marriage.—3 Bl. Com. 139. The defendant may change the venue, see 10 East, 32. I have not met with any printed form in which the declaration for crim. con. was framed *in case*; the injury has always been described as committed with force, the law supposing force and constraint, the wife having no power to consent, 3 Bl. Com. 139.—7 Mod. 79.—Bac. Ab. Marriage, E. 2; and in 2 New Rep. 482.—2 M. & S. 436, 7, the action was considered as *properly in trespass*. The action, however, is in effect *in case*, 6 East, 387, 251, because, 1st, The wrong complained of is not immediate, but consequential, the gist of the action, not being the supposed assault on the wife, but the consequent corruption of the body and mind of the wife, 6 East, 389. 2dly, That the plaintiff may declare with a *quod cum*, which is improper in trespass, 2 Salk. 636.—1 Stra. 621. 3dly, That the injury may be stated to have been committed “on di-

vers days and times, &c.” which is improper in trespass for an assault, 6 East, 391, 396. 4thly, That the plea of the Statute of Limitations is not guilty within six years. 2 Burr. 753. 6 East, 387, and not as in trespass for an assault within four years, 2 Salk. 420. And lastly, that the plaintiff is entitled to full costs, though he should not recover 40s. damages, 3 Wils. 319.—1 Salk. 206.—2 Lord Raym. 831. When it may be doubtful whether the criminal conversation can be proved, and the defendant has been guilty of enticing away, or harboring, the wife, it may be advisable to add counts for such injuries, and which may be framed as in the form in Willes, 578, 9, 80; and it may be advisable in that case to frame the count as ante, 642.

(b) See the forms and notes, ante, 643, and 2 New Rep. 476. 2 M. & S. 436. The first count may be in *trespass* for entering the dwelling-house, and there debauching the daughter, with a second count, as above.

one E. B. then and from thence hitherto being the daughter and servant of the said plaintiff, whereby the said E. B. became pregnant, &c.—
[Proceed to the end, as in the declaration in case, ante, 644, and conclude as in trespass, ante, 846, 7.]

DEBAUCH-
ING
DAUGH-
TER.

[Commencement in the King's Bench, or Common Pleas, as ante, 846 to 849.]—For that the said defendant, *on, &c. with force and arms, &c. assaulted E. F. then and still being the [daughter and] servant of the said plaintiff, to wit, at, &c. (*venue*) and then and there beat, bruised, wounded, and ill-treated the said E. F. insoinuch, that by means thereof, the said E. F. then and there became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto; during all which time the said plaintiff lost and was deprived of the service of his said [daughter and] servant, and of all the benefit and advantage which might, and would otherwise have arisen and accrued to him from such service, to wit, at, &c. (*venue*) aforesaid. —*[Add another count merely stating E. F. to have been plaintiff's servant only. Conclusion as in K. B., or in C. P., as ante, 846 to 849.]*

BATTERY
OF
SERVANT.
By a mas-
ter, for the
battery of
his ser-
vant, per
quod, &c.
(e).
[*857]

[Commencement in K. B., or C. P., as ante, 846 to 849.]—For that the said defendant, on, &c. with force and arms, &c. assaulted the said plaintiff, to wit, at &c. (*venue*) and then and there seized and laid hold of the said plaintiff, and with great force and violence pulled and dragged about the said plaintiff, and then and there gave and struck the said plaintiff a great many violent blows and strokes (e), and also then and there forced and compelled the said plaintiff to go from and out of a certain dwelling-house, situate and being in the county of — into the public street there, and then and there forced and compelled him to go in and along divers public streets, to a certain police-office, situate and being in the county of — and then and there imprisoned the said plaintiff, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of — then next following, contrary to the laws and customs of this realm, and against the will of the said plaintiff, whereby the said plaintiff was then and there not only greatly hurt, bruised, and wounded, but was also, thereby, then and there greatly exposed and injured in his credit and circumstances, to wit, at, &c. (*venue*) aforesaid. *[It is usual to add the following common count for a false imprisonment, and a count for a common assault, as ante, 852. Conclude as ante, 846 to 849.]*

FALSE IM-
PRISON-
MENT.
For an as-
sault and com-
pelling plain-
tiff to go
to a police
office, and
for false
imprison-
ment (d).

And also, for that the said defendant, on, &c. with force and arms, &c. again assaulted the said plaintiff to wit at, &c. (*venue*) and then and there beat, bruised, and ill-treated *him, and then and there imprisoned him and kept and detained him in prison there, without any reasonable or pro-

Common
count for
false im-
prison-
ment gen-
erally (f).
[*858]

(c) Observe the notes to the forms, ante, 844 to 849, and to the form, ante, 643, for debauching a daughter; a person cannot declare for the battery of his child, merely in the character of a *parent*, ante, vol. i. 70. If the plaintiff were put to any expense in medical attendance, &c. state such damage, as in the form, *supra*; and see Sir

T. Raym. 259.

(d) Observe the notes to the form, ante, 850.

(e) Describe the trespass according to the facts, which may be as ante, 850.

(f) See the notes to the last form, and to the form in 1 *Saund.* 76.

FIRST IN-
PRISON-
MENT.

bable cause whatsoever, for a long time, to wit, for the space of — hours then next following, contrary to the laws and customs of this realm, and against the will of the said plaintiff.—[*Add a count for a common assault as ante, 852, and conclude as ante, 846 to 849.*]

TO
CATTLE,
GOODS,
&c.

II. TO PERSONAL PROPERTY.

For chasing
sheep,
&c. with
special
damage
(g).

[*859]

[*Commencement and conclusion in K. B., or C. P., as ante, 846 to 849.*]
—For that the said defendant, on, &c. and on divers other days and times between that day and the day of exhibiting this bill [*or if in the Common Pleas, "before the commencement of this suit,"*] with force and arms, &c. drove, chased, and hurried the sheep, ewes, and lambs, &c. to wit, — sheep — ewes, and — lambs, of the said plaintiff, of great value, to wit, of the value of —*l.* then depasturing and being in and upon a certain waste or common called — in the parish of — in the county of — (h), and then and there chased and drove the said sheep, ewes, and lambs from and off the said common, to divers places to the said plaintiff unknown, whereby the said plaintiff was not only put to great trouble and expense, amounting in the whole to a large sum of money, to wit, the sum of —*l.* in and about endeavoring ^{to} find his said sheep, ewes, and lambs, but also divers thereof, to wit, — sheep, — ewes, and — lambs, of great value, to wit, of the value of —*l.* then and there died; and others thereof, to wit, — sheep, — ewes, and — lambs, of great value, to wit, of the value £— then and there became and were wholly lost to the said plaintiff, and the residue of the said sheep, ewes, and lambs, then and there became and were greatly damaged, and lessened in value, to wit, at, &c. (*venue*) aforesaid.

Second
count, for
chasing
sheep or
other cat-
tle gener-
ally (i).

And also for that the said defendant, on, &c. with force and arms, &c. chased and drove about other the cattle, to wit, — other sheep, — other ewes, and — other lambs, of the said plaintiff, of great value, to wit, of the value of £— to wit, at the parish aforesaid, in the county aforesaid. Whereby the said last-mentioned sheep, ewes and lambs, being of the value aforesaid, became and were greatly damaged, lessened in value, and spoiled, to wit, at, &c. (*venue*) aforesaid.—[*State the damage to the cattle according to the fact, and which may be as in the last form, and if there be any evidence to support it, add a count de bonis asportatis, as below.*]

For seiz-
ing cattle
or other
property
as a dis-
tress (k).

[*Commencement and conclusion in K. B., or C. P. as ante, 846 to*

(g) See forms, 9 Wentw. Index, ix. Observe the notes to the forms, ante, 846 to 849.

(h) This count is local, and will compel the defendant to confine his justification, if any, to chasing from off the particular common. The next count, (which is transitory, 1 Saund. 220,) should be added, and in

general is sufficient without the more special count.

(i) See forms, 9 Went. Index, ix.—Plead. A. 488; and observe the notes to the forms, ante, 846 to 849.—1 Saund. 220.

(k) See forms, 9 Went. Index, viii. ix. Pl. A. 485.—Morg. 637; and observe the notes, ante, 846 to 849.

849.]—For that the said defendant, on, &c. with force and arms, &c. seized, took, and distrained a certain cow, [or “certain goods and chattels, to wit, &c.”] of the said plaintiff, of great value, to wit, of the value of £— to wit, at, &c. (*venue*) and then and there impounded the said cow, [or, “goods and chattels,”] and kept and detained the same so there impounded, for a long space of time, to wit, for the space of — days then next following, whereby the said plaintiff, for and during all that time, lost and was deprived of the use and benefit of the said cow, [or, “goods and chattels,”] and thereby the same then and there became and were greatly damaged, lessened in value, and spoiled, to wit, at, &c. (*venue*) aforesaid.—[*Add a count de bonis asportatis, as follows :*]

TO
CATTLE,
GOODS,
&c.

And also for that the said defendant, on the day and year aforesaid, with force and arms, &c. to wit, at, &c. (*venue*) aforesaid, seized, took, and drove, [or, “led,” or if inanimate property, say “carried away,”] a certain cow, [or “certain *goods and chattels, to wit, &c.” or if fixtures be taken, say “certain goods, chattels, and effects,” enumerating them as in *trover*, ante, 835 ; but if the goods or cattle have been stated in a prior count, then say “divers cattle, goods, and chattels of the said plaintiff, of the like number, quantity, quality, description, and value, as the said cattle, goods, and chattels, in the said first count of the said declaration mentioned, there then found and being, and converted, &c.”] of the said plaintiff, of great value, to wit, of the value of £— of lawful money of Great Britain, there then found and being, and converted and disposed of the same to his own use.—[*Conclude as in K. B., C. P., or Exchequer, with the alia enormia, &c. as ante, 846 to 849.*]

Common
count, *de
bonis as-
portatis*(f).
[*860]

[*Commencement and conclusion in K. B., or C. P., as ante, 846 to 849.*] For that the said defendant, on, &c. with force and arms, &c. to wit, at, &c. (*venue*) shot off and discharged a certain gun, then and there loaded with gun-powder and shot, at and against a certain dog of the said plaintiff, of great value, to wit, of the value of £— and thereby and therewith then and there so greatly shot, hurt, and wounded the said dog, that by reason thereof the said dog, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, died, to wit, at, &c. (*venue*) aforesaid. [*If the mode in which the defendant injured the dog, &c. be doubtful, add a more general count, as follows :*—And also for that the said defendant, on the day and year aforesaid, with force and arms, &c. to wit, at, &c. (*venue*) aforesaid, greatly beat, hurt, and wounded a certain other dog of the said plaintiff, of great value, to wit, of the value of £— and by reason thereof the same dog afterwards, to wit, on the day and year aforesaid, died, to wit, at, &c. (*venue*) aforesaid, and other wrongs, &c.—[*Conclude as in K. B., or C. P., as ante, 846 to 849.*]

For shoot-
ing a dog,
&c. (m).

Second
count.

For that the said defendant, on, &c. [*day of injury, or about it,*] with force and arms, &c. at, &c. (*venue*) drove a certain cart, with great force

Trespass
for run-
ning de-
fendant's
cart
against
plaintiff's
horse, and
killing it.

(f) Observe the notes, ante, 846 to 849. What *asportatis* or damage is sufficient to entitle the plaintiff to full costs, though the verdict be for a sum under 40s. see 1 Stark. 55.—Tidd's Prac. 9th edit. 964.

(m) See forms, 9 Wentw. Index, ix.—1

Saund. 82, and observe the notes, ante, 846 to 849, &c. It may be stated that the defendant *assaulted* the cattle or other animal, but this is not usual, Barnes, 452.—3 Leon. 28.—2 Rich. C. P. 435. Plea there-
to, see 11 East, 568.

TO
CATTLE,
GOODS,
&c.

and violence, upon and against a certain horse of the said plaintiff, of great value, to wit, of the value of £—there then being, and thereby then and there with one of the shafts, and with other parts of the said cart of the said defendant, so greatly pierced, cut, hurt, lacerated and wounded the said horse of the said plaintiff, that by reason thereof the said horse, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, died, to wit, at, &c. (*venue*) aforesaid. And other wrongs, &c.—[*Conclude as usual, as ante, 846 to 849.*]

TO CAR-
RIAGES.

For run-
ning a car-
riage
against the
plaintiff's
whereby
he was
thrown
out, and
his car-
riage da-
maged,
and he was
put to ex-
pense in
repairing
it, and in
medicines,
&c. (n).

[*Commencement and conclusion in K. B. or C. P. as ante, 846 to 849.*]
—For that the said defendant, on, &c. with force and arms, &c. to wit, at, &c. (*venue*) drove a certain carriage, to wit, a curricule, which the said defendant was then and there driving in and along the king's highway, with great force and violence upon and against a certain other carriage, to wit, a certain chaise of the said plaintiff, of great value, to wit, of the value of £—, and in which said chaise the said plaintiff was then riding (o), in and along the said king's highway, and thereby, then and there, greatly broke to pieces, damaged and spoiled the said chaise of the said plaintiff. And by means of the premises, he the said plaintiff was then and there cast and thrown with great force and violence out of his said chaise, to and upon the ground, and by means of the premises, he the said plaintiff was afterwards, to wit, on the day and year aforesaid, at, &c. (*venue*) aforesaid, forced and obliged to, and did necessarily lay out and expend a large sum of money, to wit, the sum of £—in and about the repairing and amending the damage so done to the said chaise as aforesaid, and also by means of the premises, the said plaintiff then and there became and was greatly bruised, hurt, and wounded, and sick, sore, lame, and disordered, and so remained and continued for a *long space of time, to wit, for the space of — days then next following, and during all that time suffered and underwent great pain, and was hindered and prevented from performing and transacting his lawful affairs and business, by him during that time to be done, performed, and transacted; and was also thereby forced and obliged to pay, lay out, and expend, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £—in and about the endeavoring to be cured of the sickness, soreness, lameness, and disorder aforesaid, occasioned as aforesaid, to wit, at, &c. (*venue*) aforesaid.

[*861]

For seiz-
ing and
detaining
plaintiff's
cart and
horse and
convert-
ing an
halter.

[*Commencement and conclusion in K. B. or C. P. as ante, 846, to 849.*]
—For that the said defendant, on, &c. with force and arms, &c. to wit, at, &c. (*venue*) stopped and seized a certain horse and cart of the said plaintiff, of great value, to wit, of the value of £—, and kept and detained the same from the said plaintiff, for a long space of time, to wit, for the space of — then next following, and then and there seized and took, from and off the head of the said horse, a certain halter of the said plaintiff, of great value, to wit, of the value of £— and then *and there carried away the same, and converted and disposed thereof to his own use,

[*862]

(n) See form, 3 East, 593.—Observe the notes to the forms, ante, 846 to 849; and the form and notes, ante, 846 to 849. The injury and the damage should be stated precisely according to the facts.
(o) An immaterial averment, 1 Moore, 407.

to wit, at, &c. (*venue*) aforesaid.—[*Add a count de bonis asportatis, as ante, 859, and observe the notes to the forms, ante 846 to 849.*]

TO CARRIAGES.

[*Commencement and conclusion in K. B. or C. P. as ante, 846 to 849.*—For that the said defendant, on, &c. with force and arms, &c. to wit, at, &c. (*venue*) seized and took a certain barge or vessel of the said plaintiff, of great value, to wit, of the value of £— and in which said barge or vessel, the said plaintiff then and there intended, and was about to carry and convey certain goods, chattels, and merchandize, for certain freight and reward, to be therefore paid to the said plaintiff, and then and there carried away the said barge or vessel, and kept and detained the same from the said plaintiff, for a long space of time, to wit, hitherto, and converted and disposed thereof to his own use, and thereby the said plaintiff was hindered and prevented from carrying and conveying the said goods, chattels, and merchandize as aforesaid, and thereby lost and was deprived of all the profits, benefit, and advantage which might and would otherwise have arisen and accrued to him therefrom, to wit, at, &c. (*venue*) aforesaid.—[*Add a count de bonis asportatis, as ante, 859.*]

TO SHIPS,
&c.
For seizing and detaining plaintiff's barge (p).

For that the said defendant, on, &c. at, &c. (*venue*) with force and arms, &c. impressed, seized, took, and carried away one E. F. then and there being the apprentice and servant of the said plaintiff, and also a mate of a certain sloop or vessel, called — whereof the said plaintiff then and there was master and part-owner, and unlawfully kept and detained the said E. F. so being the apprentice and servant of the said plaintiff, and mate of the said sloop or vessel as aforesaid, from and out of the service of the said plaintiff, without the license or consent, and against the will of him the said plaintiff for a long space of time, to wit, for the space of — then next following, whereby the said plaintiff, for and during all that time, lost and was deprived of the service of the said E. F. and of all the profit, benefit and advantage, which might, and otherwise would have arisen and accrued to him from such service; and also thereby the said sloop or vessel was, for and during all that time, hindered and prevented from proceeding on a certain voyage she was then prepared for and about to make, and the plaintiff was also thereby forced and obliged to, and did necessarily lay out and expend, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of £— in and about the obtaining the liberation and regaining the service of the said E. F. so being the apprentice and servant of the said plaintiff, and mate of the said sloop or vessel as aforesaid, to wit, at, &c. (*venue*) aforesaid.

By the master and part owner of a ship, for impressing the mate of her, who was also his apprentice, whereby the vessel was hindered from proceeding on a voyage, and plaintiff obliged to expend money in obtaining the mate's liberation (q)

[*863]

For that the said defendant, on, &c. with force and arms, &c. at, &c. (*venue*) seized and took the boat of the said plaintiff, of great value, to wit, of the value of £— then floating and being in the river of — in, &c. and moored and fastened there with a certain rope of the said plaintiff, and then and there unmoored and unloosened the said boat from the

For letting a barge adrift up- on the river Thames, whereby the same became much damaged.

(p) See forms, 9 Wentw. iv. v. Plead. the notes, ante, 846 to 849.
A. 487, 489, 503, 510.—2 Rich. C. P. 420; and see a form, where matter of aggravation is stated, 2 M. & S. 77; and observe (q) As to the right of action, see 5 East. 39.

TO SHIPS,
&c. said place she was so moored and fastened to as aforesaid, and thereby put and set the said boat adrift in the said river of — there, whereby the said boat was damaged, broken to pieces, and spoiled, and the said plaintiff lost the whole use, profit and advantage of his said boat for a long space of time, to wit, &c. at, &c. (*venue*).—[*Second count de bonis asportatis, as ante, 859.*]

III. TO REAL PROPERTY.

TO
HOUSES,
&c.
For tres-
pass in
dwelling-
house,
breaking
open
doors, and
seizing
goods
therein
(r).

[*Commencement and conclusion in K. B. or C. P. as ante, 846 to 849.*]
For that the said defendant on, &c. and on divers other days and times (t), between that day and the day of exhibiting this bill, [or if in C. P. "the commencement of this suit,"] with force and arms, &c. broke and entered a certain dwelling-house of the said plaintiff situate and being in the parish of — in the county of — (t), and then and there made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance for a long space of time, to wit, for the space of — days then next following, and then and there forced and broke open, broke to pieces, and damaged divers, to wit, — doors (u) of the said plaintiff, of and belonging to the said dwelling-house, with the appurtenances, and broke to pieces, damaged, and spoiled divers, to wit, — locks, — staples, and — hinges, of and belonging to the said doors respectively, and wherewith the same were then fastened, and of great value, to wit, of the value of £—. And also during the time aforesaid, to wit, on the said — day of — with force and arms, &c. seized and took divers *goods and chattels, to wit, [*describe the goods, &c. as in trover, ante, 835.*] of the said plaintiff, then being found and being in the said dwelling-house, and being of great value, to wit, of the value of £— and carried away the same, and converted and disposed thereof to his own use. By means of which said several premises the said plaintiff and his family were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the said plaintiff, but also the said plaintiff was, during all that time, hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, to wit, at, &c. (*venue*) aforesaid.—[*Add a count for an expulsion ut infra if applicable to the facts, and a count de bonis asportatis, as ante, 859 a, as to the use of which see 1 T. R. 479.—7 Moore, 259.*]

The dam-
age.

(r) See the forms, 9 Wentw. Index, xv. and the notes to the form, ante, 846 to 849. The trespasses and the damages are to be stated according to the facts, and the formal points to be attended to, are as ante, 850 note e. Several counts should not be unnecessarily introduced. 1 Bla. Rep. 270.

(s) See forms, 9 Wentw. 106. Where the trespass was only on one day it should be laid accordingly, 2 Rich. C. P. 420; and see ante, 846, n. n, 850, n. i. 1 Saund. 24 a.

(t) A misdescription in the situation of the house would be fatal, and preclude the plaintiff from recovering on the first count for any injuries committed thereto or therein, 1 Moore, 161.—2 Id. 587.—3 Taunt. 539, S. C. If there be any doubt as to the situation of the premises, merely state them to be "situate in the county of —."

(u) This in substance charges the defendant with breaking open an outer door, and if he plead a justification, it must be framed accordingly, vide 11 Moore, 40.

And also, for that the said defendant on, &c. with force and arms, &c. broke and entered a certain other dwelling-house of the said plaintiff, situate in the county aforesaid, *and then and there ejected, expelled, put out, and amoved the said plaintiff and his family, from the possession, use, occupation, and enjoyment of the said last-mentioned dwelling-house, and kept and continued them so ejected, expelled, put out, and amoved for a long space of time, to wit, from thence hitherto; whereby the said plaintiff, for and during all that time, lost and was deprived of the use and benefit of his said last-mentioned dwelling-house, to wit, at, &c. (*venue*) aforesaid.

TO
HOUSES,
&c.

Count for
a common
expulsion
(w).
[*865]

[*Commencement and conclusion in K. B. or C. P. as ante, 846 to 849.*] On the statute 8 Hen. 6. c. 9, for a forcible entry and detainer (x).
For that after the making of a certain act of parliament, made at a parliament holden at Westminster, in the county of Middlesex, in the reign of Henry the Sixth, late king of England, intituled, "The duty of justices of peace, where land is entered upon or detained with force," and at the time of the committing of the grievances by the said defendant as hereinafter next mentioned, the said plaintiff was seised (that is to say) in his demense as of fee (y), of and in a certain dwelling-house ["or close," *according to the fact,*] with the appurtenances, situate in the parish of — in the county of —, and the said plaintiff being so seised thereof, the said defendant not regarding the said Statute, heretofore, and after the making of the said Statute, and whilst the said plaintiff was so seised, to wit, on, &c. with force and arms, &c. broke and entered the said messuage, [or "close," &c.] of the said plaintiff, and then and there in a forcible manner put out and disseised the said plaintiff thereof, and in a forcible manner, and with a strong hand, kept and continued the said plaintiff so put out and disseised for a long space of time, to wit, from thence hitherto, and, &c.—[*Here several trespasses on the land at common law were stated, but it was thought that they ought to be omitted, on the ground that treble damages cannot be given under the Statute for any damage subsequent to the forcible entry; a third count, however, was added, to enable the plaintiff to try that point. It was also thought that the action for a forcible entry can only be supported by a freeholder, which opinion is confirmed by the recent case in 8 B. & Cres. 409.*]
—By means whereof the said plaintiff, for and during the time aforesaid, lost and was deprived of the profits, benefits, and advantages *which might and otherwise would have arisen and accrued to him from the possession, use, occupation, and enjoyment of his said messuage, to wit, at, &c. (*venue*) aforesaid. And other wrongs to the said plaintiff then and there did, in contempt of, and against the peace of our said lord the king, and to the great damage of the said plaintiff, and against the form of the Statute in such case made and provided.

[*866]

(w) The action of trespass to recover damages for an ouster is usually adopted, instead of an action of ejectment, where the plaintiff's title is doubtful, or where the term has expired since the ouster, or is likely to expire before the action is commenced.

(x) See forms, 9 Wentw. Index, xxiv. Co. Ent. 43 a. The counts for a forcible entry should only be inserted in cases of a

very violent nature. This count can only be supported by a freeholder, 8 B. & C. 409. The plaintiff gets treble damages and treble costs, 2 Inst. 289.—10 Rep. 115 b.—1 Ventr. 22. In Hardr. 152, it is said the plaintiff gets no costs, *sed query*. See Burn, J. 23th ed. title "Forcible Entry."

(y) That this is necessary to support this count, see 8 B. & C. 409.

to
houses,
&c.
Second
count, on
possession
generally
(s).

And also, for that the said defendant after the making of the said act of parliament, to wit, on, &c. aforesaid, with force and arms, &c. and with strong hand, and against the form of the Statute in such case made and provided, broke and entered a certain other messuage [or close,] of the said plaintiff, situate, &c. and then and there in a forcible manner put out, disseised, dispossessed, and expelled the said plaintiff therefrom, and in a forcible manner, and with a strong hand, kept and continued him the said plaintiff so put out, disseised, dispossessed, and expelled therefrom for a long space of time, to wit, from thence hitherto. By means, &c. [as in the first count to the end. Add a count for trespass at common law, and for a common expulsion, as ante, 864, 5.]

TO LAND,
&c.
For tres-
pass in
closes,
breaking
open gates
and locks,
with cattle
eating
grass, &c.
and with
carts, da-
maging
grass, and
subvert-
ing soil,
cutting
down and
carrying
away hay
and corn,
cutting
down
trees, and
carrying
away the
wood, da-
maging
hedges,
and filling
up ditches
and en-
cumber-
ing the
closes with
buildings,
&c. (a).

[*867]

[Commencement and conclusion in K. B. or C. P. as ante, 846, to 849.]
—For that the said defendant, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [or if in C. P. “before the commencement of this suit,”] with force and arms, &c. broke and entered divers, to wit, — closes of the said plaintiff, situate in the parish of — in the county of — (b), then and there forced and broke open, broke to pieces, damaged and spoiled divers, to wit, — gates of the said plaintiff of great value, to wit, of the value of £— then standing and being in the said closes, and the locks, staples, and hinges, to wit, — locks, — staples, and hinges of the said plaintiff, of great value, to wit, of the value of £— respectively affixed to the said gates, and with which the same were then respectively locked and fastened, and with feet in walking trod down, trampled upon, consumed, and spoiled the grass and corn of the said plaintiff, of great value, to wit, of the value of £— there then growing and being, and with cattle, to wit, horses, mares, geldings, cows, oxen, and sheep, eat up and depastured the grass and corn of the said plaintiff, of great value, to wit, of the value of £— then growing and being in the said closes, and with divers other horses, mares, geldings, sheep, and cattle, and *also with the wheels of divers carts, waggons, and other carriages, crushed, damaged, and spoiled other the grass and corn of the said plaintiff, of great value, to wit, of the value of £— there then also growing and being, and with the feet of the said horses, mares, and geldings, and with the wheels of the said carts, waggons, and other carriages, tore up, subverted, damaged and spoiled the earth and soil of the closes; and also then and there mowed and cut down the grass and corn of the said plaintiff then growing in the said closes, and then and there seised, took, and carried away the hay and corn, to wit, — cart loads of hay, and — cart loads of corn of the said plaintiff, of great value, to wit, of the value of £— off and from the said closes, and converted and disposed thereof to their own use; and also then and there cut down, prostrated, and destroyed the trees and under-wood, to wit, — oaks, — ash trees, — elms, &c. [according to

(s) See the form, Co. Ent. 46 n. The form of a second count on the plaintiff's possession as tenant from year to year, was inserted in prior editions of this work, but the case in 8 B. & C. 409, shows that this action is not maintainable except by a freeholder.

(a) Observe the notes to the forms, ante, 846 to 849, and the forms, post—9 Wentw. Index. xv., &c.—1 Rich. C. P. 123.—2 Id.

421.—Plead. Ass. 76, 397, 488, 490, 1, 497, 502. As to the costs, see 7 East, 325.—Tidd, 9th edit. 963, &c. The trespasses should always be described according to the fact, and in the order in which they occurred.

(b) It is in general advisable to set out the abutments, or names of the closes, when they can be ascertained with certainty. See the next form.

the fact] and — other trees, and — acres of the underwood of the said plaintiff of great value, to wit, of the value of —*l.* and the timber, wood, branches, and bushes thereof, coming and arising, to wit, — loads of timber, — cart loads of wood, — cart loads of branches, and — cart loads of bushes, of the said plaintiff, of great value, to wit, of the value of —*l.* took and carried away, and converted and disposed thereof to his own use; and also then and there broke down, prostrated, and destroyed a great part, to wit, — perches of the hedges, and — perches of the fences of the said plaintiff, of and belonging to the said closes respectively, and also then and there cast and threw divers large quantities of earth, stones, and rubbish, into divers, to wit, — ditches of the said plaintiff, of and belonging to the said closes respectively, and thereby and therewith then and there choked and filled up the same; and also then and there put, placed, and erected, and caused to be put, placed, and erected, divers, to wit, — shambles, — stalls, — booths, and — tables, in and upon the said closes, and kept and continued the said shambles, stalls, booths, and tables so there put, placed, and erected, without the leave or license, and against the will of the said plaintiff, for a long space of time, to wit, from the said — day of — in the year aforesaid hitherto; and thereby and therewith, during all the time aforesaid, greatly incumbered the said closes respectively, and hindered and prevented the said plaintiff from having the use, benefit, and enjoyment thereof, in so large and ample a manner as he might and otherwise *would have done, to wit, at, &c. (*venue*) aforesaid. [*Where there has been an expulsion, a count should be added, as ante, 864; and where there has been a removal of property severed from the realty, a count de bonis asportatis should be added, as ante, 859 a.*]

TO LAND,
&c.

[*868]

For that the said defendant, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P. "before the commencement of *this suit,"*] with force and arms, &c. broke and entered a certain close of the said plaintiff, called — situate and being in the parish of — in the county of — [*or if it be described by abutments (d) omit the name of the close, and state the abutments, according to the facts, and which may be as follows:*] abutting towards the east, on a certain close in the possession of E. F.; towards the west, on a certain field called —; towards the north, on, &c.; and towards the south, on, &c. and then and there, &c.—[*Describe the trespasses according to the fact, which may be as in the former precedent.*]

The like,
setting out
the name
of the
close or its
abutments
(c).
[*869]

[*Commencement and conclusion in K. B. or C. P. as ante, 846 to 849.*]

For cut-
ting down
and carry-
ing away
trees (c).

(c) In order to avoid the necessity for a new assignment, in case the defendant should plead *Liberum tenementum*, it is frequently advisable to state the name of the close, or its abutments; see 1 Saund. 299, a, b, c.—2 Bla. Rep. 1089.—2 D. & R. 719.—Ante, vol. i. pages 439, 465; but in this case care must be taken that the description correspond precisely with the facts, for otherwise the plaintiff may be nonsuited on this count, 1 T. R. 479. Bul. N. P. 89.—1 Taunt. 495.—2 Roll. 678.—2 Stark. Evid.

1436. As to what variance, see Roscoe, 308, 9.—1 Moore, 161.—2 Campb. 4.—Plea thereto, 11 East, 51.—See 2 Bing. 49, 50.

(d) See as to proof of *abutments*, Bul. N. P. 89.—2 Rol. Ab. 678.—1 Taunt. 495.

(e) It is usual, where facts will support the allegation, to declare as well for the trespass on the close, as for cutting down the trees, (see a form, 2 Rich. C. P. 425, but the title is there improperly stated,) but where the land has been demised, and the trees were excepted in the lease, the above

TO LAND, &c. For that the said defendant on, &c. and on divers other days and times between that day and the day of exhibiting this bill, with force and arms, &c. to wit, at, &c. felled, cut down, prostrated, and destroyed the trees and pollards, to wit, — oaks, — ash trees, — elms, — other trees, and — pollards of the said plaintiff, of great value, to wit, of the value of £— then growing and being in and upon certain lands there situate, and took and carried away the same, and converted and disposed thereof to his own use.—[*Add a count for carrying away trees generally, as ante, 868, note (e).*]

For breaking close and laying quantities of wood there, by which the close was greatly incumbered. For that the said defendant, on, &c. with force and arms, &c. broke and entered a certain close, called, &c. situate, &c. and then and there put, placed, and laid, and caused and procured to be put, placed, and laid, divers large quantities of wood, to wit, — cart-loads of wood in and upon the said close, and kept and continued the said wood, so there put, placed, and laid, without the leave or license, and against the will of the said plaintiff, for a long *space of time, to wit, from the respective times of putting, placing, and laying the same as aforesaid, until the commencement of this suit, and thereby and therewith, for and during those respective times, greatly incumbered the said close, and hindered and prevented the said plaintiff from having the use, benefit, and enjoyment thereof, to wit, at, &c. (*venue*).—[*Second count for an expulsion, as ante, 864.*]

For digging in a coal-mine, and carrying away coals therefrom. For that the said defendant, on, &c. with force and arms, &c. broke and entered a certain coal-mine or vein of coals of the said plaintiff situate, &c. and dug out of the said coal-mine or vein of coals, of the said plaintiff, divers large quantities of coals, to wit, &c. of the said plaintiff, of great value there then found and being, and took and carried away the same, and converted and disposed thereof to his own use.—[*Second count de bonis asportatis, as ante, 859 a.*]

For digging mines, raising ore, and taking and converting it to his own use. For that the said defendant, on, &c. with force and arms, &c. broke and entered the close of the said plaintiff, to wit, at, &c. (*venue*) and then and there, with shovels, pick-axes, and other iron instruments, dug up, turned, and subverted, the earth and soil, to wit, — acres of earth and soil of the said close of the said plaintiff, and then and there dug, made, and sunk, divers mines, pits, shafts, and holes, to wit, — mines, — pits, — shafts, and — holes, of great breadth and depth, to wit, each of the breadth of — feet, and of the depth of — feet, in the said close of the said plaintiff there, and from and out of the said mines, pits, shafts, and holes, so dug, made and sunk as aforesaid, then and there raised, dug, and got divers large quantities of earth, soil, stones, lead ore, copper ore, *lapis caliminaris*, and other ore of the said plaintiff, to wit, &c. there then being, of great value, to wit, of the value of £—, and the same so raised, dug, and got, from and out of the said mines, pits, shafts, and holes, he the said defendant then and there seized, took, and carried away, and converted to his own use, to wit, at, &c. (*venue*) aforesaid.—[*Second count de bonis asportatis, as ante, 859 a.*]

count is most proper, 1 Saund. 322, n. 5.— the exception, see 16 East, 316.
7 T. R. 13. What trees are included in

[*Commencement and conclusion in K. B. or C. P. as ante, 846 to 849.*] For that the said defendant, heretofore, to wit, on, &c. (g) with force and arms, &c. broke and entered — messuages, &c. [*the premises are usually described as in the declaration in ejectment in which judgment was obtained*] of the said plaintiff, situate in the parish of —, in the county of —, and ejected, expelled, put out and amoved the said plaintiff from his possession and occupation thereof, and kept and continued him so expelled and amoved for a long space of time, to wit, from the day and year aforesaid, until and upon, &c. [*the day on which possession was obtained*] and during that time took, and had and received, to the use of him the said defendant, all the issues and profits of the said tenements, being of great yearly value, to wit, of the yearly value of £—. Whereby the said plaintiff, during all the time aforesaid, not only lost the issues and profits of the said tenements, with the appurtenances, but was deprived of the use and means of cultivating *the same, and was forced and obliged to, and did necessarily lay out and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £—, in and about the recovering of the possession of the said tenements, with the appurtenances, to wit, at, &c. (*venue*) aforesaid. And other wrongs, &c.—[*Conclusion in the K. B. or C. P. as ante, 846 to 849.*]

FOR MESSE
PROFITS.
Declara-
tion in
trespass
for mesne
profits,
after a re-
covery in
ejectment
(f).

Damage
(h).

[*872]

For that the said defendant, on, &c. with force and arms, &c. broke and entered, with hounds and other dogs *the closes, to wit, one close called, &c. one other close called, &c. of the said plaintiff, at, &c. (*venue*) and with his feet in walking, and with the feet of the said hounds and other dogs, trod down, consumed and spoiled the grass and corn, to wit, wheat and oats of the said plaintiff, of the value of £— there then growing, and the tame deer, to wit, — tame deer of the said plaintiff, of the value of £— there then being in the said closes, with the said hounds and other dogs hunted, chased, and pursued, insomuch that one of the said deers of the said plaintiff, of the value of £— was then and there seized, caught, destroyed, and killed, and thereby wholly lost to the said plaintiff, and the other of the said deer was then and there thereby greatly terrified and affrighted, and ran away from the said closes, and wandered and strayed thereout to places unknown, and at a great distance, and became very much injured, weakened, hurt, depreciated, and lessened in value; and the said plaintiff was put to much labor, trouble, costs, and expenses, in and about the seeking for, finding, and recovering the said last-mentioned deer, to wit, at, &c. (*venue*) aforesaid. [*Second count, for chasing deer in the plaintiff's possession, generally; third count, for converting deer in plaintiff's possession.*]

FOR HUNT-
ING, &c.
For break-
ing plain-
tiff's close
with a
pack of
hounds,
and hunt-
ing his
tame deer
killing
one, and
driving
another
out of the
closes,
whereby
plaintiff
was put to
expense in
recover-
ing it.

[*874]

(f) See the precedents in Run. Ejectm. 2d edit. (1819).—2 Rich. C. P. 440.—Plead. A. 503. As to this action in general, and the parties by and against whom it may be brought, see fully, ante, vol. i. p. 222 to 226.

(g) This is usually the day of the ouster laid in the declaration in ejectment, but where the plaintiff's right of possession, and the defendant's unlawful entry, were anterior to that time, it is advisable to state the time according to the fact. The omission of the statement in the declaration of

the time of entry, and continuance of the expulsion, will be aided after a judgment by default, or on general demurrer, 13 East, 407. Plaintiff, by statute of Limitations, if pleaded, cannot recover beyond six years of profits, Bul. N. P. 88.

(h) In this action the plaintiff may recover in damages the value of the occupation of the premises, together with the costs of the action of ejectment, and if any particular damage, waste, or injury to the premises were committed by the defendant, it

FOR FISH-
ING, &c.

First
count, for
fishing in
plaintiff's
close cov-
ered with
water (l).

[*875]

Second
count, for
fishing in
plaintiff's
several
fishery
(p).

Third
count, for
fishing in
plaintiff's
free fish-
ery (r).

Fourth
count, for
catching
plaintiff's
fish gene-
rally.

[*Commencement in K. B., C. P., or Exchequer, as ante, 846 to 849; the venue is local.*—For that the said defendant, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] with force and arms, &c. broke and entered the close of the said plaintiff, covered with water (m), situate and being in the parish of — in the county of — and then and there fished in the said close for fish, and the fish, to wit (n), — salmon, — trout, *— pike, — carp, — tench, — perch, — roach, and eels, of the said plaintiff (o), of great value, to wit, of the value of £— there then found and being, caught, and took, and carried away, and converted and disposed thereof to his own use. And also for that the said defendant on the day and year first aforesaid, and divers other days and times, between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] with force and arms, &c. broke and entered the several fishery of the said plaintiff, in a certain river called — situate in the parish of — in the county of — and then and there fished in the said fishery for fish, and the fish, to wit, &c. [*enumerate as in preceding form (o) of the said plaintiff, there then found and being, of great value, to wit, of the value of £— caught, took, and carried away, and converted and disposed thereof to his own use.* And also for that the said defendant, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] with force and arms, &c. in the free fishery of the said plaintiff in the parish aforesaid, in the county aforesaid, fished, and the fish, to wit, &c. [*as in the form, ante, 847,*] there and then found and being, of great value, to wit, of the value of £— caught, took, and carried away, and converted and disposed thereof to his own use. And also for that the said defendant, on, &c. aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, [*or if in C. P.* “before the commencement of this suit,”] with force and arms, &c. to wit, at, &c. (venue) aforesaid, took and carried away other the dead fish, to wit, &c. [*as in the form, ante, 847,*] of the said plaintiff, there then found and being, of great value, to wit, of the value of £— and converted and disposed thereof to his own use, to wit, at, &c. (venue) aforesaid.—[*Conclusion in the K. B., or C. P., as ante, 846 to 849.*]

should be stated specially, and such statement may be as in the precedent, ante, 866, 837; and see further as to what damage is recoverable, ante, vol. i. p. 225.

(l) See forms, 9 Went. Index. xxiv.—Chitty's Game Law, Appendix, 159; and for fishing in an oyster fishery, id. 161; and see form in 2 Hen. Bla. 182.—1 Campb. 309. As to the law, see Com. Dig. Piscary.—Co. Lit. 122 a, note 7. 2 Bl. Com. 89.—2 Salk. 637.—4 T. R. 437. As the owner of the soil is *prima facie* entitled to the fishery therein, it is frequently advisable to insert this count, Co. Lit. 126 b, n. 1.

(m) This is the mode of describing the right to a pond, &c. where the plaintiff is entitled to the land under the water, Co. Lit. 4 b.—Yelv. 143.

(n) Insert a sufficient number of each description of fish that may probably have been taken. As to the statement of the number, see ante, 873, n. (i).

(o) As to the allegation of the property in the fish, see ante, 873, n. (b), and Cro. Car. 553.—Lil. Ent. 449.

(p) See a different form, Lil. Ent. 449.

(q) But see ante, 873, n. (a).

(r) It is doubtful whether trespass lies for fishing in a *free* fishery, and therefore a verdict should not be taken unnecessarily on this count, Co. Lit. 127 b. notes to 122 a, n. 7.—2 Bla. Com. 39.—2 Salk. 637.—Fitz. N. B. 88.—In 3 Mod. 97. Lil. Ent. 419, it was held bad after verdict, but see Carth. 283.—In 2 H. Bla. 182, no objection was taken on this count, and see 6 Bac. Ab. 684.

*VIII. DECLARATIONS IN EJECTMENT.

In the King's Bench, (or "Common Pleas.")

— Term, — Will. 4 (t).

— (u) (to wit.) Richard Roe (w) was attached to answer John Doe (w) of a plea, wherefore he the said Richard Roe, with force and arms, &c. entered into [*here follows the statement of the premises, for the recovery of which the action is brought. The pleader will select such parts of *the following descriptions as may be applicable to his case, inserting a sufficient number of houses, acres, &c. to cover the real quantity, and will take care not to adopt the term "tenement," (x) or other improper description of the premises,*] the manor of — in the county of A manor — containing divers, to wit, — messuages, — acres of arable (y).

Declaration by original in K. B. or C. P. on a single demise (s.) [*878]

(s) In K. B. it is most usual to proceed in ejectment by declaration on a supposed original writ, Adams, 2d ed. 180. See the form in K. B. by bill, post, 886; and see forms in C. P. on single and double demises, 1 Rich. C. P. 305 to 310. 2 Id. 309, 313. As to the amendment of declaration in ejectment, see Tidd's Prac. 9th edit. 1206, 7.

(t) Though we have seen, that in general a declaration must not be intitled of a term anterior to the cause of action, (ante, 12 note (a), yet in ejectment it is otherwise, and the demise and ouster are frequently laid after the term of which the declaration against the casual ejector is intitled, and no objection can be taken, because the nominal defendant cannot demur, and the real defendant, if he appear, must, by the terms of the consent rule, accept a declaration against himself of the subsequent term, and plead only the general issue. See 1 Rich. C. P. 311.—Adams, 2d edit. 181, 2.—See 1 Ventr. 135.—The omission of stating a term is immaterial, Adams, 2d ed. 181, 2.—Tidd, 9th edit. 1204.—See 1 Ventr. 135. No advantage can be taken, though entitled of a wrong term, provided the tenant has sufficient notice given to him to appear.—2 Chit. Rep. 172.—Tidd, 9th edit. 1204.—*Sed vide* Barnes, 186. In proceeding under the 1 Will. 4. c. 70. s. 35, in ejectment by landlord against tenant, where the tenancy expires, or the right of entry accrues in or after Hilary or Trinity Terms, the declaration must be entitled specially, and see the form, post, 882.

(u) The venue is local, and even after verdict, if the venue were laid in a wrong county, it would be doubtful whether the plaintiff could obtain possession, 7 T. R. 688.

(w) Any names may be adopted for these nominal parties, but the common names, John Doe, for the supposed plaintiff, and Richard Roe, for the casual ejector are preferable. Though usual, it is not necessary to insert the supposed addition of the defendant, the statute 1 Hen. 5. c. 5, not extending to declarations, 3 B. & P. 399. As

to mistake in stating two different names, viz. the tenant was attached to answer, and afterwards using the name "Richard Roe," see 1 Chit. Rep. 573 a.

(x) For what an ejectment will lie, and what is a sufficient description. see Kunn. Ejectment, 2d edit. (1819).—Selw. N. P. 4th edit. 663, 683.—Adams' Ejectment, 1st ed. 21 to 36.—Harr. Landl. & Ten. 788 to 794.—1 C. & P. 123.—In 2 C. & P. 430, it was held, that an ejectment does not lie for *dower* before it has been assigned. The term "tenement" is improper, because ejectment in general lies only for corporeal hereditaments, and the term "tenement" includes incorporeal estates, 2 Bla. Com. 17; and an ejectment for a messuage and tenement was holden bad after verdict, 1 East, 441.—2 Stra. 191.—*Sed vide* 1 T. R. 11.—2 Saund. 44, n. 3. But notwithstanding this, the defendant will not in general be able to take advantage of such an error in description, for the court will give leave to the plaintiff, after verdict in ejectment, for a messuage and tenement, to enter the verdict according to the judges' notes, for the messuage only (pending a rule nisi to arrest the judgment for uncertainty) without obliging the lessor of the plaintiff to release the damages, 1 East, 441.—8 Id. 357; and in a late case, where judgment in ejectment for a messuage and tenement was entered up generally for the plaintiff, it was held no ground for reversal on error, 8 B. & C. 70; and see 1 M. & P. 330. So, an ejectment will not lie for a close, 11 Rep. 55.—Cro. Jac. 435, &c. But if other words be added, rendering the description certain, as to the property being an incorporated hereditament, it will be sufficient, see 3 Mod. 98.—Cowp. 349.—Cro. Jac. 435. A church or chapel must be described as a messuage, 11 Rep. 26 a.—Esp. N. P. 528.—Sty. 101.—Salk. 256.—In 8 East, 356, the court gave leave to amend; and see Adams' Ejectm. 1st edit. 28, n. (w).—Chit. Rep. 537, n.—1 M. & P. 330.—Tidd, 9th ed. 1207.

(y) Ejectment lies for a manor generally,

ON
A SINGLE
DEMISE.
A rectory
and tithes
(a).

Messu-
ages,
buildings,
land, and
common
of pasture
(c).

[*879]

The sup-
posed de-
mise by
the lessor
of the
plaintiff.

land, &c. [*describe the land as below (z),*] with the rights, members, and appurtenances to the said manor belonging; and also into the rectory of the parish church of — in the county aforesaid, and also all and singular the tithes of corn, grain, hay, wood, grass, wool, lambs, and calves, arising, growing, renewing, increasing, and happening within the said parish of — and within the bounds, limits and titheable places of the said rectory; — and also into — (b) messuages, — cottages, — barns, — stables, — coach-houses, — out-houses, — yards, — gardens, — orchards, — acres of arable land, — acres of meadow land, — acres of pasture land, * — acres of wood land, — acres of land covered with water, and — acres of other land, with the appurtenances, situate and being in the parish (d) of — aforesaid, in the county of — aforesaid, with common of pasture thereunto belonging and appertaining (e) which A. B. (f) had demised to the said

Latch, 61.—Lil. R. 301.—Runn. Ejectm. 2d edit. (1819).—Adams' Ejectm. 1st edit. 32, but see Selw. N. P. 4th edit. 665.

(z) It is said, that ejectment is not sustainable for a manor, without describing the quantity and nature of the land therein, Latch, 61.—Lil. Rep. 301.—Hentl. 146.—Selw. N. P. 4th edit. 665; but see Adams' Ejectm. 1st edit. 32.

(a) Ejectment will lie for a rectory, consisting of a church, glebe lands, and tithes, on the principle that it resembles a manor, the church being compared to the mansion-house, the glebe lands to the demesnes, and the tithes to the service, 8 B. & C. 25.—2 M. & R. 104, S. C. Ejectment lies for tithes, by statute, 32 Hen. 8. c. 1. s. 7. Toller, 19.—See Runn. Eject. 2d edit. (1819).—Selw. N. P. 4th edit. 664. As to this description, see Bul. N. P. 99.—Cro. Car. 301.—11 Rep. 25.—Dyer, 84, 116 b.—1 Rol. Rep. 65, 68.—Adams' Eject. 1st ed. 32, 3. The quality of tithes must be stated, 11 Rep. 25, 6.—1 Roll. Rep. 68. See form, stating a demise by deed, post, 886.

(b) Insert the number and quantity throughout, sufficient to include the property sought to be recovered. There is no objection to stating more than enough, Cro. Eliz. 13. If a person eject another from land, and build thereon, it is sufficient if the owner bring his ejectment for the land, without mentioning the building, except where the building is a messuage, and then, perhaps, it ought to be particularly described, 1 Burr. 133, 144.

(c) It should be stated whether pasture or meadow land, &c. Cowp. 346.—11 Rep. 55.—Adams' Ejectm. 1st edit. 31. A description of "land" generally means arable land, Salk. 256.—Runn. Ejectm. 123, 129. As to describing land in a provincial description, see Harrison's Landl. & Ten. 791.

(d) If the tenements lie in different parishes, it has been usual to enumerate the whole as lying in one parish, and to repeat the description of the tenements as lying in one other parish, but it seems sufficient

to describe the whole as lying "in the parishes of — and —," see Cro. Eliz. 465.—3 Lev. 334.—1 Burr. 623.—5 Id. 2673.—Adams' Eject. 1st edit. 187. But it would not do to say, "in the parishes of A. & B. or one of them," 7 Mod. 457; and see 4 Taunt. 671.—Where the premises were described as being in the parish of Westbury, and it was proved that there were two parishes of Westbury, viz. Westbury-on-Trym, and Westbury-on-Severn; it was held this was not a fatal variance, 5 M. & S. 326. So where the premises were stated as being in Farnham, and they were proved to be Farnham Royal; it was held this was not a fatal variance, unless it could be shown that there were two Farnhams, 13 East, 9. So, where the premises were stated as being in the parish of St. Luke, in the county of Middlesex, and there are two parishes of St. Luke in that county, the one St. Luke, Chelsea, and the other St. Luke, Old Street, or more commonly called St. Luke, Middlesex; it was held not to be a variance, 1 Y. & J. 492; and see 1 Moore, 161. But where premises were stated as being in the united parishes of St. George the Martyr and St. George's Bloomsbury, and were proved to be situated in St. George's Bloomsbury, only, the variance was held to be fatal, although the parishes were united by act of parliament, for the purpose of a joint provision for the poor, 2 Campb. 274.—6 Esp. 128, S. C. The omission of a will or parish is aided after verdict, 1 Burr. 623. 2 Bla. Com. 706: *quero* if necessary to state it at all, and see 4 Taunt 671.

(e) Ejection lies for common appurtenant, when claimed, together with the land to which it belongs, Stra. 54.—Runn. Eject. 2d ed. (1849).—Adams' Ejectm. 1st edit. 22. As to ejectment for a cattle gate, see Rep. temp. Hardw. 167.

(f) This is to be the person who is the real plaintiff, and who had the legal estate, and right of possession at the time of the supposed demise, 7 T. R. 47, and if there be any doubt in whom the legal right of

John Doe for a term which is not yet expired, and ejected him from his said farm (g); and other wrongs to the said John Doe did, to the great damage of the said John Doe, and against the peace of our lord the now king, &c.—And thereupon the said John Doe, by E. F. his attorney, complains, that whereas the said A. B. (i) on the — day of *— (k), in the — year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised the said tenements (l), with

ON
A SINGLE
DEMISE.

Count
part (A).
[*880]

possession was vested, or if parties interested be tenants in common, several counts on the several demises of the different persons should be inserted, as in the following forms, and see Adams' Ejectment, 1st edit. 36, and 177 to 180.—Selw. N. P. 4th ed. 681, 2, 3. If the right of entry be in husband and wife, in right of the wife, the demise may be alleged to be by husband and wife, Cro. Jac. 617, or by husband alone, Id. 332. The lessor's name should be spelt properly, a variance, would, it should seem, be fatal, Cro. Eliz. 776. When a pauper has been let into possession of premises by the overseers of a parish, the demise should be laid by the overseers for the time being, when the ejectment is brought, if the pauper has done any act recognizing a holding under them; but otherwise by the overseers who let him into possession, or the last set of overseers whom he has acknowledged as his landlords, 14 East, 488.—3 Campb. 447, S. C. In a late case, where a declaration in ejectment by churchwardens and overseers contained two sets of counts, one, describing them by their office, without their names, and the other by their names without their office; it was held, that the objection, if any, was cured after verdict, 2 D. & R. 608; and see stat. 59 Geo. 3. c. 12. s. 17. As to the necessity of having the lessor's consent to have his name used, see Chit. Rep. 170, 171.—3 Taunt. 440.—Ante, vol. i. 221, note.

(g) The term *farm*, here signifies the *leasehold estate* in the premises, and does not mean a farm in its common acceptation; it is therefore applicable to houses as well as land, 2 Bla. Com. 318.

(h) The count part, as in trespass in C. P. ante, 841, is an amplification of the writ.

(i) The lessor of the plaintiff, as supra, note (l).

(k) Care must be taken to insert some day after the lessor's right of entry commenced, 2 East, 257.—5 East, 132.—Bul. Ni. Pri. 105.—2 Wils. 274.—2 Stra. 1087. Run. Ejectm. 2d edit. (1819).—4 T. R. 680.—Selw. Ni. pri. 4th edit. 682.—Adams Ejectm. 1st edit. 180. It is better to lay the day as far back as possible, with a view to the recovery of mense profits, Bul. Ni. Pri. 87. When at the suit of the assignees of bankrupt, the demise must be laid after execution of bargain and sale, by the commissioners to the assignees, 2 M. & S. 446. The conveyance of an insolvent's property

by the clerk of the peace does not vest the estate in the creditor by relation either to the date of the order or the conveyance, but only from the actual conveyance by the clerk of the peace, therefore where such creditor cannot recover in ejectment upon a demise laid before the execution, though after the estate was out of the insolvent, and after the order was made to convey the same to the lessor of the plaintiff, 2 East, 277. In the case of copyhold, the demise may be laid between surrender and admittance, 16 East, 208, 211. Where an entry is necessary in order to avoid a fine, the demise must be stated to have been made subsequent to the entry, 13 East, 489.—7 T. R. 433, 727. A demise by administrator may be laid before administration, provided it be after the death, 2 Selw. N. P. 4th edit. 682; and an executor may lay a demise before probate granted, 2 W. Bla. 694. A demise by heir, on day of death of ancestor, is good, 3 Wills. 273. With respect to tenants at will the demise should be laid subsequently to the time when possession is demanded; therefore where possession had been demanded on the 5th of October of a tenant at will, and an ejectment being brought, the demise was laid on the 1st of October, it was held bad, the tenancy not having been determined until after the day of the demise laid in the declaration, 4 T. R. 680. In ejectment on a forfeiture of a lease containing the usual clause of re-entry, and a covenant generally to repair, with a further and independent covenant, within three months after notice, to repair the defects pointed out in the notice, the demise may be laid before the expiration of three months, 2 Campb. 520.—1 Moore, 89.—7 Taunt. 385, S. C. In ejectment on the 4 Geo. 2. c. 28. s. 2. the day of the demise laid in the declaration need not be after the service of the declaration, 3 B. & C. 752. 5 D. & R. 711, S. C.

The demise also should be laid when the possession of the defendant was unlawful, 13 East, 210, 212.—11 East, 56. If the right of possession accrued a considerable time before the commencement of the action it is usual to insert two sets of counts; the first on a demise immediately after the right of possession accrued, and an ouster immediately following; and the second upon a demise just before the commencement of the action and another ouster, see the form, post, 882.

(l) The words "said tenements," having

ON
A SINGLE
DEMISE.

[*881]
Plaintiff's
entry.

The ouster.

the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe, and his assigns, from thenceforth, (or from the — day of — (m), in the — year aforesaid,) for and during, and unto the full end and term of — (n), from thence next ensuing, and fully to be completed and ended.—*By virtue of which said demise, the said John Doe entered (o) into the said tenements, with the appurtenances, and became and was thereof possessed for the said term, so to him thereof granted as aforesaid.—And the said John Doe, being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid (or, on the — day of — (p), in the year aforesaid), with force and arms, &c. entered into the said tenements (q) with the appurtenances, in which the said John Doe was so interested, in manner, and for the term aforesaid, which is not yet expired, and ejected him the said John Doe out of his said farm, and other wrongs (r) to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lord the king; wherefore the said John Doe saith that he is injured, and hath sustained damage to the value of £50, and therefore he brings his suit, &c.—[At the foot of the declaration a notice to appear must be subscribed, as follows.]

Notice to
appear
thereto, in
common
cases (r).
[*882]

Mr. C. D. [The tenant or tenants in actual possession (s.)]

I am informed that you are in possession of, or claim title *to, the premises in this declaration of ejectment mentioned, or to some part thereof, and I, being sued in this action as casual ejector only, and having no claim or title to the same, do advise you to appear in next — Term [or, if the premises lie in London or Middlesex, "on the first day of next — Term (t),"] in his Majesty's court of King's Bench, wheresoever,

reference to the anterior specification, are here sufficient.

(m) It saves a repetition of days to say "from thenceforth," but if another day be inserted, then it is usually the day before that of the demise.

(n) The number of years stated is immaterial, it is usual to insert seven years, if the demise be recent, but a sufficient number of years should be inserted, so as certainly to extend beyond the time when final judgment may be obtained, Skin.161.—Runn. Ejectm. 2d edit. (1819)—3 T. R. 13.—Bul. Ni. Pri. 106.—Adams' Eject. 1st edit. 183.—Selw. Ni. Pri. 4th edit. 682.—Cro. Eliz. 13, 469, 535.—The court will allow an amendment to enlarge the term even after verdict, see Selw. N. P. 5th ed. 704, note.—Carth. 3.—Cowp. 841.—1 Scho. & Lefr. 81, note a.

(o) It is not necessary to allege any time of entry, 2 Roll. Rep. 466.—Latch, 199.

(p) The ejectment or ouster should be stated to have been after the commencement of the supposed demise, and it is not unusual, though unnecessary, to mention a particular day, Cro. Jac. 311. Selw. 4th edit. 683.

(q) In ejectment for a moiety, the words "said tenements" were held here sufficient, Cro. Eliz. 286.

(r) In proceedings in ejectment under 1 Geo. 4. c. 87, the notice is different from the above form. As to these proceedings, see Tidd, 8th edit. 525.

(s) The notice should be directed to the tenant by his name, 1 Chit. Rep. 215 a.—Adams, 2d ed. 202.—1 Moore, 113.—2 Chit. Rep. 179. It is best to insert both the christian and surname of tenant, 1 Chit. Rep. 573 a. It is usual to prefix the names of all the tenants to such notice, but this is not necessary; it suffices to direct to the individual tenant; who is served, 7 T. R. 477.—5 Moore, 73. — In 6 M. & S. 203, a rule was refused to set aside the service of a declaration in ejectment, on the ground that notice to the tenant in possession was addressed to him by a wrong christian name; for this would in effect be to allow a plea in abatement in ejectment for a misnomer. In ejectment against joint-tenants, all their names should be inserted, otherwise it would be irregular, 10 Moore, 493.

(t) In a country cause, the notice should be to appear generally in the ensuing Term, [and now, since the late rule, E. T. 2 Geo. 4, whether such Term be issuable or not, see Tidd, 8th edit. 524] but in London or Middlesex on the first day of the Term (meaning the first day in full Term,) Selw. N. P. 640.—2 Str. 1049. As to decisions

&c. [or, in the *Common Pleas*, "in his Majesty's court of Common Bench at Westminster"] by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this — day of —, A. D. —.

ON
A SINGLE
DEMISE.

Yours, &c.

Richard Roe (u).

Mr. C. D. [*The tenant or tenants in actual possession.*]

Take notice, that you are hereby required to appear in his Majesty's court of ["King's Bench," or "Common Pleas,"] at Westminster, on the first day of next — Term, then and there to be made defendant in this action of ejectment, and then and there to enter into a recognizance, by yourself and two sufficient sureties, in such sum as to the said court shall seem reasonable, conditioned to pay the costs and damages which shall be recovered in this action, if the said court shall so order.

Notice to
appear
under pro-
ceedings,
on 1 Geo.
4. c. 87
(u).

Yours, &c.

JOHN NOKES [*the landlord.*]

Mr. C. D. [*The tenant or tenants in actual possession.*]

Take notice, that in pursuance of the Statute made and passed in the first year of the reign of his present Majesty, intituled, "An Act for enabling Landlords more speedily to recover Possession of Lands and Tenements unlawfully held over by Tenants," you are hereby required to appear in the Court of King's Bench at Westminster, on the first day of next — Term, there to be made defendant in this action, and to find such bail, if ordered by the said court, and for such purposes as are in the said act specified.

The like
in another
form (x).

Yours, &c.

JOHN NOKES [*the landlord.*]

In the King's Bench (or "*Common Pleas.*")

— the day of — [*the day next after the day of the ouster in the declaration,*] Ejectment on 1 Will. 4 c. 70. s. 36 (y).
in the — year of the reign of King William the Fourth.

— (to wit.) Richard Roe was attached to answer John Doe, &c. [proceed as in other declarations in ejectment. The notice to appear there to will be the same as in other cases, except that it should require the tenant to appear and plead within ten days from the receipt of it.]

In the King's Bench (or "*Common Pleas.*")

— Term, — Will. 4.

ON
DOUBLE
DEMISES.

on the form, &c. of this notice, see Tidd, 9th edit. 185, &c.

(u) Strictly this should be the name of the casual ejector, but where the notice was signed in the name of John Doe, the nominal plaintiff, the court refused to set aside the judgment, 3 T. R. 351.

(w) This notice, in practice, is usually added after the notice by the casual ejector,

in the preceding form; but there seems to be no necessity for both notices, as this notice comprises the whole of the substance of the other.

(x) See ante, note (u).

(y) See Tidd's Supplement, 216. See also form there of the record in such an ejectment.

Declara-
tion by

ON
SEVERAL
DEMISES.
—
original on
two de-
mises
with one
ouster (z).
Writ part,
first de-
mise.
Writ part,
second de-
mise.
Count
part, first
demise.
[*883]
Second
demise.
Plaintiff's
entry.
The ouster.
The like
on two
demises
with two
ousters (c).

— (to wit.) Richard Roe was attached to answer John Doe of a plea, wherefore he the said Richard Roe, with force and arms, &c. entered into, *&c. [enumerate the premises according to the fact, as ante, 878,] with the appurtenances, &c. situate and being in the parish of — in the county of — which A. B. had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm. —And also, wherefore the said Richard Roe, with force and arms, &c. entered into *— other (a) messuages, &c. [enumerate the premises as above, inserting the words, "other (b) messuages, &c." with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, which G. H. had demised to the said John Doe for a term which is not yet expired; and ejected him from his said last-mentioned farm; and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our lord the now king. And thereupon the said John Doe, by — his attorney, complains: That whereas the said plaintiff, on the — day of — in the — year of the reign of our said *lord the king, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe the said tenements, with the appurtenances, *first* above mentioned, to have and to hold the same to the said John Doe and his assigns, from the — day of — in the — year aforesaid, for and during, and unto the full end and term of — years from thence next ensuing, and fully to be complete and ended. And also, that whereas the said G. H. on the said — day of — in the — year aforesaid, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe the said tenements, with the appurtenances *secondly* above mentioned, to have and to hold the same to the said John Doe and his assigns, from the said — day of — in the — year aforesaid, for and during, and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended.—By virtue of which said several demises the said John Doe entered into the said several tenements first and secondly above mentioned, with the appurtenances, and became and was possessed thereof for the said several terms so to him thereof respectively granted as aforesaid.— And the said John Doe being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of — in the — year aforesaid, with force and arms, entered into the said tenements, with the appurtenances, first and secondly above mentioned, to which the said John Doe was so interested, in manner and for the several terms aforesaid, which are not yet expired: and ejected the said John Doe from his said several farms, and other wrongs, &c. [as in the form ante, 881, from the *, and with the like notice to appear.]

In the King's Bench, (or, "Common Pleas.")

— Term — Will. 4.

— (to wit.) Richard Roe was attached to answer John Doe of a

(z) When to insert two demises, see ante, 879, n. (g) 880, n. (l). Most of the notes to the preceding form are here also applicable; see form, 1 Rich. C. P. 309.

(a) As to the propriety of this word, see 2 Stra. 908.

(b) The word "other," seems immaterial, 2 Stra. 1180.—1 Wils. 1.

(c) As to the use of this declaration, see ante, 880, n. (l). Most of the notes to the forms, ante, 876 to 881, are here also applicable.

plea, wherefore the said Richard Roe, with force and arms, &c. entered into — messuages, &c. [*enumerate the tenements, according to the fact, and as ante*, 878,] with the appurtenances, situate and being in the parish of — in the county of — which A. B. had demised to the said John Doe for a term which is not yet expired, and ejected *him from his said farm.—And also, wherefore the said Richard Roe, with force and arms, &c. entered into — other messuages, &c. [*enumerate as in the first count, inserting the words*, “ other messuages, &c.”] with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, which the said A. B. had demised to the said John Doe for a term which is not yet expired, and ejected him from his said last-mentioned farm; and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our lord the now king, &c. And thereupon the said John Doe by — his attorney, complains: That whereas the said plaintiff, on the — day of — (e) in the — year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe the said tenements, with the appurtenances, first above-mentioned, to have and to hold the same to the said John Doe and his assigns, from the — day of — in the — year aforesaid, for and during, and unto the full end and term of — years from thence next ensuing, and fully to be complete and ended. By virtue of which said last-mentioned demise, the said John Doe entered into the said tenements, with the appurtenances, first above-mentioned, and became and was thereof possessed for the said term so to him thereof granted as aforesaid, and the said John Doe, being so thereof possessed, the said Richard Roe afterwards, to wit, on the — day of — in the — year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, first above-mentioned, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm.—And also, that whereas the said plaintiff, on the — day of — in the — year aforesaid, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe the said tenements, with the appurtenances, secondly above-mentioned, to have and to hold the same to the said John Doe and his assigns, from the — day of — in the — year aforesaid, for and during, and unto the full end and term *of — years, from thence next ensuing, and fully to be complete and ended.— By virtue of which said last-mentioned demise, the said John Doe entered into the said tenements with the appurtenances, secondly above-mentioned, and became and was thereof possessed for the said last-mentioned terms, so to him thereof granted as aforesaid, and the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of —, in the — year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, secondly above-mentioned, in which the said John Doe was so interested in manner and for the term last aforesaid, which is not yet expired, and ejected the said John

ON
DOUBLED
DEMISES.[*884]
Second
demise
(d).Count
part, first
demise.First entry
and ouster.Second
demise.

[*885]

Second
ouster.

(d) Though in the count parts the demises are laid at different times with an intervening ouster, yet as no time is stated in the writ parts, therefore, however numerous the demises may be, they follow each

other without any statement of an intermediate ouster, &c.

(e) Some day immediately after the right of possession first accrued.

ON DOUBLE DEMISES. Doe from his said last-mentioned farm, and other wrongs, &c. [as in the form, ante, 881, 2, to the end, and with the like notice to appear.]

The like on demises by tenants in common, &c.

If there be several persons entitled to the possession, the demise or demises, stated in the declaration, must be joint or several, as their title will warrant. If the lessors of the plaintiff be joint-tenants or parceners, the declaration usually alleges a joint demise; if tenants in common, a several demise by each of their undivided shares as post (f). In the latter case, the declaration should contain as many counts as there are tenants in common lessors of the plaintiff. But tenants in common may join in a lease to a third person, and then the declaration may state a demise by such lessee. *Selw. N. P.* 4th edit. 683.—*Bul. N. P.* 107.—*Cro. Jac.* 166.—2 *Wils.* 232. It is not compulsory upon joint-tenants or coparceners to join in the action of ejectment, as they may declare upon separate demises by each, it having been decided that ejectment will lie on their several demises for the recovery of the whole premises, although the joint tenancy is served by the separate letting, 3 *Campb.* 190. So one joint-tenant may maintain ejectment on his single demise for his own share of a copyhold descending by custom to all the children equally of the tenant last seized; but it will be considered as a severance of the tenancy, 12 *East*, 39, 57.—3 *Taunt.* 120. Where by an under-lease power was reserved on non-payment of rent, “to the lessors and the original lessor” to enter; it was held that the demise was properly laid to be by the lessor alone, and that it need not be a joint demise by the lessors and the original lessors, 4 *Bing.* 276. If the ejectment be brought by a corporation aggregate, by an infant, or for tithes, formerly it was considered necessary to state that the demise was by deed, *Carth.* 390.—*Cro. Jac.* 613; but now this is considered unnecessary, see *Ld. Raym.* 136.—*Carth.* 390. *Sell. Prac.* 2d edit. c. 14. sec. 2. A. and sec. 3. D.—*Adams*, 1st edit. 184, 5, 6, acc.—*Selw.* 4th edit. 683, contra. If a demise by deed be stated it need not be proved. 1 *Esq. Rep.* 199. The demise by tenants in common, of an undivided share, is the same as the form, ante, 882, 3, inserting at the * the following words, “one undivided moiety or half part, the whole into two equal moieties to be divided of and in,” and adding a count as in the preceding form, on the demise of the other tenant in common, inserting the same words. [*886] *However, under a count for an entirety or for a moiety, an undivided third may be recovered. 1 *Burr.* 326.—3 *Lev.* 334.—1 *Sid.* 229.—1 *Esp. Rep.* 360, et supra; and see 1 *Wils.* 1.—2 *Stra.* 1180.

BY BILL.

In the King's Bench.

— Term, — Will. 4.

Declaration by bill in K. B. (g).

— (to wit.) John Doe complains of Richard Roe, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself; for that whereas the said plaintiff, on the — day of — in the — year of the reign of our said lord the king, at the parish of — in the county of — had demised to the said John Doe

(f) As to joint-tenants and tenants in common, see 11 *East*, 289. 12 *Id.* 39, 57, 61, 221. 1 *Esp. Rep.* 380.—*Adams*, 1st ed. 178, 9. As to co-heirs or coparceners, 6

East, 182.

(g) It is not usual to proceed in K. B. by bill. Many of the notes to the forms, ante, 877 to 881, are also here applicable.

— messuages, &c. [enumerate as ante, 878,] with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, to have and to hold the same to the *said John Doe and his assigns, from the — day of — in the — year aforesaid, for and during, and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended (h).—By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted; and the said John Doe being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of — in the — year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, in which the said John was so interested in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm*, and other wrongs to the said John Doe then and there did, against the peace of our said lord the king, and to the damage of the said John Doe of £50, and therefore he brings his suit, &c.

BY BILL.

[*887]

Plaintiff's
entry and
the ouster.

Pledges to prosecute } JOHN DENN,
and
RICHARD FENN.

[The notice to appear is to be precisely as ante, 881, omitting the words "wheresoever, &c." and saying, "in his Majesty's Court of King's Bench at Westminster."]

Notice to
appear.

*The declaration in ejectment on a vacant possession is the same as in other cases (see the forms ante, 877) except that the plaintiff and defendant, as well as the lessor of the plaintiff, are in this case the real parties; as for instance, A. B. the lessee of the premises should be the plaintiff, in lieu of John Doe, C. D. (a real ejector) the defendant, in lieu of Richard Roe, and E. F. (the party entitled to possession) the lessor of the plaintiff, and instead of the common notice at the end substitute the following:

[*888]

ON A
VACANT
POSSES-
SION.On a va-
cant pos-
session
(i).

Mr. —,

Take notice, that unless you appear in his Majesty's Court of King's Bench, at Westminster, in next — Term, [or if in London or Middlesex, "the first day of next — Term,] at the suit of the above-named plaintiff A. B. and plead to the declaration in ejectment, judgment will be thereupon entered against you by default. Dated, &c.

Notice to
appear
thereto
(k).

Yours, &c. J. K. plaintiff's attorney.

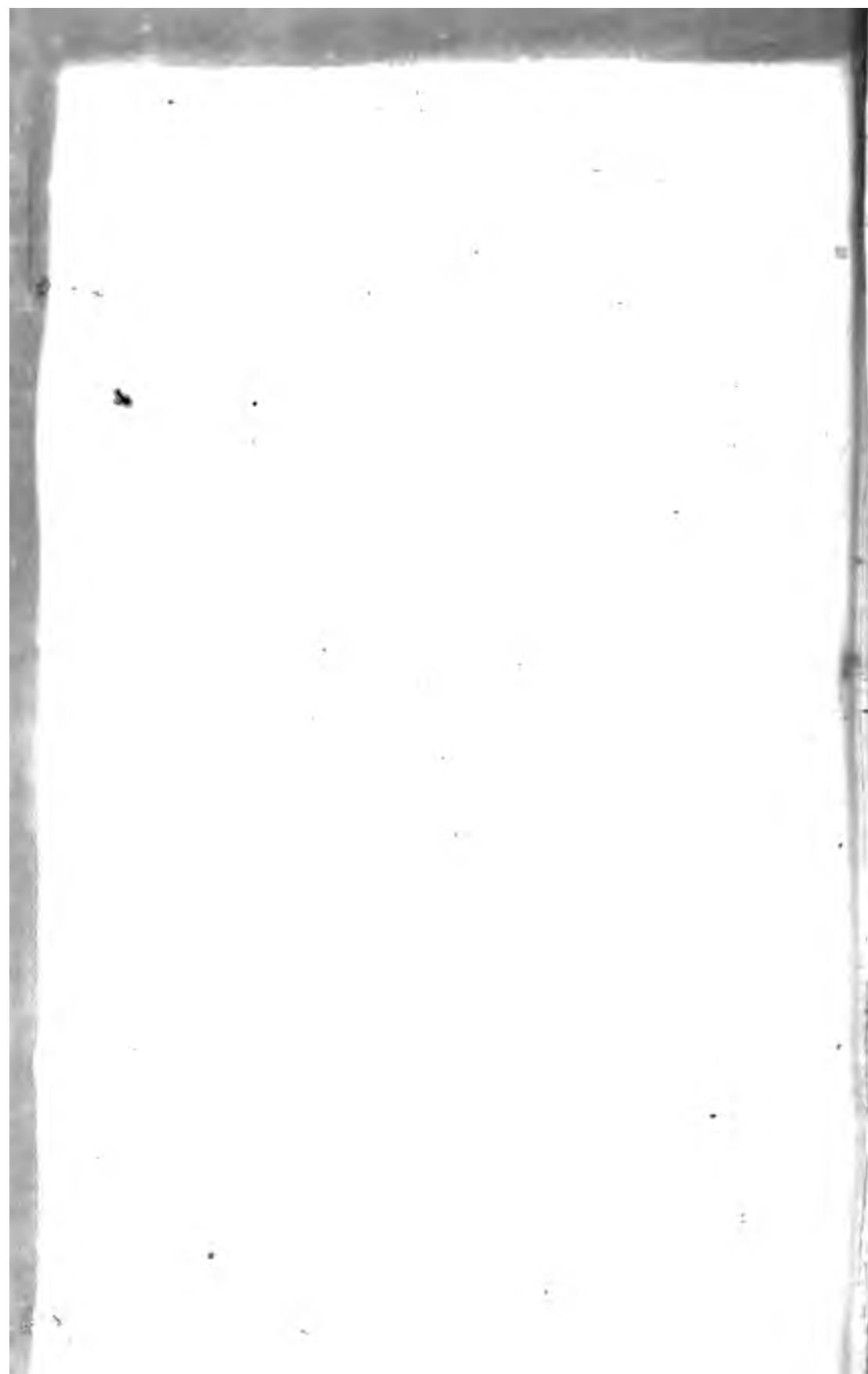
To Mr. G. H. [the last occupier.]

(h) If it be advisable to insert several demises with only one ouster, the second and other demises are here to be stated as follows: "And whereas also, G. H. on the — day of — in the year of the reign aforesaid, at, &c. aforesaid, had demised to the said John Doe — other messuages, &c. (describing them as in the first count, and then stating the entry and ouster in the plural number.) If several distinct ousters should be necessary, state the first demise,

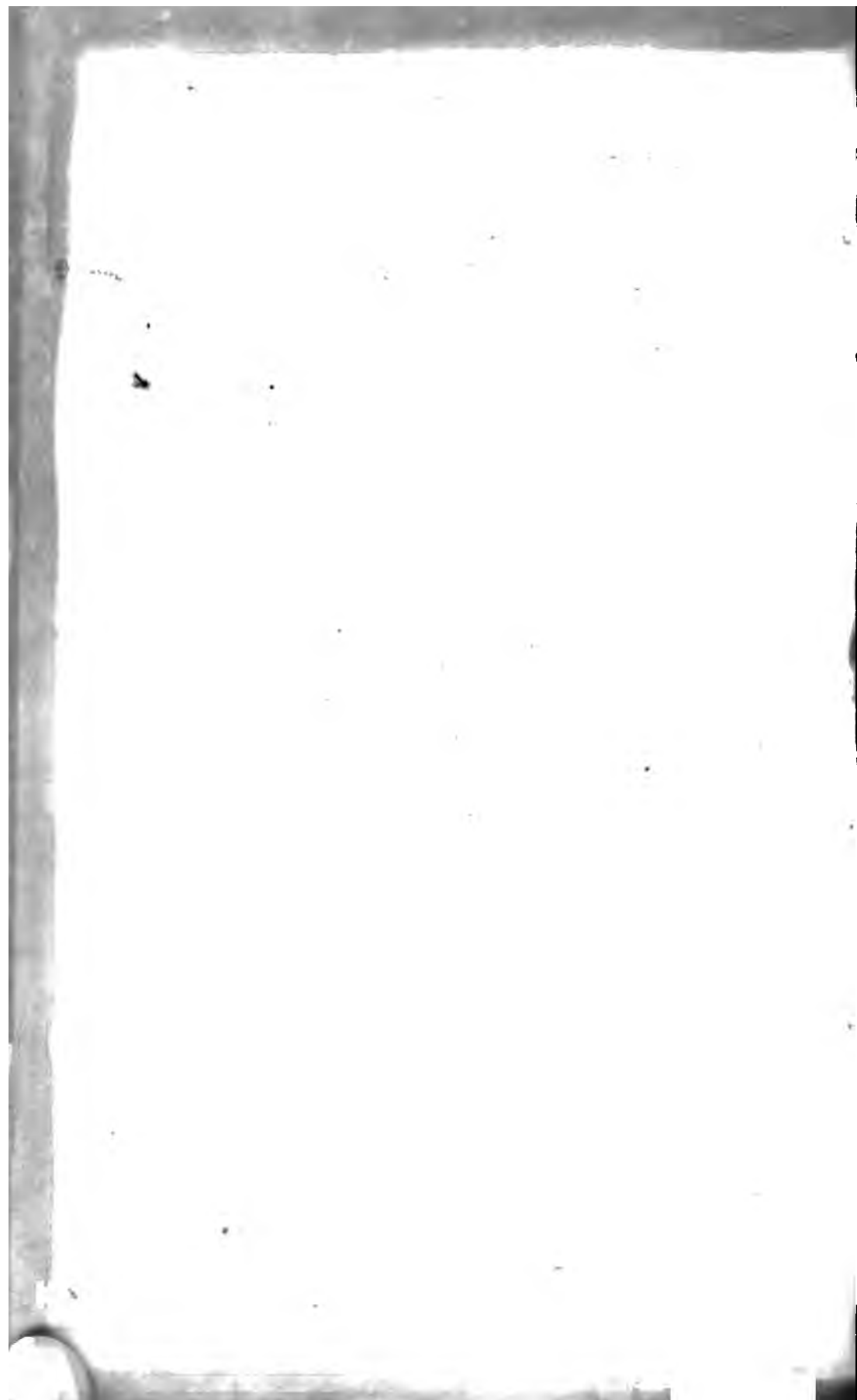
entry and ouster, as far as the *infra, and then insert the second demise, entry, and ouster.

(i) Imp. Prac. 6th edit. 572. 7th edit. 627, 8th edit. 616, and other forms; Tidd's Forms, 721, 2, 3.

(k) Impey, K. B. 8th ed. 616. See another form in Tidd's Forms, 723, where the notice in a country cause is stated to be "within the first eight days of next — Term."



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